(2016) 9 ILRA 1
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 4320 Of 2007

Samoon & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Applicants:
D.N. Wali, Ajay Kumar Srivastava, Rajesh Kumar Singh, Sudhir Dixit

Counsel for Opposite Parties:
Govt. Advocate, Mohd Yusuf, Samit Goyal
Held

The Court held that when a protest petition is filed against a police final report, the Magistrate has limited options under Section 190 Cr.P.C.: accept the final report, order further investigation, or take cognizance based only on the material collected during investigation. If the Magistrate relies on any **extraneous material**, such as affidavits filed with the protest petition, he cannot proceed under Section 190(1)(b) directly and must instead follow the **complaint procedure under Chapter XV Cr.P.C.**, including recording statements under Sections 200 and 202 Cr.P.C. Since in the present case the Magistrate had considered affidavits filed with the protest petition while summoning the accused, the order was held unsustainable in law. Accordingly, the summoning order dated 14.02.2007 was set aside and the matter was remanded for fresh consideration in accordance with law.

CASE LAW CITED

Pakhandu and others v. State of U.P. and another, 2001 (43) ACC 1096
Surya Bhan v. State of U.P. and others, 2007 (1) All JIC 784
Mohd. Yusuf and others v. State of U.P. and another, 2008 (1) All JIC 128
Dharam Pal and others v. State of Haryana and another, (2014) 3 SCC 306

(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 impugned order dated 14.2.2007 passed in Criminal Case arising out of Case Crime No. 45 of 2006, u/s 147, 323, 354, 504, 506 I.P.C. and 3(1)(x) SC/ST Act, P.S. Fatehpur, District Saharanpur, pending in the court of Judicial Magistrate III, Saharanpur, whereby the learned Magistrate, while allowing the protest petition has rejected the final report submitted by the police and has summoned the accused-applicants to face trial under the aforesaid sections.

2. Heard Sri Rajesh Kumar Singh, learned counsel for the applicants, learned AGA for the State and Mr. Mohd. Ayub, learned counsel for O.P. No. 2. Perused the record.

3. The main ground on which the learned counsel for the applicants has challenged the legality and correctness of the impugned order is that the learned Magistrate, without adopting the proper procedure prescribed under section 190 Cr.P.C., has summoned the applicants, therefore, the impugned order is liable to be quashed. In support of his contention the learned counsel for the applicants has placed reliance on the following judgments of this court reported in ***2007(1) All JIC 784, Surya Bhan Vs. State of U.P. and others, and 2008(1) All JIC 128, Mohd. Yusuf and others Vs. State of U.P. and another.***

4. The learned AGA and learned counsel for O.P. No. 2 have opposed the application by contending that the final report has been rejected by the learned Magistrate on just and proper grounds and the applicants have rightly been summoned by the learned Magistrate considering that despite the fact that all the witnesses had fully supported the prosecution story, the I.O. arbitrarily had submitted final report in favour of the applicants. Learned counsel for O.P. No. 2 has submitted that the impugned order clearly shows that the learned Magistrate has rejected the final report and has summoned the applicants, thoroughly considering the statements of the witnesses recorded u/s 161 Cr.P.C. by the I.O. and not only on the basis of the affidavits filed along with the protest petition. Therefore, there is no illegality or irregularity in the order passed by the learned Magistrate and no interference is required by this court in the impugned order.

5. Considered the rival submissions of learned counsel for the parties.

6. The law regarding the issue involved in this application is well settled.

7. If in any case, the final report is submitted by the police, against which protest petition is filed by first informant, then the Magistrate has following three options:-

1-He may accept the final report and drop the proceedings, or

2-He may direct the police for further investigation, or

3-He may summon the accused on further two grounds:-

(A) If he chooses to summon the accused on the basis of evidence collected by the Investigation officer, he may do so directly without any further evidence. or (B) If accused is summoned on the basis of protest petition, relying on extraneous material filed with protest petition, then he has to follow the procedure laid down under chapter XV of Cr. P.C. i.e. to treat the protest petition as complaint and record the evidence u/s 200 and 202 Cr P.C. and cognizance cannot be taken on the basis of extraneous material u/s 190 (1)(b) Cr.P.C, without following the aforesaid procedure.

8. The impugned order in the instant case clearly shows that the learned Magistrate, apart from considering the statements of witnesses available in the case diary, has also considered the affidavits filed along with the protest petition by the complainant.

9. In all the judgments cited by learned counsel for the applicants, this court has quashed the impugned order on the ground that the Magistrate had taken into account the extraneous material i.e. affidavits filed along with the protest petition while taking cognizance u/s 190(1)(b) Cr.P.C..

10. In ***Pakhandu and others Vs. State of U.P. and another, 2001(43) ACC 1096***, a Division Bench of this court has held as under:

"16. Where the Magistrate decides to take cognizance of the case under section 190(1)(b) of the Code ignoring the conclusions arrived at by the investigating agency and applying his mind independently to the facts emerging from the investigation records, in such a situation the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code and consequently the proviso to section 202(2) Cr.P.C. will have no application. It would however be relevant to mention that for forming such an independent opinion the Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and the material collected during investigation. It is not permissible for him at that stage to make use of any material other than investigation records."

11. In ***Surya Bhan Vs. State of U.P. and others*** (supra) this court has held as under:

"The Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and other material collected during investigation. It is not permissible for him at that stage to make use of any material other than investigation records, unless he decides to take cognizance under section 190(1)(a) of the Code and calls upon the complainant to examine himself and the witnesses present, if any, under Section 200. This shows that the Magistrate while taking cognizance under Section 190(1)(b) can only rely on the police report that means evidence and material collected by the Investigating Officer during investigation. The Magistrate cannot, therefore, take into consideration any extraneous material and if he does so, he should take cognizance under section 190(1)(a) and should proceed in the matter as a complaint case."

12. The Hon'ble Apex Court in the land mark case of ***Dharam Pal and others Vs. State of Haryana and another; 2014 (3) SCC 306*** framed 6 questions for consideration and question no. 3, which is reproduced below, involved the same issue :-

"Q III- Having decided to issue summons against the Appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?"

13. Answering the above said question in para 25 of the judgment, the Hon'ble Apex Court held as under :-

"25. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Session Court."

14. Considering the facts of the instant case, in wake of the settled legal position as stated above, the impugned order dated 14.2.2007, which clearly shows that the Magistrate has considered the extraneous material (affidavits filed along with the protest petition), cannot be sustained and is liable to be set aside.

15. The application is **allowed**. The impugned order dated 14.2.2007 is set aside and the matter is remanded back to the Magistrate concerned with the direction to make a fresh look and pass a fresh order in the light of the settled legal position, as discussed above.

(2016) 9 ILRA 5
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 26068 Of 2016

Smt. Nandni Kashyap & Ors. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Applicants:
Rafeek Ahmad Khan

Counsel for Opposite Parties:
G.A.

Held

The Court held that the summoning order under Sections 452, 323, 504 and 506 IPC was **partly unsustainable** insofar as it related to **Smt. Nandini Kashyap and Asha Kashyap**, because neither the complaint nor the statements recorded under Sections 200 and 202 Cr.P.C. disclosed their presence or involvement in the incident dated 21.06.2015. Even if the prosecution evidence was taken at its face value, no prima facie case was made out against them. Therefore, the summoning order qua these two accused was held to be **erroneous, perverse and without basis**, and was quashed. However, since there was sufficient prima facie evidence against the remaining accused, the proceedings against them were allowed to continue. The application under Section 482 Cr.P.C. was thus **partly allowed**.

CASE LAW CITED

None

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Complaint case no. 17296 of 2015, (Surendra Raikwar Vs. Vimal Kashyap @ Ashok & 5 others) was filed for prosecution of proposed accused persons for offences u/ss 304-B, 147, 452, 323, 504 and 506 IPC. In said case the complainant had examined himself u/s 200 CrPC and two witnesses Bahgwati Raikwar and Neeraj Gupta u/s 202 CrPC. After considering those evidences the Chief Metropolitan Magistrate, Kanpur Nagar had passed order of cognizance and summoning dated 28.7.2016, by which all the six persons named in complaint were summoned for prosecution for offences u/ss 452, 323, 504 and 506 IPC. Out of those six persons, three accused namely Smt. Nandini Kashyap, Kapil Kashyap and Atul Kashyap have preferred present application u/s 482 CrPC challenging the proceeding of aforesaid complaint case and for quashing the same.

2. Learned counsel for the applicants contended that death of the victim Manju was due to ailment relating to gangrene, for which she was hospitalized, and in spite of proper treatment by the applicants, she died on 6.4.2015. In this matter, no post-mortem was conducted and there was no altercation between the parties before, at the time of or soon after death. His further submission is that in complaint case, false incident of 21.6.2015 was mentioned by the complainant (/opposite part no.-2), who is brother of victim Manju @ Soni. His further submission is that trial court had not properly appreciated evidences under Chapter XV CrPC and passed impugned order of summoning; therefore, proceeding of trial court should be quashed.

3. The learned AGA had opposed the contentions of applicants? side and contended that the defence version of applicants may be considered at the time of defence evidence during the trial.

4. From perusal of record including certified copies of documents made available before this court, it is found that trial court had rightly declined to pass order of cognizance for offence u/ss 304-B IPC because there was no prima-facie evidence relating to it. From perusal of record and evidences, it is found that there has been statements of witnesses u/ss. 200 and 202 CrPC that in the incident of 21.6.2015, for which order of cognizance and summoning was passed, only four persons namely Ram lal Kashyap, Vimal Kashyap @ Ashok, Atul Kashyap @ Ashok, and Vinod Kashyap @ Komal alongwith three unknown persons were involved. None of the witnesses adduced under sections 200, 202 CrPC, including the complainant had named Asha Kashyap and Nandini Kashyap as person present at the time of incident dated 21.6.2016. these witnesses had stated nothing about their involvement in any way in the incident in question. But the trial court had passed order of cognizance and summoning for six persons including those Asha Kashyap and Nandini Kashyap (applicant no.-2). If the evidences adduced u/ss 200 & 202 CrPC are taken to be true in its entirety, even then these two persons Asha Kashyap and Nandini Kashyap were not involved in the incident. Even in complaint case the presence of Asha Kashyap and Nandini Kashyap is not mentioned for incident relating 21.6.2015, for which order of cognizance and summoning was passed. Therefore, this court finds that impugned order dated 28.7.2016 passed by Chief Metropolitan Magistrate, Kanpur Nagar regarding cognizance and prosecution of Asha Kashyap and Nandini Kashyap (applicant no.-1) is erroneous, perverse and is without basis, which should be quashed, but considering the facts that for other summoned accused order of cognizance is supported with evidences. Therefore, said order, at this stage relating to other applicants/accused should not be interfered.

5. Ordinarily in such matters, notice should be issued to opposite party-complainant, but in this matter facts are so prominently clear that issuance of notice and inviting objection etc. would result in nothing but wastage of precious time of this Court, trial court and parties to proceedings of this case and other co-accused of complaint case under challenge. So notice is not being issued to complainant (O.P. no.-2). The error was not committed by the complainant but by the trial Court, that should be rectified.

6. It is made clear that if during prosecution, the evidences for any other offence or against any person is found, then the jurisdiction of trial court will not be barred to pass appropriate order in that regard, in accordance with law.

7. In view of the above, this application is partly allowed. The portion of impugned order dated 18.7.2016 regarding cognizance and summoning of Nandini Kashyap (applicant no.-1) and Asha Kashyap is quashed. It is directed that trial court will proceed with the trial of complaint case no. 17296 of 2015, Surendra Raikwar Vs. Vimal Kashyap @ Ashok and others pending in the court of Chief Metropolitan Magistrate, Kanpur Nagar against remaining accused in accordance with law.

(2016) 9 ILRA 8
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No. - 26078 Of 2016

Yogeshwar Mishra & Anr. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Applicants:
Manish Tiwary, Ashwini Kumar Awasthi

Counsel for Opposite Parties:
G.A.

Held

The Court held that the present application under Section 482 Cr.P.C. was not maintainable and devoid of merit, as an earlier application seeking the same relief had already been decided on merits and rejected by the High Court. It was observed that filing a second application for the same relief in the guise of challenging the rejection of a discharge application under Section 245(2) Cr.P.C. amounted to an abuse of the process of the Court. On merits also, the Court found no legal or factual infirmity in the trial court's order rejecting discharge, since the issues raised by the applicants were essentially matters of defence and disputed facts, which could only be adjudicated upon after evidence during trial. Accordingly, the application was dismissed and the applicants were directed to appear before the trial court immediately.

CASE LAW CITED

None

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. In complaint case no. 1298 of 2013 (Sanjay Singh Vs. Yogeshwar Mishra & others), the court of Special Chief Judicial Magistrate, Allahabad had passed order dated 6.11.2013, of cognizance and summoning of applicants Yogeshwar Mishra and Chandr Prabha Mishra for offences u/ss 504 and 506 IPC. The proceedings of said complaint case was challenged through application u/s 482 CrPC No. 5844 of 2015 with request for quashing entire proceedings of said case. This application was disposed of by order dated 26.2.215 this Court, by which relief sought for quashing of the proceedings of said case, but it was observed that if accused feels appropriate, he may avail relief through application u/s 245(2) CrPC before trial court. After it applicants moved

application dated 3.4.2015 for their discharge. After affording opportunity of hearing to parties trial court had dismissed said application by it's order dated 30.6.2015.

2. Said order dated 30.6.2015 and entire proceedings of aforesaid complaint case has been challenged again by same applicants through present application u/s 482 CrPC.

3. Learned counsel for the applicants contended that complaint was filed on the basis of incorrect facts, because daughter of applicant no.-2 was never married with complainant (present opposite party no.-2). He further pointed out that there are other criminal proceedings going on against opposite party no.-2, in which he is absconding and is not even appearing in proceedings u/s 9 of the Hindu Marriage Act initiated by him. His submission is that prosecution is malicious and is based on incorrect facts, therefore, the proceedings of said complaint case should be quashed.

4. These contentions were refuted by AGA who supported the merits of the impugned ofder, and also submitted that after disposal of earlier application u/s 482 CrPC on merits for the identical relief, the second application is not maintainable.

5. From perusal of record, it is found that the order of cognizance and summoning was passed against the applicants for using defamatory language against complainant, and also for using foul words relating to abusive language and intimidating him. At this stage, this contention of learned counsel for the applicants cannot be accepted that on the basis of allegedly claimed relationship the opposite party no.-2 had filed complaint case maliciously on the basis of incorrect facts. Such averments are in nature of defence version relating to facts that can be considered by trial court at appropriate time, when evidences in that regard will adduced and facts will be proved.

6. So far as the merits of the impugned order dated 30.6.2015 is concerned, there appears no factual or legal irregularity or infirmity in it. The order of cognizance and summoning was passed against the applicants on the basis of facts available before the trial court. In fact this case relate to facts and not to law points. Whether applicants had committed overt acts for which they were summoned, is a matter of fact that can be proved or disproved on the basis of evidences only. When the order of cognizance and summoning has become final on the basis of factual aspect, the allowing of any application u/s 245(2) CrPC in such matter will amount to reviewing the said order or recalling it, that cannot be done by trial court. After considering the facts trial court had passed impugned order rejecting application u/s 245(2) CrPC, which apparently suffers from no infirmity or perversity that may require interference by this court.

7. Apart from it, earlier application u/s 482 Cr.P.C. No. 5844 of 2015 has been moved by applicants for same relief, for which present application has been moved. At the time of disposal of earlier application, relief sought has been declined by this court. The contention of learned counsel for the applicant on subsequent filing of application u/s 482 CrPC for same relief is totally unacceptable. If this court has once considered the prayer for the relief sought by applicant and rejected it, then subsequent application for same relief cannot be allowed in exercise of inherent jurisdiction of this court on the ground that for such subsequent application for same relief and for

same facts but in different garb of order of rejection of application u/s 245(2) CrPC. Such practice is nothing but abuse of process of court which should be depreciated. There is no legal propriety for granting same relief, when matter has been decided only on merit.

8. In view of above this application is dismissed.

9. Applicants are directed to appear before trial court immediately.

(2016) 9 ILRA 11
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2016

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Application U/S 482 No.- 27295 Of 2016

Susheel Rai & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Applicants:
Nazrul Islam Jafri

Counsel for Opposite Parties:
G.A., R. Rashid

Held

The Court held that the Magistrate was fully empowered under **Section 190(1)(b) Cr.P.C.** to disagree with the police report and, after examining the case diary and material collected during investigation, take cognizance of offences against all accused persons, including those exonerated by the police. It was observed that where a **negative report** is submitted in respect of some accused, the Magistrate can summon them if sufficient material exists on record. The Court distinguished State of Gujarat v. Girish Radhakrishnan Varde on facts, holding that the said case applied to a situation involving only a positive charge-sheet, whereas the present matter involved a mixed report with some accused exonerated. Relying on the Constitution Bench decision in Dharam Pal v. State of Haryana, the Court found no legal infirmity, impropriety, or jurisdictional error in the cognizance order dated 30.07.2016 and accordingly dismissed the application under Section 482 Cr.P.C.

CASE LAW CITED

State of Gujarat v. Girish Radhakrishnan Varde
Dharam Pal v. State of Haryana
Kishun Singh v. State of Bihar
Prasad Shrikant Purohit v. State of Maharashtra

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Nazrul Islam Jafri, learned counsel for the applicants as well as learned AGA for the State and Sri S. Rashid, learned counsel for the opposite party no. 2 and perused the record.

2. The present application under Section 482 Cr.P.C. has been filed for quashing the order dated 30.7.2016 passed by the Additional Chief Judicial Magistrate, Court No. 12, Azamgarh

whereby learned Court below has taken cognizance against the applicants. It is further prayed for quashing the entire proceedings of Criminal Case No. 252 of 2016 (State vs. Susheel), arising out of Case Crime No. 329 of 2014 under Sections 406, 419, 506, 467, 468, 471 IPC, P.S. Kotwali Jiyanpur, District Azamgarh.

3. A first information report dated 23.12.2014 was lodged by the opposite party no. 2-Amzad Khan against the applicants herein, which was registered as Case Crime No. 329 of 2014, under Sections 406, 419, 420, 506 IPC. After investigation, the Investigating Officer filed charge-sheet under Section 406 IPC only against the applicant no. 1-Susheel Rai herein and the other co-accused named in the first information report were exonerated.

4. Against the said charge-sheet, an objection was raised by the opposite party no. 2 to the effect that offences under Sections 406, 419, 420, 467, 468, 471, 506 IPC have been made out against all the accused persons, who are applicants herein. The prosecution also filed an application to the same effect stating therein that in parcha nos. 1 to 23 the Investigating Officer has categorically recorded that against accused persons, offences under sections as noted above have been made out and as such, cognizance should be taken against all the persons. After considering material so collected during investigation on record, by the impugned order dated 30.7.2016 the Additional Chief Judicial Magistrate, Court No. 12, Azamgarh has taken cognizance against all the persons under Sections 406, 419, 420, 506, 467, 468 IPC.

5. It may be noticed that charge-sheet was submitted against the applicant no. 1-Susheel Rai herein only and other three persons, namely, applicant no. 2-Sudhakar Rai, applicant no.3-Santosh Rai and applicant no. 4-Harish Chandra Rai have been summoned by the court below on the basis of material collected during investigation.

6. Submission of the learned counsel for the applicants is that the charge-sheet against the applicant no. 1 was filed under Section 406 IPC only and addition of Sections 419, 420, 506, 467, 468, 471 IPC is not permissible in view of the law laid down by the Hon'ble Apex Court in the case of *State of Gujarat vs. Girish Radha Krishnan Varde*, 2014 (3) SCC 659 wherein Hon'ble Apex Court has held under:

"The Magistrate in a case which is based on a police report cannot add or substract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be."

7. It was next submitted by the learned counsel for the applicants that other co-accused persons have wrongly been summoned as they are not at all connected with the alleged offence. It was pointed out that the applicants no. 2 and 3 are government servant and working as Assistant Teacher and applicant no. 4 has already retired as a teacher in the year 2009 and he is aged about 70 years. It was also submitted that as a matter of fact in a business transactions where the applicant no. 1 was duped by one Pramod Rai and others, he had lodged first information report against

Pramod Rai and two other persons on 15.8.2014, which was registered as Case Crime No. 468 of 2014 under Sections 419, 420, 468, 471, 406, 506 IPC. During investigation, statement of the opposite party no. 2-Amjad Khan was recorded by the police wherein it has come that the applicant no. 1-Susheel Rai has borrowed a sum of Rs. 12,50,000/- from him and about Rs. 7,24,000/- has already been returned to him. Submission is that subsequently the present criminal prosecution was lodged, which is absolutely baseless and order impugned herein is wholly illegal and is liable to be set aside in the light of Varde's case (supra).

8. Per contra, learned AGA and learned counsel for the opposite party no. 2 has supported the impugned order and submitted that in view of the law laid down by the Constitution Bench of Hon'ble Apex Court in the case of *Dharam Pal and others vs. State of Haryana and another*, 2014 (3) SCC 306, the Magistrate has power to disagree with the police report and if he is convinced that a case has been made out, he has power to issue summons against persons who were exonerated by the police during investigation and can include their names in connection with the case made out in the police report. It was next submitted that in this light Varde's case (supra) is of no help to the applicants including applicant no. 1-Susheel Rai against whom the charge-sheet was submitted under Section 406 IPC and therefore, submission is that after the judgement of Dharam Pal's case (supra), if the Magistrate was satisfied that sufficient material is available on record for addition of sections against the chargesheeted person, his powers are not restricted.

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

10. A Constitution Bench of the Hon'ble Apex Court in the case of Dharam Pal's case (supra) has discussed the powers of the Magistrate under Section 190 Cr.P.C. upon filing of a police report under Section 173 (2) Cr.P.C. Before proceeding further, it would be appropriate to quote paragraphs no. 7, 7.2, 33, 34, 35 and 36 of the Dharam Pal's case (supra):-

"7. The questions which require the consideration of the Constitution Bench are as follows:

7.2 If the Magistrate disagree with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?

33. As far as the first question is concerned, we are unable to accept the submissions made by Mr Chahar and Mr Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate has no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to Mr Dave, there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation

where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.

34. The view expressed in Kishun Singh vs. State of Bihar, (1993) 2 SCC 16, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173 (2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(2) of the Code, he was helpless in taking recourse to such a course of action while the Sessions Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

35. In our view, the Magistrate has a role to play while committing the case to the Court of Sessions upon taking cognizance on the police report submitted before him under Section 173 (2) Cr.P.C. In the event the Magistrate disagree with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

36. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court."

11. Thus, as held in Dharam Pal's case, " In the event the Magistrate disagree with police report", the Magistrate has power to summon accused persons on the basis of case diary and the material collected during investigation and placed along with the police report while dealing with a negative police report and can proceed against the accused persons dehors the police report.

12. As per settled law and more recently reiterated by Hon'ble Apex Court in *Prasad Srikant Purohit vs. State of Maharastra*, (2015) 7 SCC 440 that taking of 'cognizance' under Section 190 Cr.P.C. does not involve any formal action or indeed action of any kind and that it only indicates the point which Magistrate or a Judge taken judicial notice 'of offence' 'not of offender' and thus, cognizance is mainly of the offence and not of the offender.

13. In the light of the aforesaid, it is to be seen as to whether Varde's case (supra) would apply to the present case or not.

14. Admittedly, in the present case although applicant no. 1-Susheel Rai was chargesheeted under Section 406 IPC, however in respect to other three named accused, namely, applicant no. 2-Sudhakar Rai, applicant no.3-Santosh Rai and applicant no. 4-Harish Chandra Rai, negative report was submitted by the police. The prosecution as well as informant has raised objection to the police report. Thus, as per settled law, under Section 190 Cr.P.C., the Magistrate has power to look into/go into the police report and the material placed along with police report filed under Section 173 (2) Cr.P.C. for the purpose of taking cognizance of offence. From perusal of the impugned order, it is very much clear that the learned Magistrate has gone through case diary and the material filed along with the police report thoroughly and has recorded his satisfaction and found that there is sufficient basis for taking cognizance under Sections 406, 419, 420, 467, 468, 471 IPC against all accused persons.

15. In Varde's case (supra), Hon'ble Apex Court was considering a case where a police report i.e. positive charge-sheet was submitted by the police and there was no negative report, therefore, it was held that under such circumstances, correct stage for addition or substraction of the sections will have to be determined at the time of framing of charge, whereas in the present case in hand there is a negative report insofar as applicant no. 2-Sudhakar Rai, applicant no.3-Santosh Rai and applicant no. 4-Harish Chandra Rai are concerned and therefore, the Magistrate has power to go into police report and the material filed along with the police report and has, therefore, rightly exercised his power under Section 190(1)(b) Cr.P.C. For this reason Varde's case (supra), as relied on by learned counsel for the applicant, is clearly distinguishable and would not be applicable in the present case.

16. In view of the above discussion, I do not find any legal infirmity or impropriety or jurisdictional error in the impugned order dated 30.7.2016 passed by the Additional Chief Judicial Magistrate, Court No. 12, Azamgarh and there is no good ground to quash the proceedings of the aforesaid case.

17. The present application lacks merit and is accordingly dismissed.

(2016) 9 ILRA 16
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 27383 Of 2016

Virendra & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Applicants:
Sanjay Kumar Dwivedi

Counsel for Opposite Parties:
G.A., R. Rashid

Held

The Court held that the proceedings against the applicants **Virendra, Sanju, and Amar Singh** were liable to be quashed because there was **no allegation of any overt act, participation, presence, or conspiracy** on their part in the alleged execution of the forged agreement to sell. Merely stating that they were friends of the co-accused Mahesh and had allegedly been involved in similar acts earlier was held to be **purely speculative and unsupported by evidence**. The statements under Sections 200 and 202 Cr.P.C. also did not disclose any material connecting them with the offence. Accordingly, the summoning order dated 11.05.2016 was found unsustainable qua these applicants, and the complaint proceedings were quashed only against them, while proceedings against co-accused Mahesh were directed to continue in accordance with law.

CASE LAW CITED

None

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicants, learned AGA and perused the records.

2. The prosecution case in brief is that the Mahesh had impersonated him as Harish (complainant) and executed registered agreement to sell of property of Harish without information to complainant. Only this much is written in complaint that applicants Virendra, Sanju and Amar Singh are friendly with him and had been involved in doing such acts in past.

3. This contention of learned counsel for the applicants Virendra, Sanju and Amar Singh is apparently correct that no overt act had been committed by them in execution of alleged forged registered agreement to sell which was executed on behalf of Harish by co-accused Mahesh. This

contention is acceptable that not being marginal witness of the document in question and no evidence against these applicants, no case of commission of any offence or any overt act is made out by these applicants.

4. From perusal of record, it is found that there is evidence that Mahesh had posed himself as Harish and executed registered deed of agreement for sale of property of Harish. There is no allegation or averment that at the time of execution of said registered document, applicants Virendra, Sanju and Amar Singh were present. No evidence in that regard had surfaced during the statements under section 200 and 202 CrPC showing that at the time of execution of said forged document the applicants Virendra, Sanju and Amar Singh had been helpful or were involved in any manner. The names of applicants were mentioned in complaint and statement under section 202 Cr.P.C. only on the basis of speculation without mentioning their involvement or even conspiracy.

5. The trial court had not properly appreciated the evidences at the time of passing of order dated 11.5.2016. It had discussed the evidences, in which evidences of alleged overt act by Mahesh is mentioned, but it had passed order of cognizance and summoning of applicants only on the ground that they are friend of co-accused Mahesh. In absence of any evidence, direct or remote, against applicants for their involvement in incident in question, their prosecution is not legally unacceptable. These points were not considered by trial court at the time of passing of impugned order.

6. These facts are so apparent and prominently clear that this Court finds no sufficient reason to issue notice to OP No.-2/complainant in this matter. As a rule the OP no.-2 should have been afforded opportunity of hearing, but in present case, when it is found that if prosecution case mentioned in complaint and the statement of complainant is taken to be true in its entirety, even then the applicants cannot be said to be guilty of any over act relating to incident for which the complaint has been filed, then there is no propriety in issuing notice to OP No.-2 in this matter. For saving the precious time of this Court and of trial court, as well as of the parties concerned, and for protecting them from harassment during unnecessary legal proceedings, it appears appropriate that in this particular case the proceedings against applicants should be quashed.

7. It is made clear that, in future, there would be no restriction on powers of court to exercise its right of taking cognizance against any person in accordance with law, if evidences/ facts for the same are available before it. But at this stage, there is no justification for permitting the proceedings being carried out by trial court against applicants, without any satisfactory reason.

8. In view of the above, this application is allowed. The proceedings of complaint case no. 1851/2015 (Harish Vs. Mahesh and others), under sections 420, 467, 468, 471 IPC, P.S. Nauhjhil, District Mathura pending before the court of Judicial Magistrate, Mathura are quashed only against the applicants Virendra, Sanju and Amar Singh.

9. It is observed that proceeding against co-accused Mahesh shall be carried out by trial court in accordance with law.

(2016) 9 ILRA 18
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Civil Revision No.- 89 Of 2015

Kandarp Construction India Pvt. Ltd. ...Revisionist
Versus
Brijesh Pathak & Ors. ...Opposite Parties

Counsel for Revisionist:
Brijesh Kumar Saxena, Ritesh Kumar Srivastava

Counsel for Opposite Parties:
Abhinav N Trivedi

Held

The High Court partly allowed the appeal and held that the conviction under Section 3(1)(x) of the SC/ST Act was unsustainable because the essential ingredients of the offence were missing. There was no allegation in the FIR that caste-related abusive words were used in public view, and the dispute arose out of an existing land/crop enmity, not on account of the complainant's caste. Accordingly, the conviction under the SC/ST Act was set aside. However, the conviction under Sections 352, 504 and 506 IPC was upheld. Considering that the incident was of 1991 and the appellant was above 60 years of age, the Court granted him the benefit of Section 4 of the Probation of Offenders Act, 1958 instead of sending him to jail, subject to bonds and good behaviour for one year.

CASE LAW CITED

Gorige Pentaiah v. State of Andhra Pradesh
Pappu Singh v. State of Uttar Pradesh
Sections 3 & 4, Probation of Offenders Act, 1958

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. This revision filed under Section 115 of Code of Civil Procedure is directed against the judgement/order dated 28.5.2015 passed in Regular Suit No. 2887 of 2014 whereby preliminary objection i.e. lack of territorial jurisdiction of the court below raised by the revisionist/defendant, giving rise to a preliminary issue, has been decided against him and the suit has been held to be rightly filed before the court of Civil Judge, Senior Division, Mohanlalganj, Lucknow instead of returning the plaint for being filed before the court of Civil Judge, Senior Division, Malihabad, Lucknow, within whose territorial jurisdiction the immovable property is situated.

2. The impugned order passed by the court below gives rise to the following questions of law:

(1) Whether a preliminary issue relating to the territorial jurisdiction of a court can be framed on the basis of an objection raised by the defendant before filing a written statement and if yes, as to what would be the manner of deciding such an objection;

(2) Whether the relief sought in the suit at hand essentially relates to a dispute in relation to immovable property and consequently the objection of territorial jurisdiction raised would be maintainable;

(3) In a situation where relief sought by the plaintiff is partly or wholly not triable before the court where the suit is instituted, whether such a proceeding can be transferred by virtue of the powers conferred on this Court under Section 24 (5) of CPC to the court of competent jurisdiction instead of returning the plaint in terms of Order VII Rule 10A.

Background

3. Briefly stated, facts of the case are that a suit for specific performance coupled with a relief of perpetual injunction was instituted before the court of Civil Judge, Senior Division, Mohanlalganj and at the time of filing of the suit, the Munsarim, in terms of Rule 35 of General Rules (Civil), endorsed his report by making a specific mention that the immovable property described in the plaint was situated beyond the territorial jurisdiction of Civil Judge, Senior Division, Mohanlalganj but having regard to the cause of action set out in paragraph 34 of the plaint which recited the execution of sale agreement before the Sub-Registrar, Lucknow the territorial jurisdiction of Civil Judge, Senior Division, Mohanlalganj on that premise was reported as maintainable. At the time of admission of the suit, the plaintiff appears to have contested the report submitted by the Munsarim on the basis of factum of registration of sale agreement. The court recording, prima facie, satisfaction in the order dated 23.12.2014 proceeded to invite written statement/objections from the defendants, however, the question as to the territorial jurisdiction was left open to be dealt with after the written statement/objections were filed.

4. After dealing with the objection reported by the Munsarim at the time of admission of the suit in the manner stated above, the court passed an order on 23.12.2014 separately on the application filed under Order XXXIX Rule 1 and 2, granting ex-parte temporary injunction on the same date and posted the suit for disposal of objections on temporary injunction on 2.1.2015.

5. It is an admitted position of fact that the immovable property described in the plaint is beyond the territorial jurisdiction of Civil Judge, Senior Division, Mohanlalganj and none of the defendants as described in the plaint are residents of a place that would confer territorial jurisdiction of the cause on 'Mohanlalganj court' in terms of Section 16 (d) CPC or the proviso appended thereto, on any ground whatsoever. The suit filed was nevertheless registered subject to

objections as is evident from the order dated 23.12.2014 which was passed separately simultaneous to the order granting ex-parte interim injunction.

6. In the context of the order passed by the court below on 23.12.2014 registering the suit, specific objections were filed against the maintainability of suit on the ground that not only that the suit for specific performance was filed in relation to land situated beyond the territorial jurisdiction of the court but it was also pleaded that the suit for perpetual injunction in any view of the matter would not be cognizable before the court concerned, hence prayer to reject the plaint or alternatively the plaint be returned to the plaintiff for being presented/filed before the competent court i.e. the court of Civil Judge, Senior Division, Malihabad, Lucknow was made. The objections were supported with an affidavit.

7. The objections so filed by the revisionist-defendant were strongly contested by the opposite party/plaintiff taking recourse to file a reply on affidavit, obviously for the reason to defend the ex-parte injunction order already granted in his favour and partly to avoid consequential complications.

8. The objection filed by the revisionist-defendant as well as the stand of the plaintiff being strongly contested, came to be considered and decided by the impugned order passed on 28.5.2015 that has given rise to the instant revision.

9. Sri Brijesh Kumar Saxena, learned counsel for the revisionist while assailing the findings and the proposition of law applied by the court below, has argued that learned Civil Judge on the question of territorial jurisdiction, has completely misconstrued the provisions of CPC in relation to cause of action and in particular, Section 16 (d) as well as the proviso which contemplate the requisite conditions within which a suit in relation to immovable property may be instituted before a court of civil jurisdiction. It is argued that once a relief sought in the plaint is cognizable under Section 16 (d) or the proviso appended thereto or Sections 17 or 18 CPC, there is no scope for such a case being governed under Section 20 (c) of the CPC.

10. Learned counsel for the revisionist has further argued that the second prayer made in the plaint specifically for a perpetual injunction which is an independent relief that can be read only within the scope of Section 38 of the Specific Relief Act in relation to the immovable property described in the plaint, therefore, once the relief sought in the plaint is in relation to the immovable property, the provision of Section 16 (d) or proviso appended thereto would apply leaving no scope for applicability of Section 20 (c), as such, the findings recorded by the court below suffer from a manifest error of law.

11. The parties have cited decisions on the legal issues as to how the territorial jurisdiction is to be construed in respect of a relief for specific performance and otherwise.

12. Learned counsel for the revisionist has cited following decisions:

1). Harshad Chiman Lal Modi v. D.L.F. Universal Ltd. and another, AIR 2005 SC 4446,

2). Hanamanthappa v. Chandrashekharappa, (1997) 9 SCC 688;

3). Madhusudan Das Agarwal and others v. Banaras Hindu University and others; [Writ Petition No. 2793 (MS) of 2000] (Allahabad High Court, Lucknow Bench) decided on 22.7.2015;

4). Vogel Media International v. Jasu Shah and others, 115 (2004) DLT 679;

5). K.P. Ranga Rao v. K.V. Venkatesham and others, (2015) 13 SCC 14;

6). Lallu alias Chandrika Prasad and others v. Lakshmi Narain and others, 2006 (1) AWC 428 (LB).

13. The findings recorded by the court below have vehemently been supported by Sri Abhinav Trivedi learned counsel for the opposite party/plaintiff on the basis of various judgements cited before this Court.

14. Learned counsel for the respondent has relied upon the following case laws:

1). Abdul Gafur and another v. State of Uttarakhand and others, (2008) 10 SCC 97;

2). Foreshore Co-operative Housing Society Ltd. v. Praveen D. Desai (dead) through LRs and others, [2015 (33) LCD 1812];

3). Adcon Electronics Pvt. Ltd. v. Daulat and another; (2001) 7 SCC 698;

4). Excel Dealcomm Private Limited v. Asset Reconstruction Company (India) Limited and others, (2015) 8 SCC 219;

5). Gunwantbhai Mulchand Shah and others v. Anton Elis Farel and other, (2006) 3 SCC 634.

Statute

15. Before delving into the legal issues framed above, it is apt to glance through the statutory provisions which relate to the territorial jurisdiction of civil courts leading to the development of law. Insofar as the proceedings before the civil courts are concerned, the place of suing as per the provisions contained in CPC, is regulated under Part I Section 15 to 20. By virtue of Section 120 CPC, Section 16, 17 and 20 of Code of Civil Procedure are not applicable to the

High Courts in the exercise of its original civil jurisdiction. The High Courts of original civil jurisdiction for the purposes of territorial jurisdiction are governed under Letters Patent (Madras, Bombay and Calcutta) whereunder clause-12 of the Letters Patent defines the original jurisdiction as to suits viz. place of suing etc. The provisions contained in the Code of Civil Procedure as compared to clause-12 of the Letters Patent stand at variance and the distinction in construing the two streams of law, while dealing with an issue in relation to the place of suing is necessary to be kept in mind for more than one reason. Firstly the language used in the two sets of provisions stands at variance and secondly Section 120 CPC clearly spells out that Section 16, 17 and 20 CPC would not apply to the High Courts exercising original civil jurisdiction.

16. On the aspect of preliminary issue, Section 9A in the State of Maharashtra mandatorily lays down for the civil courts to go into the preliminary issue of jurisdiction before the grant of interim relief once the objection is raised, whereas, it is discretionary in terms of Order XIV Rule 1 and 2 and the position may differ from one case to another.

17. The case at hand is a one governed under the provisions of CPC, therefore, decisions of the apex court rendered within the scope of clause-12 of the Letters Patent would necessarily require to be analyzed bearing in mind the distinguishing feature of the statutory law applicable in the respective States as well.

Discussion/Findings

18. Now coming to the first question as to how and on what material a preliminary issue as to the territorial jurisdiction is to be formulated, it is essential to have a look at the relevant provisions of CPC. Section 26 read with Order IV Code of Civil Procedure contemplate institution of suits by presentation of a plaint or in such other manner as may be prescribed. The situation before this Court is that of presentation of a plaint. Facts stated in the plaint have to be proved on the basis of affidavit. Chapter VII Rule 1 provides for particulars to be contained in plaint which for the purpose of issue at hand, include the name of the court in which the suit is brought; name, description and residence of the defendants; facts constituting the cause; facts showing that the court has jurisdiction and the relief claimed etc.

19. The description of particulars set out in the plaint are subjected to scrutiny of the Munsarim at the first place by virtue of the General Rules (Civil) framed under Article 227 of the Constitution of India read with Section 122 of the Code of Civil Procedure. In this regard Rule 35 of the General Rules (Civil) being relevant, is extracted below:

*"**35. Munsarim's duty in respect of plaints.**- A Munsarim of a civil court appointed to receive plaints shall examine each plaint presented to him, and shall report thereon whether the provisions of the Code and the Court-fees Act, have been observed whether the claim is within the jurisdiction of the Court, constitutes a cause of action, and has been presented within the period prescribed for the institution of such a suit, and whether the plaint is otherwise in proper*

form including that in a suit whether a notice under Section 80, C.P.C., necessary, such a notice has been given.

The Munsarim shall see that the actual date of the presentation of the plaint is entered upon the impressed stamp and adhesive label, if any, below the date of purchase endorsed on them.

On the back of all plaints the Munsarim shall note-

(a) date of presentation of the plaint,

(b) name of presenter,

(c) classification of suit, and

(d) court-fee paid."

20. The requirement of law clearly postulates a report on the aspect of jurisdiction and it is rather the Munsarim of the court concerned who would report on the question of jurisdiction, being it a matter of his duty which in the present case seems to have been discharged attentively. A plaint once filed cannot be returned for being presented before the proper court as per the rules of procedure (civil) except in accordance with the power exercisable under CPC. A suit duly filed is admitted and procedure accordingly follows.

21. In the instant case, the suit filed was simply registered by order dated 23.12.2014, however, objections as to the territorial jurisdiction were left open to be raised by the defendants and summons were accordingly issued. The Munsarim in his report dated 18.12.2014 has candidly reported the issue of territorial jurisdiction which was tentatively dealt with in the order dated 23.12.2014 subject to the objections that were to be raised by the revisionist/defendant and others.

22. From the above mentioned order, it is clear that the court below while issuing the summons has clearly invited objections on the issue of territorial jurisdiction of the court meaning thereby that the report of the Munsarim was not rejected finally but an issue in that light could only be dealt with when an objection on oath was raised by the defendants. The Code of Civil Procedure under Order XIV Rule 3 provides for the materials from which issues may be framed. It is amply clear from the said provision that an issue can be framed on an allegation made on oath by the parties. The objection as to the territorial jurisdiction of a court in terms of Section 21 of the Code of Civil Procedure is bound to be raised at the earliest possible opportunity. Section 21 (1) CPC being relevant is reproduced below:

"21. Objections to jurisdiction.- (1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first

instance at the earliest possible opportunity and in all cases were issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the court of first instance at the earliest possible opportunity, and, in all cases where sues are settled, at or before such settlement, and unless there has been a consequent failure justice.

(3) No objection as to the competence of the executing court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection taken in the executing court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

23. It is worthwhile to note that law lays emphasis on raising the objection of jurisdiction at the earliest possible opportunity and in the present case, the revisionist/defendant at the earliest possible opportunity has raised such an objection apart from what was reported by the Munsarim. Once such an objection is put on record, the plaintiff has an option under Order VII Rule 10A to seek the opinion of the court whether a plaint be returned. In the present case, the opposite party/plaintiff having contested the matter in support of the maintainability of suit before the civil court where it was filed, did not leave any scope for return of the plaint in terms of Order VII Rule 10 and 10A. The report of the Munsarim coupled with the objections of revisionist/defendant on affidavit and reply thereto filed by the opposite party/plaintiff on affidavit, gave rise to an issue which has come to be dealt with by way of a preliminary issue. The question that crops up is as to whether such an issue being an issue of law can at all be dealt with and disposed of by way of 'preliminary issue' before filing the written statement and framing of all the issues.

24. This court has already noticed that the plaintiff in the present case did not choose to avail the benefit of Order VII Rule 10 and 10A CPC, therefore, in a contested case where the question of jurisdiction has arisen before a court, an issue of law by virtue of Order XIV Rule 1 can be framed even before filing of a written statement provided there are allegations made on oath by the parties. In the instant case, apart from the pleadings set out in the plaint supported by affidavit, objections on oath were filed by the revisionist on affidavit which were duly replied by the opposite party/plaintiff on affidavit constituted adequate material for dealing with the preliminary issue, as such, the contention of the opposite party that such an issue can be tried only after filing written statement, in my humble opinion, is wholly misconceived particularly when Order XIV Rule 2 empowers the court to dispose of a case on preliminary issue.

25. Having given an anxious thought to the scheme of provisions contained in CPC, I am of the considered opinion that a preliminary issue under Order XIV Rule 1 can be framed even before filing of a written statement, provided there is adequate material stated on oath or denial by the defendant in the like manner and when the emerging issue being a question of law goes to the root of proceedings. This requirement having been met with adequately in the present case does not leave it open to the opposite party/plaintiff to contend that the course adopted by the court below

leaves the issue still open, particularly when reply on oath duly filed on his behalf to the objections filed by the revisionist/defendant stand decided by the impugned order. The judgements cited before this Court, as a matter of law, do not lay down that a pure question of law cannot be framed and dealt with as a preliminary issue even before filing a written statement provided there is material on record on the basis of which such an issue can be framed. It is also well settled that a court of law cannot exercise its jurisdiction beyond what is conferred even if the parties consent, therefore, consequent failure of justice in a situation of lack of jurisdiction is but natural. The discretion to decide an issue as a preliminary issue before the settlement of other issues, however, lies within the discretion of the court concerned and such an exercise of jurisdiction as is evident in the present case does not suffer from any error of law. In view of the aforesaid discussion, the first question framed hereinabove is answered in affirmative.

26. Now coming to the **second issue**, it would be relevant to note that in relation to the relief for specific performance of an agreement, the apex court judgement reported in ***(2001) 7 SCC 698 (Adcon Electronics Pvt. Ltd. v. Daulat and another)*** in paras 16, 17, 18 and 19 has observed as under:

16. In a suit for specific performance of contract for sale of immovable property containing stipulation that on execution of the sale deed the possession of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is part of the decree of specific performance of contract. But in this connection it is necessary to refer to Section 22 of the Specific Relief Act, 1963 which runs :

"22. Power to grant relief for possession, partition, refund of earnest money, etc. --

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed :

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as my be just for including a claim for such relief."

17. It may be seen that sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further reliefs mentioned in clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed. Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for.

18. In the instant case the suit is for specific performance of agreement for sale of the suit property wherein relief of delivery of the suit property has not been specifically claimed as such it cannot be treated as a "suit for land".

19. We cannot also accept the contention of Mr. Chitale that the suit is for acquisition of title to the land and is a "suit for land". In its true sense a suit simpliciter for specific performance of contract for sale of land is a suit for enforcement of terms of contract. The title to the land as such is not the subject-matter of the suit."

27. The view expressed by the apex court holds good even now but the case at hand seeks a two-fold relief. The relief of perpetual injunction has specifically been prayed for as an independent relief. The second relief in terms of the impugned order is held to be an incidental relief notwithstanding the fact that the position reflected in the plaint placed on record is just contrary. Looking to the nature of prayer made in the plaint, there is no doubt that such a prayer can only be read within the scope of Section 38 of the Specific Relief Act, 1963, which reads as under:

"Perpetual injunction when granted. --

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property the court may grant a perpetual injunction in the following cases, namely-

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damages caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings."

28. Once the relief of perpetual injunction was prayed in the suit that cannot be understood except what Section-38 (3) Specific Relief Act provides, it would be difficult to affirm the observation of the court below that such a relief is incidental. An incidental relief is one which flows from the main relief and the position in this regard may vary in each case but the ingredients for grant of an incidental relief must be satisfied. This Court in the case reported in ***AIR 1973 All. 55 (Om Prakash and another v. Anar Singh and others)*** has observed in para 8 as under:

"8. Learned counsel for the petitioner urged that the determination of the right or interest in the immovable property in the present case, and generally in the case of all injunctions, is only an incidental matter and not a matter essential for the grant of relief and accordingly Section 16(d) will not be attracted. The contention is not correct. Section 38 of the Specific Relief Act speaks about the grant of perpetual injunctions. Sub-section (3) of Section 38 says that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of the property the court may grant a perpetual injunction in the circumstances detailed in the section. Thus a court can grant a perpetual injunction only after it determines that the plaintiff has a right to enjoy the property. As it is a matter essential for granting the injunction, the determination of the right of the plaintiff cannot be held to be a matter only incidental and not essential for granting the relief of injunction. And. as such determination is a necessary prerequisite for the grant of the relief of injunction. Section 16 (d) must apply to a suit for a permanent injunction.

29. On a perusal of the plaint placed on record, the relief for perpetual injunction sought by the opposite party/plaintiff cannot be read otherwise than what lies within the scope of Section 38 (3) of Specific Relief Act, 1963 and such a relief, for its determination, would necessarily involve determination of the right of the plaintiff to enjoy the property, thus the relief is essential and has wrongly been construed to be incidental by the court below. The essential relief sought by the plaintiff relates to the immovable property, hence Section 16 (d) CPC must apply in the case of perpetual injunction as is the case at hand. Now in a situation, where the first relief prayed for specific performance simpliciter though being within the jurisdiction of the court below but sought alongwith the relief of perpetual injunction which relates to the immovable property attracting Section 16 (d) CPC, would the prayer of such a description be maintainable before the court below within the purview of Section 20 (c) CPC. Section 20 (c) CPC being relevant is extracted below:

"20. Other suits to be instituted where defendants reside or cause of action arises .- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction--

(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

30. It is well settled that Section 20 CPC is a residuary provision and covers those eventualities which do not fall under Sections 15 to 19. The very opening words of Section 20 CPC "subject to the limitation aforesaid" are significant and do not leave any room for doubt that the residuary provision would only apply when the application of other provisions is totally ruled out. In the instant case, application of Section 20 (c) is construed on the basis of registration of the sale agreement in relation whereof a relief simpliciter is prayed for under clause-1 but other relief sought by the opposite party/plaintiff is in the nature of perpetual injunction.

31. It has already been held hereinabove that the prayer made in the suit for perpetual injunction would relate to the immovable property hence Section 16 (d) CPC would be attracted, therefore, in a situation where any part of the relief is governed under Section 16 (d) CPC, the jurisdiction of the court will have to be determined accordingly. The situation would have been different if the defendants were residents of a place situated within the territorial jurisdiction of Civil Judge (Senior Division), Mohanlalganj. In that event, the proviso appended to Section 16 (d) wold have applied so as to enable the court below to exercise its jurisdiction. Thus, the place of registration of a document would only be relevant when other provisions i.e. Sections 15 to 19 have no application at all. In view of the above discussion, I am of the considered opinion, that even though the relief of specific performance simpliciter may lie within the jurisdiction of court below but the relief as a whole not being within its territorial jurisdiction, the suit cannot proceed as the application of Section 16 (d) CPC is inescapable and the relief of perpetual injunction being a relief in relation to land renders the suit proceedings as non-maintainable.

32. The **third issue** in the present situation being significant may also be dealt with in the light of relevant provisions. Order VII Rule 10 CPC before the Amendment Act 104 of 1976 provided for return of plaint at any stage but after the amendment, the Code of Civil Procedure has taken due care of a situation that may emerge as a consequence of an objection of lack of jurisdiction. A plaintiff on such an objection being raised may subscribe to the opinion of the court under Order VII Rule 10A at the earliest or may choose to contest as is the case at hand. Once the plaintiff has chosen to contest a proceeding upto a certain stage and the defendants have also represented their case without any prejudice of opportunity being caused, then in such a situation, the provisions of Section 24 (5) can be fruitfully invoked by the court to transfer the proceedings

from one court to the court having territorial jurisdiction. The only difference that it would make is that in the former case, the proceedings would transfer from the very inception but in the later case the proceedings would stand transferred from the stage at which they have reached before the trial court. Reference may also be made to the apex court judgement in the case of ***Ramesh Chandra Sankla etc. v. Vikram Cement etc. reported in (2008) 14 SCC 58.*** In paragraph 68 of the said judgement, the apex court observed as under:

"68. The Law Commission also considered the question and did not favour the tendency of deciding some issues as preliminary issues. Dealing with Rule 2 of Order XIV (before the amendment), the Commission stated;

"This rule has led to one difficulty. Where a case can be disposed of on a preliminary point (issue) of law, often the courts do not inquire into the merits, with the result that when, on an appeal against the finding on the preliminary issue the decision of the Court on that issue is reversed, the case has to be remanded to the Court of first instance for trial on the other issues. This causes delay.

It is considered that this delay should be eliminated, by providing that a court must give judgment on all issues, excepting, of course, where the Court finds that it has no jurisdiction or where the suit is barred by any law for the time being in force". (emphasis supplied)"

33. On this issue, both the parties at this stage, have agreed that they shall have no objection if the suit proceedings are transferred at the stage at which they are pending, therefore, bearing in mind the authority of this Court under Section 24 (5) CPC, the proceedings of R.S. No. 2887/14 pending before the court of Civil Judge (Senior Division), Mohanlalganj are hereby transferred to the court of Civil Judge (Senior Division) Malihabad. The consent of parties shall, however, be without prejudice to their rights on other issues decided by this Court.

Order

34. In the light of discussions and findings recorded above, the impugned judgement/order dated 28.5.2015 is hereby set aside and the revision is allowed. The proceedings of R.S. No. 2887/14 shall stand transferred in terms of the direction issued and the District Judge, Lucknow shall ensure the transfer of record of the suit forthwith. Parties shall be informed of the date fixed in the proceedings. The suit proceedings are expedited and the court below is expected to conclude the proceedings expeditiously.

35. No order as to cost.

(2016) 9 ILRA 30
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 10825 Of 2015

Indrapal **...Applicant**
Versus
State Of U.P. **...Opposite Parties**

Counsel for Applicant:
R.R. Singh, Ajay Kumar Mishra, Anoop Mishra, Mohit Singh

Counsel for Opposite Parties:
G.A., R. Rashid

Held

The Court held that, considering the overall facts and circumstances, the applicant-husband was entitled to be **released on bail** in the dowry death case. The Court took note of the fact that the deceased died by **ante-mortem hanging**, with no external injury marks in the post-mortem report, and that the father's initial information to the police contained **no allegation of dowry demand or cruelty**, rather stating that no one from the in-laws' side was responsible and that the deceased had committed suicide due to illness. The subsequent FIR alleging dowry demand, lodged after a delay of more than twenty days, was considered a relevant circumstance at the stage of bail. Keeping in view the **period of detention, delay in trial, nature of evidence, and absence of material suggesting tampering**, the Court enlarged the applicant on bail subject to conditions of non-interference with evidence and mandatory personal appearance before the trial court.

CASE LAW CITED

None

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

1. This is a bail application moved on behalf of husband who is facing the charge of committing dowry death of his wife.

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

3. Perused the record.

4. Submission is that though this is said to be a case of dowry death but admittedly to the prosecution side the deceased died as a result of ante mortem hanging. The post mortem report does not indicate any mark of violence on her body. Further submission is that the information about her death was duly given to her parents on which they had also arrived on the place of occurrence. Attention was drawn to Annexure-SA-1 filed along with supplementary affidavit which is information given by the father of the deceased to the police in which no allegation of demand of dowry or ill-treatment committed against the deceased was made and it was specifically stated in the initial information. that none of the in-laws or husband are to blame for the death of his daughter. It was also stated in this F.I.R. that she was suffering from some internal illness and being fed up and frustrated by the same she has committed suicide. The inquest proceedings of deceased were performed and even at that time the first informant and his son themselves were made witnesses of the inquest proceedings. Subsequently, after a lapse of more than twenty days the present F.I.R. in question was lodged against the applicant and entirely false and frivolous allegations of demand of dowry and ill-treatment meted out to deceased were made. Contention is that had there been any truth in these allegations, there was no reason for making a contradictory report earlier and there was also no explanation as to why this subsequent F.I.R. was lodged with so much inordinate delay. Submission is that in the aforesaid circumstances the false implication of the applicant is manifestly apparent on the face of record. 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 10.2.2015 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

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-Indrapal, involved in complaint no. 70 of 2012, in Case Crime No.245 of 2011, u/s 304-B, 498-A, 342 I.P.C. and 3/4 D.P. Act, P.S.-Nakhasa, District-Moradabad 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.

(2016) 9 ILRA 33
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 128 Of 2009

Inspector **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Ashok Kumar Singh, S.M. Ayaz Ali

Counsel for Respondent:
Govt. Advocate

Held

The High Court allowed the criminal appeal and acquitted the appellant of the charge under Section 302/34 IPC, holding that the prosecution failed to prove the case beyond reasonable doubt. The Court found the FIR to be doubtful and possibly ante-timed, due to contradictions regarding how and when the police was informed. It also held that the presence of the alleged eyewitnesses was unnatural, there was no reliable proof of any source of light at 2:00 a.m., and the injury on co-accused Karan Singh remained unexplained, creating serious doubt about the prosecution version. Further, the alleged recovery of the axe was held unreliable, and the investigation appeared biased and unfair. On cumulative assessment, the conviction was set aside and the appellant was directed to be released forthwith, subject to Section 437-A CrPC bond compliance.

CASE LAW CITED

Waman and Others v. State of Maharashtra
State of U.P. v. Jagdeo
Dalbir Kaur v. State of Punjab

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. On 23.9.2016, we after hearing learned counsel for the parties, had made the following order:

2. "Heard Sri Sangam Lal Kesharwani, leaned counsel for the appellant and Sri J. K. Upadhyay, Sri Hasan Abdi and Km. Meena, learned AGAs for the State and perused the record of this appeal. We will give reasons later but we make the operative order now. The appeal is allowed.

Impugned judgement and order dated 22.12.2008 passed by Sessions Judge, Kannauj in Sessions Trial No. 299 of 2003 (State Vs. Inspector and others) arising out of Case Crime No. 274 of 2003 convicting the appellant under Sections 302 IPC, police station- Gursahaiganj, district- Kannauj is hereby set aside. The appellant is acquitted of all the charges framed against him. Appellant is in jail. He shall be released forthwith unless and until he is wanted in any other case after complying with the provisions of Section 437-A Cr.P.C.

3. There shall be no order as to cost."

4. These are the reasons upon which we set aside the impugned judgement and order:

5. Heard Sri Sangam Lal Kesarwani, learned counsel for the appellants, Sri Sagir Ahmad, learned A. G. A. assisted by Mrs. Manju Thakur, Brief Holder appearing for the State of U. P.

6. This criminal appeal has been preferred by the appellant Inspector against the judgement and order dated 22.12.2008 passed by the Sessions Judge, Kannauj in S. T. No. 299 of 2003; State Versus Inspector arising out of Case Crime No. 273 of 2003; under Sections-302/34 IPC, P. S.-Gursahaiganj, district-Kannauj by which the appellant has been convicted under Sections-302/34 IPC and sentenced to life imprisonment and a fine of Rs. 5000/- and in case of default of payment of fine, additional three months' R. I.

7. The facts of this case as spelt out in the F. I. R. (Ext. Ka 1) lodged by P. W. 1 Sant Prakash, S/o Deen Dayal at 7.00 A. M. on 5.6.2003 at police station-Gursahaiganj, district-Kannauj on the basis of which Case Crime No. 273 of 2003 was registered against the appellant and two others namely, Jageshwar Singh, S/o Shiv Dayal, and Karan Singh, S/o Phool Singh, all residents of Mahona, P. S.-Gursahai Ganj, district- Kannauj and later testified by the prosecution witnesses of fact P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad, are that the informant had set up a flour mill on the south western corner of the village. About twenty days before the incident an altercation had taken place between Jageshwar Singh and his brother deceased Phal Singh as the aforesaid Jageshwar Singh suspected that Phal Singh was having an illicit relationship with his daughter. On the date of incident a dust storm storm had hit the village at midnight which lasted for about two hours and had resulted in a large number of unripe mangoes falling from the mango trees and while the complainant and his brother Ganga Prasad were collecting mangoes, which had fallen on the ground at about 2.00 A. M. they heard a shriek of their brother coming from the side of the flour mill where he was sleeping on a thakat on which complainant and his brother ran towards the flour mill and on reaching there, they saw the appellant Inspector standing near their brother holding an axe in his hands, while the co-accused Karan Singh had gagged him by pressing his palms across his mouth and Jageshwar Singh was also standing there. Inspector assaulted his brother with the axe. On being challenged by the complainant and his brother, Ram Sanehi, S/o Girwar, residents of the same village also reached the place of incident, on which the appellant and the other accused ran towards south and when the complainant and his brother saw their brother closely, they found him wriggling in pain and blood oozing out from his face. Considering the serious condition of his brother, the informant did not chase the assailants. In the meantime a huge crowd had gathered at

the place of incident and while arrangements were being made to take Phal Singh to the hospital, he died on the spot. Leaving behind the dead body of the deceased at the place of incident, the complainant Sant Prakash went to the police station to lodge the F. I. R. of the occurrence. On the basis of the written complaint (Ext. Ka 1) given by the complainant P. W. 1, Sant Prakash at P. S.-Gursahaiganj, district-Kannauj, check F. I. R. Ext. Ka 3 was prepared and registered vide rapat No. 9, dated 5.6.2003 (Ext. Ka 4) at Case Crime No. 274 of 2003, under Section-302 IPC; State Versus Inspector and three others. Soon after the registration of the case investigation was entrusted to S. H. O. Dayanand Singh, who after copying the check F. I. R. in the case diary recorded the statement of P. W. 4 Dhawal Singh, who had prepared the check F. I. R. and proceeded to the place of occurrence along with the other members of his force and conducted the inquest of the dead body of the deceased and got the inquest report (Ext. Ka 5) prepared by H. C. P. Mohd. Hafiz under his supervision. He also prepared other related documents, letters addressed to C. M. O., chalan of the dead body, photograph of the dead body (Exts. Ka 6, Ka 7 and Ka 8 respectively) and dispatched the dead body of the deceased for conducting post mortem. He also inspected the crime scene and prepared the site plan (Ext. ka 9). He collected plain and blood stained earth (material Ext. Ka 1 and material Ext. Ka 2 respectively), blood stained and plain wood scraps extracted from the thakat (material Ext. Ka 3 and material Ext. Ka 4 respectively) and prepared recovery memo (Ext. Ka 10). He also recorded the statements of the witnesses Ganga Prasad, Ram Singh, witnesses of recovery and the inquest and H. C. P. Mohd. Hafiz. He arrested all the three accused on 7.6.2003 at 5.30 A. M. near Ramashram in front of P. C. O. where he had reached on the basis of the information given to him by the police informer, in the presence of witnesses Vimal Kumar and Chandra Prakash. Co-accused Karan Singh at the time of his arrest, had a visible injury on his hand. The accused Inspector after his arrest disclosed that he had hidden the axe which was used in committing the murder of the deceased Fhal Singh in the drawing room of one Rajendra Singh and expressed his readiness to get the same recovered. A blood stained axe (material Ext. Ka 5) was recovered from the south west corner of the drawing room of Rajendra Singh in the presence of witnesses Vimal and Chandra Prakash by the accused Inspector. The blade of the axe was wrapped in a bundle of wool and sealed. The recovery memo of crime weapon (Ext. Ka 11) was prepared on the spot and signatures of the witnesses were obtained thereon. The investigating officer of the case prepared the site plan of the place from where the crime weapon was allegedly recovered (Ext. Ka 12). The accused Karan Singh was taken to the Primary Health Centre, Gursahaiganj for treatment of his injuries. The post mortem of the dead body of the deceased Phal Singh was conducted by P. W. 3 Dr. Janardan Babu on 5.6.2003 at about 5.40 P. M. who prepared the post mortem report (Ext. Ka 2) of the deceased and noted following ante mortem injuries on his dead body:

Incised wound 9 cm x 2 cm into bone deep present on the right side of parietal region involving right lateral surface of neck below label of right ear. Wound line margins are clean cut. Both angles blood present around the wound on die section of mandible bone and maxilla bone cut. Fractured muscles and falls cut.

8. After obtaining the forensic report (Ext. Ka 14) of the blood stains found on the axe and collecting other evidence P. W. 5 Dayanand Singh submitted chargesheet (Ext. Ka 13) against the all the accused under Sections-302/34 IPC.

9. Since the offences enumerated in the chargesheet were triable exclusively by the court of Sessions, the concerned C. J. M. committed the case for the trial of the accused to the Court of Sessions. The trial so committed to the Court of Sessions was registered as S. T. No. 299 of 2003; State Versus Inspector and two others. Charge was framed against all the accused under Sections-302/34 IPC. The accused denied the charge framed against them and claimed trial.

10. The prosecution in order to prove the charge framed against the accused examined two witnesses of fact namely P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad and four formal witnesses namely P. W. 3 Dr. Janardan Babu, P. W. 4 Dhawal Singh, P. W. 5 Inspector Dayanand Singh, P. W. 6 Dr. R. A. S. Tomar, Medical Officer. The sessions Judge after considering the evidence on record and the submissions advanced before him by learned counsel for the parties convicted the appellant Karan Singh under Section-302/34 IPC and awarded aforesaid sentences to them while co-accused Jageshwar Singh was acquitted .

11. Sri Sangam Lal Kesarwani, learned counsel for the appellant has submitted that from the evidence of P. W. 2 Ganga Prasad it is crystal clear that the information regarding the incident was given by the P. W. 1 Sant Prakash to the police by phone and the police had reached the place of incident in response to the aforesaid information and till then identity of the accused was not known, the remaining paper work including scribing of the F. I. R., was done at the place of incident with the aid, advice and interference of the police and hence the F. I. R. of the incident appears to be wholly un-reliable and ante timed. He next submitted that the incident which had taken place in the night at about 2.00 A. M. on 5.6.2003 was preceded by a thunder storm which had hit the village in the mid night and had lasted for about two hours and during which the power supply in the village was snapped, hence the prosecution case is liable to be thrown out on account of the failure of the prosecution to lead any evidence, showing that there was any source of light at the place of incident or the alleged light emitting from the electric bulb hung against the wall of tube-well near the place of incident, was sufficient to enable the two chance witnesses to identify the assailants as claimed by the prosecution or that the electricity supply which had been disrupted following the dust storm which had lasted for two hours from 12.00 to 2.00 A. M., had been restored. The presence of the two eye witnesses at the place of the incident, who are real brothers of the deceased being highly partisan and interested at 2.00 A. M. and their having seen the occurrence in the absence of any source of light at the crime scene, is highly doubtful and the explanation given by them for their being present near the place of incident, at the time of the occurrence is wholly unconvincing and unacceptable and hence the appellant's conviction on the basis of the thoroughly interested testimonies of P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad cannot be sustained and is liable to be set aside.

12. He further submitted that at the time of the incident co-accused Karan Singh was also sleeping on the same thakat on which the deceased was sleeping and he had also received an injury on his hand in the incident which the prosecution witnesses have failed to explain and hence their testimony cannot be treated as reliable. It was co-accused Karan Singh who had gone to the house of the deceased Phal Singh and informed his family members including the P.W. 1 and P. W. 2. about the incident, whereafter they had arrived at the place of incident. Karan Singh had also

accompanied the complainant P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad to the police station for lodging the F. I. R. and had told the police that the assailants had veiled their faces as such he was not able to identity them and although after the recovery of the alleged crime weapon from the drawing room of Rajendra Singh, the police had taken all the three accused and Rajendra Singh to the police station but when co-accused Karan Singh refused to falsely nominate as accused the persons of the choice of the police as he had not been able to identify them, strangely Rajendra Singh was allowed to go escort free, while appellant along with Karan Singh and Jageshwar Singh was made accused of the murder of Phal Singh. He next submitted that the acquittal of the co-accused Jageshwar Singh who as per the prosecution case, alone had a very strong motive to commit the murder of the deceased and the prosecution having failed to prove any motive for the appellant to commit the murder of the deceased, the conviction of the appellant on the basis of the same evidence on which accused Jageshwar Singh was acquitted is not maintainable at all. He lastly submitted that from the facts and circumstances of the case and evidence on record, it is crystal clear that no-one had seen the incident and after the dead body of the deceased was recovered, a false F. I. R. was lodged by the P. W. 1 Sant Prakash after due deliberations, consultations and police interference and hence he recorded conviction of the appellant and the sentence awarded to him by the trial court on the basis of the absolutely tainted investigation done pursuant to an F. I. R. credibility whereof itself is under cloud, cannot be sustained and is liable to be set aside.

13. Per contra, Sri Saghir Ahmad, learned A. G. A. assisted by Mrs. Manju Thakur, Brief Holder appearing for the State of U. P. submitted that the prosecution case stands fully proved from the eye witness account of P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad, which stands further fully corroborated from the medical evidence. The conviction of the appellant is based upon cogent and reliable evidence and sentence awarded to him by the trial court is supported by relevant considerations, hence the impugned judgement and order does not warrant any interference by this Court. This appeal lacks merit and is liable to be dismissed.

14. We have heard learned counsel for the parties and scanned the entire lower court record. The only question which arises for our consideration in this case is whether the prosecution has been able to prove its case against the appellant beyond all reasonable doubts.

15. In order to ascertain whether the prosecution has been able to prove its case against the appellant beyond all reasonable doubts, we have to examine whether the F. I. R. of this case is credible and not ante timed and whether the prosecution has been able to prove the time, place and manner of occurrence and motive for committing the crime as spelt out in the F. I. R. and whether the evidence of witnesses of fact examined on behalf of the prosecution is reliable and trustworthy.

16. The credibility of the F. I. R. in this case has been challenged by learned counsel for the appellant on the ground of there is a glaring contradiction in the testimonies of P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad with regard to manner in which occurrence was reported to the police.

17. P. W. 1 Sant Prakash in his examination-in-chief (at page 12 of the paper book) has deposed that he had scribed the written report of the incident (Ext. Ka 1) on the spot and thereafter he had gone to the police station and given the same to "Deewan Ji" and on the basis of the aforesaid written report, the case was registered and his statement was recorded by "daroga ji". Thereafter the police had gone to the place of incident and conducted the inquest of the dead body of the deceased and completed the necessary paper work, whereas P. W. 2 Ganga Prasad, the other eye witness of the occurrence (at page 16 of the paper work) stated in his examination-in-chief stated that his elder brother P. W. 1 Sant Prakash had telephonically informed the police about the occurrence in the morning. The police had thereafter arrived at the place of incident and after doing necessary paper work had sealed the dead body of the deceased and dispatched it for post mortem.

18. P. W. 5 Dayanand Singh, the first I. O. of this case (at 12 of the paper book) in his cross examination stated that he did not remember the time at which he had reached the place of incident on the date of occurrence. Neither the time of his departure, nor the time of his return to the police station, was recorded in the case diary.

19. In this connection, it would be relevant to refer to the cross examination of P. W. 4 S. I. Dhawal Singh who had upon receiving the written report (Ext. Ka 1) prepared the check F. I. R. of the case (Ext. Ka 3) and made the relevant G. D. entry, in which on page 27 of the paper book in which he had stated that on 5.6.2003 before or after registration of the instant case no other criminal case was registered at P. S.-Gursahaiganj but he denied the suggestion given to him by defence counsel that before leaving the police station the Investigating Officer of the case had instructed him to keep the G. D. blank or that he had returned to the police station with the complainant and co-accused Karan Singh and had thereafter recorded the time of registration of the F. I. R. according to his convenience. It is apparent that P. W. 1 Sant Prakash and P. W. 4 did not speak the truth before the trial court as P. W. 5 Dayanand Singh, the Investigating Officer of this case in his cross examination on page 32 of the paper book clearly stated on oath that he did not remember the time at which he reached the place of incident, however, when the returned to the police station he was not accompanied by the complainant but he had brought co-accused Karan Singh to the police station after arresting him at about 5.20 a. m. from a place in front of a P. C. O. near Ramashram although according to the arrest memo of the accused (Ext. Ka 11) all the three accused including co-accused Karan Singh were arrested on 7.6.2003 at about 5.35 a. m. Thus the aforesaid discrepancy with regard to the date of the arrest of the co-accused Karan Singh mentioned in the recovery memo (Ext. Ka 11) and in the statement of P. W. 5 Dayanand Singh indicates that when the co-accused Karan was taken to the police station on the date of incident he had actually not been arrested and for some reason or the other the I. O. of the case tried to show that co-accused Karan Singh was arrested along with the other accused on 7.6.2003.

20. Thus, there is a glaring contradiction in the evidence of the two eye witnesses with regard to the manner in which the incident was reported to the police and on the point of arrival of the police at the place of incident, that is whether the police had reached the place of occurrence after the lodging of the written report (Ext. Ka 1) or before the same was scribed. The P. W. 2 in his examination-in-chief has unequivocally stated that the police had arrived at the place of incident on

being informed about the murder telephonically by P. W. 1 and had conducted the inquest and completed the necessary paper work on the spot. The failure of the I. O. in his cross examination to disclose the time at which he had reached the place of incident on the date of occurrence, further strengthens the doubt that when the police had reached the place of incident, the F. I. R. was not in existence and the same was scribed later, after due deliberations, consultation and under police interference and registered at the police station-Gursahaiganj after the Investigating Officer had returned back to the police station with the co-accused Karan Singh.

21. Thus, in view of the above, the credibility of the F. I. R. in this case stands totally shattered.

22. The appellant has not seriously challenged either the time or the place of incident as alleged by the prosecution in the F. I. R. and hence we hold that the prosecution has been able to prove that the incident had taken place near the flour mill in village Jahangirpur at about 2.00 a. m.

23. The manner of assault however has been castigated by the appellant on the ground that the co-accused Karan Singh had also received injury in the incident and his injury report is on record as Ext. Ka 15. The prosecution has not been able to come up with any explanation with regard to the injury received by co-accused Karan Singh although it was specifically stated by co-accused Karan Singh in his additional statement recorded before the trial court under Section 313 Cr. P. C. that while he along with the deceased Phal Singh was sleeping on the same wooden cot in the flour mill of the complainant, they were assaulted by several persons, who had veiled their faces and in the assault both the deceased and the appellant had received injuries and it was co-accused Karan Singh who had informed P. W. 1 Sant Prakash and his other relatives about the incident but the police falsely implicated him in the present case as an accused after he failed to nominate the persons of the choice of the police as accused in the F. I. R.

24. Rebutting the aforesaid submissions of learned counsel for the appellant, Sri Saghir Ahmad, learned A. G. A. appearing on behalf of the State submitted that as far as the injury received by co-accused Karan Singh is concerned, the same is either manufactured or received by the co-accused Karan Singh while the appellant had wielded the blow on the neck of the deceased while Karan Singh had gagged him with his palms. The injury report of the appellant is dated 7.6.2003. Duration of his injury is stated to be about two or three days and there being no reliable evidence on record indicating that the aforesaid injury was received by the appellant in the same incident, the manner of assault as spelt out in the F. I. R. cannot be doubted.

25. The medico legal injury report of the appellant which is dated 7.6.2003, has been brought on record by the prosecution as Ext. Ka 15 and proved by P. W. 6 Dr. R. S. Tomar. The injury report (Ext. Ka 6) of the co-accused Karan Singh denotes one injury on his person dimension whereof is shown to be 4 cm x 1 cm skin bony deep. The injury was estimated to be about two or three days old.

26. P. W. 6 Dr. Tomar (on page 35 of the paper book) has deposed that co-accused Karan Singh was produced before him on 7.6.2003 at about 11.00 A. M. by C. P. 81 Sewak Ram and Home Guard 374 Ram Kumar for examination of his injuries. P. W. 6 (on 36 of the paper book) in his examination-in-chief further stated that the injury found on the person of the appellant could have been inflicted on him on 5.6.2003 at about 2.00 a. m. He however also opined that the injury could also be caused, if co-accused Karan Singh was holding someone while he was being assaulted. The evidence of P. W. 6 thus proves that the co-accused Karan Singh could have received the injury on his hand on 5.6.2003 at about 2.00 A. M. but since neither P. W. 1 nor P. W. 2 who claim themselves to be the eyewitnesses of the incident have deposed that co-accused Karan Singh had also received an injury on his hand when the appellant had assaulted the deceased Phal Singh with an axe, the same indicates that they had not witnessed the incident and the possibility of co-accused Karan Singh being assaulted by the same culprits who had assaulted the deceased while he was sleeping with him on the same "thakat', cannot be ruled out.

27. P. W. 1 Sant Prakash in his cross examination (on 15 of the paper book) has stated that the deceased Phal Singh and Karan Singh often used to sit and sleep together. He further deposed that he was not sure whether on the date of incident co-accused Karan Singh was also with his brother at the flour mill (page 15 of paper book).

28. Thus, from the evidence of P. W. 1 Sant Prakash at least this much is clear that the deceased Phal Singh and co-accused Karan Singh frequently used to sit and sleep at the flour mill and hence the explanation given by the co-accused Karan Singh with regard to the manner in which he had received the injury cannot be disbelieved outrightly. If co-accused Karan Singh had been injured while he had gagged the deceased by putting his palms across his mouth from the assault of the axe wielded on the neck of the deceased by the appellant, then this fact would definitely have found mention in the evidence of P. W. 1 and P. W. 2 if, as they claim, were present at the place of the incident and had seen the occurrence.

29. Thus, in view of the failure of the prosecution to come up with any explanation for the injury received by the co-accused Karan Singh on his hand there being no suggestion by the prosecution that the injury of co-accused Karan Singh was either or superficial and the admitted friendship between the deceased and the co-accused Karan Singh and the fact that they were so close that they often used to sit and sleep at the flour mill, the possibility of the incident having taken place in the manner as described by the co-accused Karan Singh cannot ruled out. It is apparent that the prosecution has either suppressed the material facts or the same were not within the knowledge of the prosecution witnesses of fact as they had not witnessed the occurrence. The Hon'ble Supreme Court in Waman and Others vs. State of Maharashtra, **(2011) 7 SCC 295** observed as hereunder:

"36. Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then

certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case."

30. We accordingly hold that the prosecution has failed to prove that the incident had taken place in the manner as spelt out in the F. I. R.

31. Coming to the motive part, we find that it is the specific case of the prosecution that about twenty days before the incident, co-accused Jageshwar Verma and the deceased had quarrelled with each other as Jageshwar Verma suspected that the deceased Phal Singh was having an affair with his daughter. As far as the appellant is concerned, there is no whisper of any motive for him to commit the murder of the deceased. However, in view of the settled legal position that in a case of direct evidence the prosecution is not under an obligation to prove the motive but the quality of the evidence adduced by the prosecution must be such so as to inspire confidence. Motive has little relevance in a case of direct evidence and the entire prosecution case cannot be discarded even if the prosecution fails to establish the motive beyond doubt.

32. We now proceed to consider the appellant's challenge to the credibility of the prosecution witnesses in the present case. So far as the present case is concerned, we have already noticed that the prosecution in order to prove its case has produced two eyewitnesses who are the real brothers of the deceased.

33. The credibility of the two eyewitnesses examined by the prosecution in this case has been castigated by learned counsel for the appellant interalia on the grounds that they being the real brothers of the deceased are highly partisan and interested witnesses and no reliance can be placed on their testimonies for convicting the appellant; that there being no cogent proof of any source of light at the place of incident even if it is presumed for the sake of argument that P. W. 1 and P. W. 2 were present near the place of incident at the time occurrence they could not have seen the incident and identified the assailants; and that the reason given by them for their presence near the place of incident at 2.00 a. m. on the date of incident is wholly unconvincing as in the natural course there was no justification for the P. W. 1 and P. W. 2 for being present at the place of incident.

34. On the point of interested witnesses, the Hon'ble Supreme Court in **State of U.P. v. Jagdeo, 2003 Cri.L.J. 844 (S.C.)** observed that only on the ground of interested or related witnesses, their evidence cannot be discarded. Most of the times eye witnesses happen to be family members or close associates because unless a crime is committed near a public place, strangers are not likely to be present at the time of occurrence.

35. The Hon'ble Supreme Court in ***Mst. Dalbir Kaur v. State of Punjab, 1976 Cr.L.J. 418 (S.C.)*** made following observations:-

(i) Interested witness:- Relatives who are natural witnesses are not interested witnesses and their testimony can be relied upon. The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused is somehow or the other is convicted either because he had some animus with the accused or for some other reason. In the reported case the incident took place at mid night inside the house, the only natural witnesses who could be present to see the assault were the persons present in the house at that time. No outsider can be expected to have come at that time because the attack was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness.

(ii) Witness gained over by accused not examined by the prosecution- held withholding or keeping back of witnesses is not unfair and adverse inference cannot be drawn. There is no duty on the prosecution to examine witnesses who might have been gained over by accused and even if those witnesses are not produced by the prosecution, there is nothing to stop accused from applying to the court for examining such witnesses.

(iii) witness who gives details with absolute accuracy is trustworthy.

36. Thus what follows from the perusal of the aforesaid judgement of the Hon'ble Supreme Court is that relationship cannot be a factor which affects the credibility of witnesses. The evidence of interested or relative witnesses can be relied upon subject to their evidence being trustworthy and admissible in accordance with law.

37. Hence in view of the above, the evidence of P. W. 1 and P. W. 2 cannot be discarded merely on the ground of their being the real brothers of the deceased Phal Singh. We, accordingly, proceed to test the credibility of the prosecution witnesses on the touch stone of the trustworthiness and admissibility in accordance with law.

38. A perusal of the evidence of P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad indicates that they have contradicted each other on the point of time at which the Investigating Officer had arrived at the place of incident and the manner in which occurrence was reported to the police by P. W. 1 Sant Prakash, while P. W. 1 Sant Prakash in this examination-in-chief deposed that after the incident he had scribed the written complaint of the occurrence on the spot and thereafter he had gone to the police station and given the same to the officer present there and thereafter he had returned to the place of occurrence with the Investigating Officer. However, P. W. 2 Ganga Prasad deposed that the police had arrived at the place of occurrence after the incident was reported by his brother P. W. 1 to the police telephonically and completed the necessary paper work on the spot.

39. The presence of P. W. 1 and P. W. 2 at the place of incident at 2.00 a. m. does not appear to be natural. They ought to have a very strong and compelling reason for their being awake at 2.00 a. m. and for being present in the mango grove of Parshuram. Both the P. W. 1 and P. W. 2 have uniformly deposed that as soon as the storm was over, they came out of their house with the object of picking up the mangoes from the grove of Parshuram which may have fallen on the ground as a result of the storm and as soon as they reached the grove of Parshuram, they heard the shriek of their brother coming from the side of his flour mill, on which they rushed there and saw the incident. It has been pointed out by learned counsel for the appellant that both

P. W. 1 and P. W. 2 have admitted in their evidence that they do not own any mango grove near their flour mill. P. W. 2 in his cross examination (page 16 of the paper-book) has admitted that he owns a mango grove in which there are about 50-60 trees and which is in the east of his flour mill. In the normal course of human behaviour, after the dust storm had subsided, if we accept the claim of P. W. and P. W. 2 that they were awake till 2.00 a. m. on the date of incident to be true, they would have rushed to their mango grove for collecting the mangoes which must have fallen from the mango trees of their grove, rather than going to the mango grove of Parshuram. The reason given by the P. W. 1 and P. W. 2 for their presence near the place of incident at the time of occurrence does not appear to be very convincing also in view of their having stated in their evidence that they had not brought any basket or bag with them for collecting the mangoes fallen on the ground but even if we accept for the sake of argument that they were present in Parshuram's mango grove near the place of incident at the time of occurrence, whether there was any illumination at the crime scene or any source of light available, which would have enabled them to witness the incident. It is noteworthy that in the F. I. R. of the incident which was lodged by P. W. 1 Sant Prakash there is no mention of any source of light at the place of incident. However, both P. W. 1 and P. W. 2 in their evidence tendered during the trial have stated in unison that the place of incident was illuminated from the light which emitted from the electric bulb of Parshuram's tube-well which was adjacent to his house.

40. The question which now arises for our consideration is whether the place of incident was close enough to the place of incident to be be illuminated from the light emitted by the electric bulb hung on the wall of Parshuram's tube-well. The site plan of the place of incident (Ext. Ka 9) neither shows any tube-well nor any electric bulb.

41. Thus, in order to determine whether there was any source of light at the place of occurrence and the distance between the tube-well and the place of incident we are left only with the evidence of P. W. 1 Sant Prakash and P. W. 2 Ganga Prasad.

42. As far as the P. W. 1 Sant Prakash is concerned, he has not stated anything about the distance between the place of incident and the tube-well of Parshuram. P. W. 2 Ganga Prasad on page 17 of the paper book in his cross examination has stated that the house of Parshuram is at a distance of 10-15-20 (kadams) (25-33-50 fts.) from his grove in the south. Distance between the flour mill and tube-well of Parshuram which has a power connection is about 10-15 'kadam' (25-37 ft). He further deposed in his cross examination on the same page that the tube-well of Parshuram is adjacent to his house and there is no power connection in the flour mill. Flour mill is operated by a generator. Flour mill was not illuminated. On the same page he has further deposed that the grove of Parshuram lies between his tube-well and the flour mill. Tube-well lies in the north of the grove and in the northern wall of the tube-well, an electric bulb is fixed. Between the tube-well and the grove, there is a vacant land of about 6-7 kadam (15-18 ft.) in length. The grove is about 6-7 'kadam' (15-18 ft.) north-south and the flour mill is at a distance of about 5-6 kadam (12.5 ft.-15 ft.) in the north of the grove. Thus, the total distance between the tube-well and the place of incident according to the evidence of P. W. 2 Ganga Prasad is about 17-20 kadam (42.5-50 ft.). The mango grove of Parshuram having 7-8 trees exists between his tube-well and the flour mill. There is no evidence on record about the wattage of the bulb which was allegedly emitting light from the tubewell of Parshuram and even if we assume that the light was being emitted from the electric bulb hung on the wall of the tube-well, we find it difficult to accept

keeping in view the distance between the tube-well and the crime scene and existence of the grove between the tube-well that the light emitted from the tube-well could have illuminated the place of incident also.

43. Another important aspect of the matter is that it is common knowledge that whenever power supply is snapped due to dust storm it takes several hours for the power supply to restore even in cities. In the instant case both the witnesses of fact have stated that the dust storm had lashed the village and lasted for two hours resulting in snapping of power supply. The prosecution has failed to lead any evidence by examining any employee of the power station to prove that the power supply in the village was restored immediately after the dust storm had abated. The chances in all probabilities are that the power supply in the village could not have been restored at 2.00 a. m., the time at which the storm had abated.

44. Thus, for the aforesaid reasons, we do not find that the prosecution has succeeded in proving that there was any source of light available at the time of incident at the place of occurrence by any cogent evidence.

45. Learned counsel for the appellant has also assailed the investigation in this case on the ground that the same was biased and unfair. In this regard he has invited our attention to the additional statement co-accused Karan Singh recorded under Section 313 Cr. P. C. in which he has clearly stated that at the time of occurrence he along with the deceased Phal Singh was sleeping on the same thakat and assailants had veiled their faces with "tattha" and as such he was unable to identify them. A suggestion was given by the defence counsel to the I. O. of this case that when he had arrived at the place of incident he was informed by the complainant that the assailants had veiled their faces with "tattha" and they had left behind a 'tapora' which had been handed over to him by P. W. 1 Sant Prakash and it was on account of the aforesaid reason that co-accused Karan Singh was not able to identify them. On page 31 of the paper-book the aforesaid suggestion was denied by the P. W. 5 Dayanand Singh.

46. Similar suggestion was given by the defence counsel to P. W. 1 Sant Prakash also that he had informed the investigating officer that the assailants could not be identified as they had veiled their faces and the I. O. had told him that he would search out the real culprits (page 15 of the paper-book).

47. A glaring instance of the unfair manner in which the I. O. had investigated the matter is apparent from the fact that Rajendra Singh from whose drawing room it is alleged that the crime weapon (axe) used in committing the murder of Phal Singh was recovered at the alleged pointing out of the appellant was not arraigned as accused in this case.

48. Learned counsel for the appellant has assailed the credibility of the prosecution claim that the crime weapon was recovered on the pointing out of appellant by first referring to the recital contained in the recovery memo according to which, the appellant, co-accused Jageshwar Singh and Karan Singh were arrested on 7.6.2003 at about 5.35 A. M. and on being interrogated, they confessed before the I. O. that they had committed the murder of Phal Singh and the appellant further expressed his willingness to get the axe which was used in committing the murder of Phal Singh recovered from the use of one Rajendra and thereafter recovery of axe was made from the corner of the drawing room of Rajendra Singh in the presence

of independent witnesses Vimal Kumar Verma and Chandra Prakash and recovery memo (Ext. Ka 11) was prepared.

49. Learned counsel for the appellant further invited our attention to page 32 of the paper book on which P. W. 5 Dayanand Singh, I. O. of this case has deposed on oath that he had arrested the co-accused Karan Singh at about 5.20 A. M. from a place in front of a P. C. O. near Ramashram and had taken him to the police station on the date of the occurrence itself. Thus, the contradiction with regard to the date of arrest of co-accused Karan Singh although as per the recovery memo (Ext. Ka 11) all the three accused were arrested on the same day i. e. 7.6.2003 mentioned in the recovery memo (Ext. Ka 11) and the evidence of P. W. 5 fully disproves prosecution's allegation that the recovery of crime weapon was made from the drawing room of one Rajendra Singh on the alleged pointing out of the appellant and indicates that the alleged recovery of the crime weapon on the pointing out of the appellant has been fabricated by the police with the object of falsely implicating him in the present case. The recovery of the crime weapon in this case at the appellant's behest further appears to be doubtful on account of the failure of the prosecution to examine the two independent witnesses in whose presence crime weapon was allegedly recovered by the appellant. Since the prosecution has failed to prove the recovery memo of crime weapon on the pointing out of the appellant by any cogent and un-impeachable evidence, the forensic report of the crime weapon (Ext. Ka 14) according to which human blood was found on the axe recovered from the drawing room of Rajendra Singh will not be of any help to the prosecution for proving charge of murder of the deceased against the appellant.

50. It is true that the prosecution case cannot be discarded or disbelieved merely on the ground of omissions and irregularities committed by the Investigating Officer but the cumulative effect of the laches on the part of the Investigating officer in conducting the investigation in this case which have been highlighted by learned counsel for the appellant on the prosecution case appears to be that no honest attempt was made by the Investigating Officer to nab the actual perpetrators of the crime. On the other hand, he fabricated documents with a view to implicate the appellant and other co-accused falsely in the present case.

51. In view of the foregoing discussions, we are of the view that the conviction of the appellant recorded by the Sessions Judge, Kannauj vide order dated 22.12.2008 passed in S. T. No. 299 of 2003; State Versus Inspector, arising out of Case Crime No. 273 of 2003; under Sections-302/34 IPC, P. S.-Gursahaiganj, district-Kannauj and the sentence awarded to him is liable to be set aside and is hereby set aside.

52. Accordingly, this appeal succeeds and is allowed. The appellant, Inspector who is in jail, stands acquitted of all the charges framed against him and shall be released forthwith, if not wanted in any other case.

53. However, keeping in view the provisions of Section 437 A Cr. P. C. the appellant, Inspector is directed to forthwith furnish a personal bond in the sum of Rs. One lac and two reliable sureties in the like amount before the trial court (which shall be effective for a period of six months) to the effect that in the event of filing of Special Leave Petition against the instant judgement or for grant of leave, the appellant on receipt of notice thereof. shall appear before the Hon'ble Supreme Court.

(2016) 9 ILRA 46
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 466 Of 1983

Sanjay **...Appellant**
Versus
State **...Respondent**

Counsel for Appellant:
G.S. Chaturvedi, A. Mallick, Anoop Trivedi, Awadh Sharma, D.P. Singh, G.C. Saxena, G.S. Saran, Keshav Sahai, P.C. Chaturvedi, Sanjeev Ratan

Counsel for Respondent:
AGA, S.K. Agarwal

Held

The Court held that, considering the overall facts and circumstances, the applicant-husband was entitled to be **released on bail** in the dowry death case. The Court took note of the fact that the deceased died by **ante-mortem hanging**, with no external injury marks in the post-mortem report, and that the father's initial information to the police contained **no allegation of dowry demand or cruelty**, rather stating that no one from the in-laws' side was responsible and that the deceased had committed suicide due to illness. The subsequent FIR alleging dowry demand, lodged after a delay of more than twenty days, was considered a relevant circumstance at the stage of bail. Keeping in view the **period of detention, delay in trial, nature of evidence, and absence of material suggesting tampering**, the Court enlarged the applicant on bail subject to conditions of non-interference with evidence and mandatory personal appearance before the trial court.

CASE LAW CITED

Meharban Singh v. State of Madhya Pradesh, 1997 Cr.L.J. (SC)
Pandurang Chandrakant Mhatre v. State of Maharashtra, (2010) 1 SCC (Cri) 413
Gopal v. State, 1999 Cr.L.J. 2501 (FB, Allahabad)
Hardev Singh v. Harbhej Singh, 1997 SCC (Cri)
Bhupendra Singh v. State of U.P., (2010) 1 SCC (Cri) 275
Bishundeo Poddar v. State of Bihar, 2003 Cr.L.J. 1558
Amar Singh v. Balwinder Singh, 2003 Cr.L.J. 1282

(Delivered by Hon'ble Bharat Bhushan, J.)

1. This criminal appeal on behalf of surviving appellant Mukesh assails judgment and order dated 24.2.1983 passed by the then Additional Sessions Judge, Meerut in Sessions Trial No. 198 of 1982 (State versus Sanjay and another) whereby sole surviving appellant Mukesh and late appellant Sanjay were convicted under section 302 read with section 34 Indian Penal Code (in short, IPC) and sentenced to undergo imprisonment for life.

2. During pendency of this appeal, appellant Sanjay died, therefore, his appeal stands abated. This Court is now concerned with the appeal of sole surviving appellant Mukesh only.

3. Appellant Mukesh and late appellant Sanjay were brothers. Deceased Brijesh Mohan Sharma and informant Dharmesh Mohan Sharma (PW-1) were brothers too. Both, accused-appellants and deceased used to reside in Shivpuri locality though houses of deceased and appellants were situated on Hapur and Garh road respectively. Smt. Vimla, Bua (father's sister) of deceased and wife of veterinary doctor used to reside at the residence provided within compound of veterinary hospital situated at Hapur-Garh road, Meerut. On the day of incident (5.2.1982), informant Dharmesh Mohan Sharma (PW-1) and his elder brother Brijesh Mohan Sharma left their residence at about 3:45pm for visiting their Bua Smt. Vimla, then living in the compound of veterinary hospital. PW-2 Rajendra also met and joined them. As soon as, they reached near the house of Sri Ram Kumar Sharma, owner of National Book Depot, his son, namely, Mukesh (appellant) and Sanjay (deceased appellant) accosted them. Appellant Mukesh was armed with spear (bhala) and late appellant Sanjay was wielding knife. Both of them expressed their annoyance at the alleged use of foul language by deceased against accused persons and threatened to kill him. Appellant Mukesh first advanced towards deceased Brijesh Mohan Sharma aiming spear at him but caught by PW-1 Dharmesh Mohan Sharma (informant). Both of them scuffled with each other. In the meantime, late appellant Sanjay attacked deceased Brijesh with knife and caused injuries. PW-1 Dharmesh Mohan Sharma pushed appellant Mukesh away and tried to grab accused-appellant Sanjay who pushed the informant back and then struck deceased Brijesh Mohan Sharma several times with knife whereupon already injured deceased fell on the ground. Mukesh also attacked deceased with handle part of Spear (Bhala). The blood sprinkled over cover of the car of accused persons and some blood also scattered on the ground. A crowd also gathered there whereupon both the accused fled from the spot.

4. Injured deceased was initially admitted to Pyare Lal Sharma Hospital (in short, P.L.Sharma Hospital) and later shifted to Medical College, Meerut. In the meantime, a report was scribed by Dinesh Mohan Sharma at the dictation of Dharmesh Mohan Sharma (PW-1) and lodged at Police Station (in short, P.S.) Civil Lines, Meerut at 4:55pm.

The place of occurrence was situated at 1 ½ kms. away from the P.S. Civil Lines, Meerut. The deceased was examined by Dr. Sharvan Kumar (PW-6), who found the following injuries on the person of deceased :-

1. Incised wound 3 cm. X ¾ cm. X depth not probed. Over Rt. Side of chest 6 cm. from the nipple- tailed outer side.

2. Incised wound 4 cm. X 2 cm. X depth not probed on Lt. Side of chest over 11 cm. above the left nipple-tailed outer part.

3. Incised wound 1/8 cm. X 1/8 x muscle deep on outer front part of Rt. thigh upper part.

4. L. wound 3 cm. X ½ x scalp deep on Lt. side of head 8 cm. Above the head.

5. Deceased then succumbed to the injuries and died therefore, the case was converted to section 302 IPC and relevant entries were made in General Diary (in short, G.D.) at the P.S.Civil Lines. Initial investigation was conducted by one S.I. Pooran Singh Sagar (PW-5). He recorded statements of Dharmesh (eye-witness) and Head Moharrir Kripal Singh (PW-7) visited P.L.Sharma Hospital where he was apprised by Constable Pramod Kumar that injured Brijesh Mohan Sharma had already been sent to Medical College, Meerut for further treatment. He took clothes and shoes of the deceased in his possession from P.L.Sharma Hospital. He prepared site-plan (Ex. Ka-3) and also took samples of blood stained earth and plain earth.

6. Meanwhile cadaver of deceased was sent for postmortem which was conducted by Dr. N.S.Pal (PW-4), who found the following ante-mortem injuries on the person of deceased :-

1. Incised wound 2.5 cm. X 2 cm. X chest cavity deep in front of upper part of chest left side 10 cm. above left nipple at 12 O' clock position. The wound is 'L' shaped, direction down wards & back ward.

2. Incised wound 2 cm. X 1 cm. X muscle deep on Rt. side front of chest 4 cm. below Rt. nipple at 8 O'clock position obliquely placed.

3. Incised wound 1.5 cm. X 0.5 cm. X muscle deep front of lower part of abdomen 10 cm. below umbilicus at 6 O' clock position.

4. Lacerated wound 4 cm. X 1 cm. X bone deep on left side head 11 cm. above left ear.

5. Lacerated wound 2 cm. X 0.5 cm. X scalp deep on left side of head 3 cm. behind injury no. 4.

6. Partially healed wound 2 cm. X 1 cm. on front of left leg upper part.

7. Scabed abrasion 2.5 cm. X 1.5 cm. front of Rt. Knee lower part. Scab partially fallen off.

7. Doctor opined that injury nos. 1 to 3 were caused by sharp edged weapon while injury nos. 4 and 5 were caused by blunt object. The time of death was ascertained between 5:00pm to 6:00pm on 5.2.1982. The postmortem report is available on record as Ex.Ka-2.

8. After conversion of this case under section 302 IPC, the investigation was then taken over by Inspector Kripal Singh (PW-7) on 6.2.1982. During investigation, Inspector tried to apprehend the accused persons but they absconded, therefore, a report was filed for issuance of process under sections 82 and 83 Cr.P.C. against them but accused surrendered in the court and were sent to jail. After recording their statements, a charge-sheet was filed against appellant Mukesh and his late brother Sanjay (Ex.Ka.7).

9. Trial Judge charged appellants Mukesh and late Sanjay under section 302 read with Section 34 IPC. They pleaded not guilty and desired to be tried.

10. During the course of trial, prosecution adduced three witnesses of fact, namely, PW-1 Dharmesh Mohan Sharma, PW-2 Rajendra (eyewitness) and PW-3 Yashvir Singh (eye-witness). In addition to them, formal witnesses were also produced, namely, Dr. N.S.Pal (PW-4), S.I. Pooran Singh Sagar (PW-5), Dr. Sharvan Kumar (PW-6) who conducted autopsy, Inspector Kripal Singh (PW-7) who conducted investigation, Head Constable Tirpal Singh (PW-8), Constable Karan Singh (PW-9) and Head Constable Tripal Singh (PW-10). Statement of accused persons were recorded under section 313 Cr.P.C. wherein late Sanjay admitted the factum, of altercation with informant Dharmesh Mohan Sharma and deceased Brijesh Mohan Sharma and claimed that they were in fact attacked by deceased Brijesh Mohan Sharma and informant Dharmesh Mohan Sharma with knives. He defended himself and snatched knife from informant Dharmesh Mohan Sharma and used it in his defence.

11. Sole surviving appellant Mukesh has denied his presence on the spot and claimed that he has been falsely implicated on account of his relationship with Sanjay. Appellant produced one witness Dr. D.P. Arora (DW-1) who had examined late appellant Sanjay at Muzaffarnagar. It appears that Sanjay had gone to Muzaffarnagar after the incident and appeared before Dr. D.P.Arora in the night of 6/7th of February, 1982 at about 2:15am and a medical report was prepared. Incidentally, Dr. D.P.Arora did not communicate this information either to local police or police at Meerut. He has opined that injuries were 1 ½ days old and could have been caused on 5.2.1982 at about 3:45pm. Interestingly, one injury was shown towards left side of body but during the course of evidence, DW-1 Dr. D.P.Arora conceded that this injury existed on right side of chest of late Sanjay. Both injuries were reported to be caused by knife and both of them were simple. Doctor also concluded that he did admit injured in the hospital as general condition of patient was good. Doctor also conceded that no one identified the injured to him.

12. Trial Judge heard counsel for both the parties and thereafter, concluded that there was sufficient evidence to hold both appellant Mukesh and late Sanjay guilty of offence under section 302 read with section 34 IPC and accordingly both of them were convicted under the aforesaid

sections and sentenced to undergo life imprisonment vide impugned judgment and order dated 24.2.1983. This judgment is under challenge before this Court.

13. Heard Sri Anoop Trivedi, learned counsel for the sole surviving appellant and Sri Syed Ali Murtuza, learned Additional Government Advocate (in short, AGA).

14. Before we embark to dwell upon the merits of rival case, it would be appropriate for this Court to briefly examine the entire prosecution evidence.

15. In the instant case, the report was lodged by real brother of deceased, Dharmesh, Mohan Sharma, informant (PW-1) on 5.2.1982 at about 4:55pm. According to PW-1 Dharmesh Mohan Sharma, he along with deceased Brijesh Mohan Sharma, his elder brother left their residence for visiting Vimla (Bua) residing in the compound of Veterinary Hospital, Hapur-Garh Road, Meerut. He has explained that for visiting the residence of Bua, deceased and his brother had to inevitably cross the residence of accused persons.

16. Both informant and his brother deceased Brijesh Mohan Sharma went to veterinary Hospital for meeting their Bua on 5.2.1982 at about 3:30pm. As soon as they came out of their residence, PW-2 Rajendra, who was resident of a house located across the house of deceased also joined them. He too was going to veterinary hospital, therefore, all three persons simultaneously crossed the house of appellant Mukesh and late Sanjay (now dead) for visiting veterinary hospital. Suddenly, both appellants Mukesh and late Sanjay accosted them. Appellant Mukesh was holding spear and late appellant Sanjay was wielding knife. Both of them admonished deceased Brijesh Mohan Sharma for his alleged use of foul language against appellants earlier. Both of them threatened the deceased to eliminate him. Appellant Mukesh advanced towards Brijesh Mohan Sharma aiming spear. Informant Dharmesh Mohan Sharma (PW-1) grabbed him in order to save his brother. A scuffle broke out between Mukesh (appellant) and Dharmesh Mohan Sharma (informant). Meanwhile, accused late Sanjay inflicted knife injuries on the person of the deceased. Seeing this, informant pushed back Mukesh and tried to nab Sanjay. Mukesh in turn pushed back informant whereupon Sanjay knifed Brijesh Mohan Sharma couple of times. Appellant Mukesh also assaulted deceased Brijesh Mohan Sharma with wooden handle of his spear effectively using it as lathi. This witness Dharmesh Mohan Sharma (PW-1) has further stated that several persons including his father and Rajendra Chaudhary arrived on the spot. Injured was rushed to P.L.Sharma Hospital. A First Information Report (in short, FIR) (Ex.Ka-1) was scribed by Dinesh Mohan Sharma and thereafter, report was lodged. Brijesh Mohan Sharma succumbed to his injuries on the same day. As stated earlier, PW-2 Rajendra had also accompanied deceased and informant to the place of occurrence. He has testified as PW-2 and he reinforced the story of PW-1 Dharmesh Mohan Sharma. Rajender is not related to deceased.

17. PW-3 Yashvir Singh owns a medical store. He too was going to his shop after having lunch at his residence. He witnessed the entire incident. He has stated that appellant Mukesh was using spear and late Sanjay was using knife. He has testified that appellant Mukesh and late Sanjay came out of their house and first threatened deceased and his brother and thereafter attacked them

with their respective weapons. He has supported the prosecution story by saying that surviving appellant Mukesh used Bhala (spear) as lathi at least twice.

18. Dr. Sharvan Kumar (PW-6) initially examined deceased but after death of Brijesh Mohan Sharma, autopsy was conducted by Dr. N.S.Pal. A careful examination of record would reveal that prosecution has adduced evidence of three eye-witnesses including informant. Both doctors, who conducted initial medical examination of deceased and who later on conducted autopsy have been produced.

19. Three eye-witnesses produced by prosecution are credible and trustworthy. Two eyewitnesses were, in fact, present at the place of occurrence since inception of the incident. Entire incident occurred before their eyes. PW-1 Dharmesh Mohan Sharma is the brother of the deceased. His evidence is natural, consistent with normal human conduct and trustworthy. This incident occurred in broad daylight in presence of several persons. The factual evidence is highly trustworthy. There is absolutely no reason why prosecution witnesses would lie about the incident especially, informant Dharmesh Mohan Sharma who is the brother of the deceased. There is absolutely no reason for him to spare the real culprits and falsely implicate the appellants.

20. It is argued on behalf of the appellant that there are several discrepancies and contradictions in the evidence of prosecution. Learned counsel for the appellant has argued that these contradictions create suspicion about veracity and credibility of prosecution evidence. He has especially drawn attention of this Court towards the fact that there is absolutely no evidence to support the claim of PW-2 Rajendra that he took injured to P.L.Sharma Hospital. Before analyzing this argument advanced on behalf of appellant, it would be appropriate to dwell upon the story advanced on behalf of appellant. Late appellant Sanjay has specifically put forth a positive case by virtually admitting the entire incident and involvement of rival parties in it. During course of statement under section 313 Cr.P.C. the following admission was made by late Sanjay :-

5/2/82 को मैं सीमेन्ट की तराई कर रहा था। ब्रजेश धर्मेश वहां आये इन दोनों के हाथ पर चाकू था इन्होंने यह कह कर कि साले तुझे उस दिन का मजा चखाते हैं, चाकुओं से हमला किया मैनें धर्मेश मोहन का चाकू छीन लिया, धर्मेश वहां से भाग गया। ब्रजेश ने इसी दौरान हमको चाकू मारा, मैनें अपने बचाव में धर्मेश का छीना हुआ चाकू चलाया। हमें चाकू से चोटें आयी थी। इस घटना के बारे में मैनें तार मुख्यालय में भेज दिया क्योंकि पुलिस ने मेरी रिपोर्ट नहीं लिखी थी। मेरी चोटों की डाक्टरी हुयी।

21. A perusal of aforesaid admission would reveal that as far as factum of incident is concerned, even appellants have no quarrel with their rival. The claim that they were attacked by informant and deceased with knife and that Sanjay snatched knife from Dharmesh and used it against Brijesh in defence while informant fled from the spot. This claim of late Sanjay establishes the factum of incident. He has not raised any dispute regarding time and place of occurrence also. His only defence is that incident occurred other way round. Deceased and (PW-1) Dharmesh Mohan Sharma attacked them with knife and he retaliated in defence. This admission on the part of Sanjay reinforces the prosecution story and evidence as far as factum of incident and involvement of rival parties are concerned.

22. Sole surviving appellant Mukesh has also not denied factum of incident. He claims that incident occurred between late appellant Sanjay and deceased Brijesh and informant Dharmesh. He has been falsely implicated due to his relationship with late Sanjay. He claims that he was not present on the spot.

23. The claim of appellant Mukesh can not be accepted for the simple reason that three eye-witnesses have narrated his involvement in the incident in a very trustworthy manner. There is nothing on record to demonstrate that appellant Mukesh was not present on the spot in the light of very cogent and trustworthy evidence of prosecution. The mere fact that some discrepancies can be pointed-out in their evidence is not ground to reject their testimony. The prosecution evidence especially of eyewitnesses have reinforced prosecution story on material particulars.

24. It is pertinent to point-out that every discrepancy, contradiction, and variation in prosecution evidence may not be sufficient to adversely affect the prosecution case. Sometimes, variation merely indicates that witnesses have not been tutored. So long core of prosecution evidence is intact and trustworthy, minor discrepancies in the prosecution evidence are not sufficient to discard otherwise trustworthy testimony of prosecution witnesses. Hon'ble Apex Court in **Meharban Singh and others versus State of Madhya Pradesh, 1997 Cr.L.J. (S.C.)** has held that it is the duty of courts to evaluate the discrepancy and to see whether minor discrepancy in fact adversely affect the trustworthy character of evidence or not. If the courts can believe the trustworthy character of evidence, then minor discrepancies are not sufficient to discard the evidence of otherwise trustworthy witnesses.

25. Learned counsel has argued that prosecution has not been able to establish the visit of deceased to P.L.Sharma Hospital and this demolishes the prosecution case entirely. We are afraid, the appellants are merely creating castle in the air as far as this claim is concerned. The record reveals that the FIR was lodged almost within 70 minutes. The incident occurred suddenly and mental condition of a younger distraught brother can only be imagined. They intended to visit a family relation and suddenly a murderous assault was made on the brother in broad daylight. Elder brother was assassinated in presence of younger brother without any warning. The fact of the matter is that informant Dharmesh Mohan Sharma also could have been seriously injured in the same attack. At one hand, he was trying to save his brother and on the other hand, he was probably thinking of his own self at least on subconscious level. There was no occasion or opportunity for the prosecution to invent the story of visit of deceased Brijesh Mohan Sharma to P.L.Sharma Hospital. There was, in fact, no reason for them to invent this story.

26. PW-1 Dharmesh Mohan Sharma has categorically stated that at first deceased was taken to P.L.Sharma Hospital and there is absolutely no reason to disbelieve it. Same fact was reiterated by PW-2 Rajendra, who is not related to informant or deceased. Both, in fact, belonged to two different social groups as admitted by PW-2 Rajendra himself. In paragraph-11 of his statement, he has stated that he went to P.L.Sharma hospital along with informant Dharmesh Mohan Sharma and stayed there only few minutes and then they took injured Brijesh Mohan Sharma to Medical College. PW-3 Yashvir Singh directly went to medical college and found

Brijesh dead there. It is not merely witnesses of fact, who have deposed about initial visit of deceased to P.L.Sharma Hospital for treatment but PW-5 Pooran Singh Sagar also went to P.L.Sharma Hospital and acquired clothes and shoes of the deceased from there. This witness also visited the Medical College. Inquest report was prepared on the same day at about 6:45pm. Entire documentation regarding death of deceased Brijesh was done on the same day. There are many documents on record to belie the ante-timing of FIR. The relevant entries had been made in General Diary of Police (Ex. Ka-9) in the wake of incident and subsequent to registration of FIR.

27. We have carefully examined all the material on record and believe that argument of learned counsel for appellant on this score has no basis. Fact of matter is that there was no reason for the appellant to invent the story of P.L.Sharma Hospital. There was no doubt that deceased died in the incident occurred at the stated place of occurrence. There is no doubt that deceased died later on in Medical College on account of injuries sustained in the same attack. If deceased had not been taken to P.L.Sharma Hospital, then prosecution could have simply said that they directly went to Medical College and that would not have adversely affected the prosecution case at all.

28. Learned counsel for the appellant has also argued that FIR is faulty and ante-timed and it does not contain essential features of incident. It was argued that use of spear as lathi has not been mentioned. The name of PW-3 Yashvir is missing in the FIR. We are afraid, this argument is not sustainable. FIR is primarily used for setting the criminal justice machinery in motion. The FIR was lodged immediately in aftermath of the incident at 4:55pm. Dharmesh Mohan Sharma waited for his brother, a budding lawyer at that time. It was quite natural on his part to seek the assistance of his brother. FIR was reduced into writing by Dinesh Mohan Sharma on the dictation of Dharmesh Mohan Sharma (PW-1). Disclosure of names of all the witnesses and narration of minute details in the FIR was not required. Primarily role of FIR is to move the Police machinery in motion.

29. The Full Bench Allahabad High Court in **Gopal versus State, 1999 Cr.L.J. 2501** has held that FIR can not be treated as encyclopedia. Hon'ble Supreme Court in **Pandurang Chandrakant Mhatre and others versus State of Maharashtra (2010) 1 SCC (Cri) 413** has held that FIR has a limited value during criminal trial and it merely sets the criminal law in motion. FIR is not expected to be encyclopedia of events. So long FIR discloses the commission of cognizable offence and its details, it is sufficient for the purpose of criminal trial.

30. In the present case, FIR was lodged within 70 minutes of the incident. FIR contains all significant details of events but mention of names of every witness is not required therein. Use of weapon and names of accused persons, time, place and manner of incident are enshrined in the FIR. This Court is convinced that FIR (Ex. Ka-1) contains all the necessary ingredients and we believe that contents of FIR can not be discarded at any ground.

31. Learned counsel for the appellant has claimed that they did not have any motive to commit the crime. We believe that question of motive is one of perception. The motive is usually lie locked in the heart of aggressor and others can only make guess about it. In this case, complainant party believes that deceased was attacked because appellants believed that deceased

was using filthy and foul language against them behind their back. It is difficult to prove this kind of perception but this incident occurred in broad day light. The statement of appellant during the course of 313 Cr.P.C. discloses that rival parties believed that they were on antagonistic terms. Informant says that they were attacked on account of enmity and sole surviving appellant also believes that he had been implicated on account of previous enmity. Therefore, it is apparent that both the rival parties at least, have admitted the existence of inimical relationship between them. Whether existence of enmity would impel any one of them to the extent of committing murder is purely an academic question which need not be answered for the simple reason that human behavior or reactions to events and incidents can not be categorized into tight compartments. They vary from person to person. Time, Opportunity, availability of tools etc. do influence the outcome.

32. An argument has also been raised that incident occurred in broad day light. There were various shops around the place of occurrence and only interested witnesses have been introduced. It is said that informant Dharmesh is real brother of deceased. PW-2 Rajendra was accompanying them and PW-3 Yashvir has also been denounced as partisan witness. We are not impressed by this argument. PW-2 Rajendra belongs to Jat community while informant and deceased belong to Bhahmin community. Of course, they are neighbours and were going together to the place of occurrence. Had PW-2 Rajendra been not produced then prosecution would have been accused of withholding the best evidence. Both PW-1 Dharmesh and PW-2 Rajendra are best witnesses for establishing the case of prosecution and they have supported the prosecution case to the hilt. Simultaneously PW-3 Yashvir too has supported the prosecution evidence and there is no significant and material discrepancy in the testimonies of these witnesses. He has narrated the incident in trustworthy manner.

33. Courts can not be oblivious of reluctance of general public to help the Police or victims of crime. The trial judge has noted that realities by saying that citizens are averse to depose for couple of reasons. Firstly, involvement of risk from criminals and secondly, it is a thankless job. We believe that brother of deceased Brijesh in fact is better witness as far as murder of his brother is concerned. Ordinarily there is no reason for him to spare the real murderers of his brother. We do not, therefore, give much credence to the argument of learned counsel for the appellant that evidence of PW-1 Dharmesh Mohan Sharma and PW-2 Rejendra can not be taken into consideration because of their relationship with deceased and evidence of PW-3 Yashvir because his name had not been mentioned in the FIR. We are afraid, the question of relationship of witnesses with deceased or injured is no longer reason for discarding their testimony. We believe that Court has to appreciate the evidence given by close relative of deceased with greater care but we also believe that mechanical rejection of evidence of witnesses on sole ground of relationship would result in failure of justice.

34. Apex Court in **Pandurang Chandrakant Mhatre and others versus State of Maharashtra (2010) 1 S.C.C. (Cri) 413** has held that the dominant question to be considered is whether the witnesses, despite being interested, have spoken the truth and are creditworthy. Once it is found by the court, subsequent to analysis of such evidence that there is no reason to disbelieve

such witnesses then the mere fact that the witnesses are interested, is not enough to reject the prosecution case on this ground alone.

35. Hon'ble Supreme Court in common judgment in **Hardev Singh Vs Harbhej Singh and others/Suba Singh and others 1997 SCC (cri)**, has held that evidence of close relations cannot be rejected merely on the ground that they happened to be relatives. However, evidence of such witnesses should be scrutinized carefully. If the court is convinced that evidence of such witnesses is sufficient to establish the guilt of accused then the fact of interestedness alone cannot be a ground for rejecting the evidence of prosecution witnesses.

36. Hon'ble Supreme Court in **Bhupendra Singh and others Vs State of UP (2010) 1 SCC (Cri) 275**, has held that merely because eye witnesses are family members, their evidence cannot per se be discarded. When there is allegations of interestedness, the same has to be established. Mere statement that being relatives of deceased they are likely to falsely implicate accused, cannot be a ground to discard the evidence, which is otherwise cogent and credible.

37. We believe that testimony of PW-1 Dharmesh Mohan Sharma can not be rejected on the ground of his relationship with deceased. In any case, we believe that PW-2 Rajendra and PW-3 Yashvir are independent and trustworthy witnesses and failure of mentioning the name of PW-3 Yashvir in FIR would not rob his evidence any credibility.

38. Learned counsel for the appellant also argued that Investigating Officer has examined some of the witnesses with delay and that delay would effect the prosecution case adversely. We are afraid that delay in examination of the witnesses is not necessarily a negative factor. It depends upon circumstances of each case. There can be various reasons for delay in examination of the witnesses. In the instant case, first investigation was entrusted to PW-5 Pooran Singh Sagar who immediately started investigation. After conversion of case under section 302 IPC, the investigation was entrusted to PW-7 Kripal Singh, Inspector of Police and he continued with investigation. It is pertinent to point-out that most of the witnesses were examined within reasonable time. It is true that investigation could have been done with little more enthusiastically. The argument has been raised that FIR was not promptly transmitted to the Magistrate. We believe that FIR should have been transmitted to the Magistrate with little haste but that by itself would not necessarily affect the prosecution case adversely. We believe that no irregularity was committed during investigation though Investigating Officer could have sent blood for chemical examination or used forensic evidence but in our opinion, these weakness in investigation are not so serious enough to render the entire prosecution case unworthy or unreliable.

39. The Full Bench of this Court in **Gopal and etc. Vs State of UP, 1999 Cr.L.J.2501** has already established the following principle:-

"At the very outset, we want to say that it is very easy to find fault with anything. Even accurate computers are prone to commit faults and mistakes. Not only this, human mind cannot be read. Sometimes it works in the direction that it becomes adamant to help one party and

tries its level best to spoil the case. It is well known, at least by the police officers, who investigate the case, also know that they should take prompt action and should immediately record the statement of the witnesses. They should not make cuttings and over-writings etc. in the police papers so as to create suspicion about the sanctity of the papers. They should fairly prepare the inquest report and police papers and should write the case diary with accuracy and correctly. These propositions of law and facts cannot be doubted. But if the police officers deliberately sleep over the matter, try to spoil the case and do not record the evidence of the witnesses immediately, the poor dead persons who have been killed cannot come out to say why you are spoiling the case. The bereaved family and the witnesses have only to remain silent spectators to what the police officers do. If they intervene, a judicial notice of the fact can be taken that they are humiliated, even beaten and implicated in false cases. Fear of police atrocities keeps them mum. They are also ignorant of the fact that what shall be the effect of delay and discrepancy. Therefore, also, they have nothing to intervene with the investigation. In our view, investigation of the case, if faulty, even mischievous or collusive should not be a ground to reject the ocular testimony of the informant who lodged the F.I.R. promptly. If the FIR is recorded soon or is recorded after four or five hours, why should the prosecution or the persons who have died 'suffer'. Each and every case has to be decided on its intrinsic evidence. If the eye-witnesses are believable the mere weakness of the investigation should not be a ground to reject their testimonies."

40. Apex Court in its judgment **Bishundeo Poddar and others Vs The State of Bihar, 2003 Crl. L. J. 1558** has held thus:-

"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 filed. The fate depends on the evidence which is on record."

41. Similarly, the Apex Court in its judgment of **Amar Singh Vs Balwinder Singh, 2003 Crl. L.J. 1282** has held that every failure or omission of Investigating Officer cannot render prosecution case doubtful or unworthy of belief.

42. Learned counsel for the appellant has also submitted that according to prosecution, deceased was done to death by late co-accused Sanjay by using knife. It is said that main attack had been attributed to accused Sanjay while appellant Mukesh has merely been assigned passive role. Learned counsel for the appellant has argued that appellant Mukesh used spear merely as a lathi inasmuch as claim of prosecution is that Mukesh used spear from wooden handle side, therefore, sole surviving appellant Mukesh can not be convicted under section 302 read with the aid of section 34 IPC because there is no evidence to suggest that surviving appellant Mukesh shared common intention with his late brother Sanjay. We are not convinced with this argument for the simple reason that entire prosecution story discloses prior meeting of minds. Prosecution story says that both attackers came out simultaneously while extending threats to eliminate deceased. Surviving appellant Mukesh was using more dangerous weapon but he was caught by informant Dharemesh, therefore, he could not use spear with force. It appears that in the scuffle, he managed to use spear from handle side because he failed to use more dangerous side of spear. If we have carefully examine all the evidence adduced by the eye-witnesses, it would reveal that surviving appellant Mukesh used spear (Bhala) from handle side on

deceased Brijesh Mohan Sharma inasmuch as he could not swing spear (Bhala) with full force because he was caught by informant. In fact, evidence reveals that he was first off the block as far as attack was concerned. Appellant Mukesh in fact initiated the attack though later on injuries caused by late Sanjay proved to be fatal. Medical report indicates that deceased sustained injuries caused by blunt weapon as well. The testimony of PW-4 Dr. N.S.Pal reveals that lacerated wound 4 cm. X 1 cm. X bone deep on left side head 11 cm. above left ear and lacerated wound 2 cm. X 0.5 cm. X scalp deep on left side of head 3 cm. behind above injury. Doctor has opined that both these injuries were caused by blunt object i.e. wooden side of spear. Both these injuries are on vital part of the body. Both injuries were caused on head which indicates the intention of appellant Mukesh.

43. The aforesaid discussion indicates that requirement of provision is sharing of common intention upon being present on the place of occurrence. Section-34 applies where two or more accused are present and at least two factors are established. Participation of accused persons in the crime and common intention. We believe that despite absence of overt act, the section can still be invoked. In the present case, participation in crime and presence of both the appellants at the place of occurrence have been established. The consistent attempt of surviving appellant Mukesh to assault Brijesh Mohan Sharma is evident. He did give massive blow on the head of deceased from the wooden side of spear. He failed to use spear from its dangerous side merely because he was simultaneously involved in scuffle with informant as well, prohibiting him from using spear with full force and because of that he could only use spear from handle side. We believe that but for the attempt of informant, appellant Mukesh would have used spear from dangerous side.

44. We have carefully examined all material on record. We believe that prosecution has established his case by direct testimony of the eye-witnesses. Ocular testimony is consistent with medical evidence. We also believe that every failure or omission of Investigating Officer can not render prosecution case doubtful or unworthy of belief. We believe that prosecution has proved the offence against the accused with trustworthy evidence. Criminal trial envisages the proof beyond reasonable doubt. It does not require proof beyond every shadow of doubt as it is possible to have fanciful doubts just about anything in the world. We believe that surviving appellant committed the crime with which he is charged. In our opinion, accused Mukesh is guilty of section 302 read with section 34 IPC.

45. In view of the aforementioned discussion, we are of the view that the appeal lacks merit and deserves to be dismissed. It is accordingly dismissed. Impugned judgment and order dated 24.2.1983 passed by the then Additional Sessions Judge, Meerut in Sessions Trial No. 198 of 1982 (State versus Mukesh and others) arising out of Case crime no. 95 of 1982, Police Station Civil Lines, District Meerut, is affirmed. Appellant, Mukesh,who is on bail, is directed to surrender immediately. His bail is cancelled and sureties discharged. Trial court is also directed to get him arrested and send him to jail to serve out the remaining sentence awarded by trial court and affirmed by this Court.

46. Office will certify this order to the court concerned through the Sessions Judge within 15 days. Trial court shall communicate compliance of this judgment within 30 days thereafter.

(2016) 9 ILRA 58
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 608 Of 1998

Shiv Mohan Tiwari **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Rakeshwar Prasad, Surya Kumar

Counsel for Respondent:
Govt. Advocate

Held

The High Court partly allowed the appeal and held that the conviction under Section 3(1)(x) of the SC/ST Act was unsustainable because the essential ingredients of the offence were missing. There was no allegation in the FIR that caste-related abusive words were used in public view, and the dispute arose out of an existing land/crop enmity, not on account of the complainant's caste. Accordingly, the conviction under the SC/ST Act was set aside. However, the conviction under Sections 352, 504 and 506 IPC was upheld. Considering that the incident was of 1991 and the appellant was above 60 years of age, the Court granted him the benefit of Section 4 of the Probation of Offenders Act, 1958 instead of sending him to jail, subject to bonds and good behaviour for one year.

CASE LAW CITED

Gorige Pentaiah v. State of Andhra Pradesh
Pappu Singh v. State of Uttar Pradesh
Sections 3 & 4, Probation of Offenders Act, 1958

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

1. Challenge in this appeal is to the judgement and order dated 30.10.1998 passed by IInd Additional District Judge/Special Judge, Hardoi in Special Criminal Appeal No. 263 of 1992 (State Vs. Shiv Mohan Tiwari) arising out of Crime No. 208/1991, under Sections 352, 504, 506 I.P.C. and Section 3(1)(x) SC/ST Act, Police Station-Kachhauna, District-Hardoi, whereby the accused-appellant was found guilty and convicted one month's rigorous imprisonment under Section 352 I.P.C., one year's rigorous imprisonment under Section 504 I.P.C., one year's rigorous imprisonment under Section 506 I.P.C. and one years' rigorous imprisonment and Rs. 500/- fine under Section 3(1)(x) SC/ST Act with default stipulation.

2. Filtering out unnecessary details the prosecution case in brief is that an oral report was lodged by informant at the police station stating that the informant had got a lease executed in his favour, in which he had sown paddy. The accused-appellant Shiv Mohan wanted to trespass on this land for which the son of the informant had given an application at the police station.

3. On 6.11.1991 at 12 O'clock in the day time, when the informant was working in his field, the accused came to his field, he abused him, threatened to kill him and ran to beat the informant with a Lathi. He was saved by Gajju and Balak, at which accused-appellant fled away threatening to kill the informant. The informant has danger to his life and life of his family members. Thus, oral report was lodged, which ended into charge-sheet.

4. The prosecution proceeded to examine five witnesses. P.W. 1 is Indal, who is informant in this case, who has proved oral report as Exhibit Ka-1. P.W. 2 is head Constable Amar Singh, who scribed the oral report of of the informant and proved the same. He further proved copy of the G.D. as Exhibit Ka-2. P.W. 3 is S.I. Indraj, who is investigating officer in this case. He copied the chik and G.D. in the C.D. Further he recorded the statement of the informant. On 7.11.1991 he inspected the spot at the instance of the informant and prepared the site plan, which was proved by him as Exhibit Ka-3. After that he recorded the statement of Gajju and Balak and other witnesses and submitted the charge-sheet against the accused, which was proved by this witness as Exhibit Ka-4. P.W. 4 is Gajju, who is said to be witness of fact and P.W. 5 is Balak, who is also said to be witness of fact.

5. After hearing the learned counsel for the parties, the learned lower court convicted and sentenced the accused as stated in para 1 of the judgement.

6. Feeling aggrieved, the accused has come up in appeal.

7. Heard Shri R.P. Shukla, learned counsel for the appellant and learned Government Advocate for the State and perused the lower court record.

8. Learned counsel for the appellant has submitted that the judgement of the lower court is bad in the eyes of law, because the learned lower court has based its judgment on an inadmissible evidence.

9. On the other hand learned A.G.A. has submitted that the findings of the fact recorded by the trial court is based on evidence available on record, hence appeal is liable to be dismissed.

10. As far as the evidence of the independent witnesses Gajju, P.W. 4 and Balak P.W. 5 is concerned both the witnesses have denied of having seen any incident. They have denied their presence also at the place of occurrence. Both these witnesses were declared hostile by the prosecution, who cross-examined these witnesses. I am aware that even the evidence of hostile witnesses can be relied upon, but there is nothing in the evidence of P.W. 4 Gajju and P.W. 5 Balak, which could help the prosecution in any way whatsoever.

11. Now the court was left with the sole testimony of P.W. 1 Indal. As far as convictino under Section 3(1)(x) SC/ST Act is concerned 3(1)(x) reads as follows :-

"3. Punishments for offences of atrocities-(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;"

12. I have perused the the F.I.R. There is not a whisper in the F.I.R. that the accused addressed the informant with any caste related words. For the first time in the statement before the Court, the informant said that the accused stated as follows :-

"तब मुल्जिम ने मुझे पासी साले जान से मार डालेंगे धमकी दी।"

13. Learned counsel for the appellant has placed reliance upon the case of ***(2009) 1 SCC (Cri) Page 446 Gorige Pentaiah Vs. State of Andhra Pradesh and Others*** in which it has been laid down that:-

"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."

In the same context learned counsel for the appellant has placed reliance upon ***2002 Crl.J. Page 1251 Pappu Singh Vs. State of Uttar Pradesh*** in which it has been held that :-

"Moreover this witness has stated that the applicant had not used ugly words relating to the caste of the complainant. In this way there was no evidence on record to make out offence punishable under section 3(1)(X) of the Act against the applicant and the finding recorded by the learned Special Judge was without evidence and was thus perverse. A perverse finding of fact can be interfered with in the revision. As such there was no justification in convicting and sentencing the applicant under section 3(1)(X) of the Act. Thus, the revision succeeds."

14. The provision of Section 3(1)(x) of the SC/ST Act and legal position, as noted above, provides that a person can be punished under this provision only when he commits such offence against person of scheduled-caste/scheduled-tribe community on the ground that such a person/victim is a member of SC/ST community. From the evidence in the present case, it appears

that alleged act had allegedly been committed by accused-appellant only because of already existing enmity and dispute of crop. It was not the prosecution case that offence was committed for the reason that victim/ complainant belonged to the scheduled-caste community. At least there is no evidence in this regard. Therefore even if prosecution case is accepted to be true in toto, in such matters accused cannot be punished for offence punishable under Section 3(1)(x) of SC/ST Act.

15. Thus, the trial court has committed grave illegality in convicting the accused under Section 3(1)(x) SC/ST Act, since there was absolutely no evidence on record to prove the charge under Section 3(1)(x) SC/ST Act against the accused.

16. As far as Sections 352, 504 and 506 I.P.C. are concerned, learned counsel for the appellant has submitted that there are sufficient grounds to grant the benefit of Sections 3 and 4 of the Probation of Offenders Act, 1958 to the appellant. Thus, the residual question is applicability of Sections 3 and 4 of the Probation of Offenders Act, 1958 and Section 360 of the Code of Criminal Procedure.

17. Where the provisions of Probation of Offenders Act are applicable, the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, who gave birth to the Probation of Offenders Act and the Code Criminal of Procedure wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code of Criminal Procedure to apply one of the other beneficial provisions; be it 360 of the Code of Criminal Procedure or the provisions of the Probation of Offenders Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elevation of the provisions of the Probation of Offenders Act are further noticed in sub section (10) of Section 360 of the Code of Criminal Procedure which makes it clear that nothing in the said Section shall affect the provisions of the Probation of Offenders Act. Those provisions have a paramountacy of their own in the respective areas where they are applicable.

18. Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of 7 years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation of Offenders Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any rule for Probation Officers in assisting the courts in relation to supervision and other matters while Probation of Offenders Act does make such a provision. While Section 12 of the Probation of Offenders Act states that the persons found guilty of an offence and dealt with under Section 3 or 4 of the Probation of Offenders Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the Probation of Offenders Act as applicable at the same time in a

given area cannot be gathered from the provision of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force. The provisions of Section 360 of the Code are wholly inapplicable.

19. Enforcement of Probation Act in some particular area excludes the applicability of the provisions of Section 360, 361 of the Code in that area. Section 3 of the Probation of Offenders Act reads as follows:-

"3. Power of court to release certain offenders after admonition.- When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

Explanation.- For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4."

20. Thus, this was the bounden duty of the learned trial and also the appellate court to consider why they did not proceed to grant the benefit of Probation of Offenders Act. Section 4 of the Probation of Offenders Act reads as follows:

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2)Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

21. Protection of society and stamping out criminal proclivity must be the object of law, which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice should meet the challenges confronting the society. Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. As justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong.

22. The occurrence relates to the year 1991. Presently as per the statement of the appellant he is above 60 years of age. Sending the accused-appellant to jail would serve no useful purpose. Thus, I think It will be proper to grant the benefit of Section 4 of the Probation of Offenders Act to the appellant. Consequently, the appeal is ***partly allowed*** with the following modifications :-

(a) The conviction and sentence of the appellant under Sections 352, 504 and 506 I.P.C. is hereby confirmed.

(b) The conviction of the appellant under Section 3(1(x) SC/ST Act is hereby set aside, however the conviction of the appellant under Sections 352, 504 and 506 I.P.C. is upheld.

(c) Instead of sending the appellant to jail, the appellant shall get the benefit of Section 4 of the Probation of Offenders Act 1958. The appellant shall file two bonds to the tune of Rs. 20,000/- coupled with personal bond to the effect that he shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions he will subject himself to undergo sentence as indicated above. The bonds aforesaid be filed by the accused-appellant within two months from the date of judgement. The time for filing of bonds shall not be extended on any ground whatsoever.

23. Let certified copy of this order be sent to the court concerned for compliance.

(2016) 9 ILRA 65
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 1329 Of 1983

Raj Bahadur Singh & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
Amar Saran, A.D. Giri, Devendra Swarup, V. Singh

Counsel for Respondent:
A.D.Giri, V.S.Singh, V.Singh

Held

The High Court dismissed the criminal appeal and affirmed the conviction of the surviving appellant Surendra Singh under Section 302 read with Section 34 IPC, holding that the prosecution had successfully established the offence through prompt FIR, consistent ocular testimony of four eye-witnesses, and corroborative medical evidence. The Court held that minor discrepancies regarding the type of firearm, omission of certain details in the FIR, or lapses in investigation were not sufficient to discredit the otherwise trustworthy prosecution case. It further held that the evidence clearly proved the appellant's participation with common intention in the fatal firearm assault on the deceased, and therefore the conviction and life sentence were justified. The appellant was directed to surrender within 30 days to serve the remaining sentence.

CASE LAW CITED

Pandurang Chandrakant Mhatre v. State of Maharashtra, (2010) 1 SCC (Cri) 413
Ram Gopal v. State of Rajasthan, (1998) 6 SCC 441
Chapho @ Jakeal v. State of Kerala, (1998) 6 SCC 602
Hardev Singh v. Harbhej Singh, 1997 SCC (Cri)
Bhupendra Singh v. State of U.P., (2010) 1 SCC (Cri) 275
Gopal v. State of U.P., 1999 Cr.L.J. 2501 (FB, Allahabad)
Bishundeo Poddar v. State of Bihar, 2003 Cr.L.J. 1558
Amar Singh v. Balwinder Singh, 2003 Cr.L.J. 1282

(Delivered by Hon'ble Bharat Bhushan, J.)

1. Sole surviving appellant Surendra Singh has assailed the impugned judgment and order dated 31.5.1983 passed in Sessions Trial No. 90 of 1982 (State Vs Surendra Singh and three others) by 4th Addl. Sessions Judge, Varanasi whereby the appellants Surendra Singh, Raj Bahadur Singh

@ Raju, Gajendra Narain Singh @ Gajju and Vikrama Singh @ Vikramaditya Singh were convicted under Section 302 read with Section 34 of Indian Penal Code (in short IPC) and sentenced to undergo life imprisonment.

2. This appeal was initially filed by four appellants but appellants Raj Bahadur Singh @ Raju, Gajendra Narain Singh @ Gajju and Vikrama Singh @ Vikramaditya Singh have died during the pendency of the present appeal and hence their appeal stand abated vide order order dated 2.11.2015. This court is now concerned only with the appeal of surviving appellant Surendra Singh.

3. The facts giving rise to this appeal are that on 15.9.1981 at about 8 a.m. the deceased Ram Nayan Singh was sitting at a tea stall situated at bus stand of Village Rajwari with Lal Bahadur Singh (P.W.-2) and Keshav Singh (P.W-4). Suddenly, accused persons namely Late Raj Bahadur Singh @ Raju, Late Gajendra Narain Singh @ Gajju and Late Vikrama Singh @ Vikramaditya Singh and the surviving appellant Surendra Singh arrived there. All of them were armed with firearm weapons. Late Vikrama Singh @ Vikramaditya Singh, father of remaining three accused urged his sons to assassinate deceased Ram Nayan Singh. First, accused late Raj Bahadur Singh fired a shot upon the deceased Ram Nayan Singh. Deceased tried to escape towards a hut located behind the tea stall whereupon the appellant Surendra Singh and his companions Late Raj Bahadur Singh @ Raju and Late Gajendrda Narain Singh @ Gajju opened fire on Ram Nayan Singh who sustained injuries on his back. Informant Ramji Singh (P.W.-1), Banshidhar and several other persons arrived on the spot on observing the pandemonium at the place of occurrence. They claimed to have witnessed the incident along with P.W.-2 Lal Bahadur Singh and P.W.-4 Keshav Singh. These witnesses tried to catch the assailants but they boarded the scooter and Bullet motorcycle and fled towards northern side. Informant found his brother dead and thereafter went to the police station (in short P.S.) to lodge the First Information Report (in short the FIR) immediately.

4. The FIR (Ex-Ka-1) was lodged at 9.15 a.m. i.e. within seventy-five minutes of the incident at P.S. Chaubeypur, District Varanasi, which was six miles away from the Village Rajwari. A chick report (Ex-Ka-3) was also carved out. Relevant entries were made in the General Diary, extract of which is available on record as (Ex-Ka-4). Investigation was entrusted to Sri Faiyaz Ahmad (P.W.-6), the then Station House Officer, P.S. Chaubeypur. Inquest report was prepared and autopsy performed. The investigating Officer (I.O.) recovered live cartridge of 315 bore from the place of occurrence and samples of blood stained and plain earth were taken from the spot. Statements of witnesses were recorded by the I.O., thereafter a charge sheet (Ex-Ka-12) was submitted against four accused persons namely Late Raj Bahadur Singh @ Raju, Late Gajendra Narain Singh @ Gajju and Late Vikrama Singh @ Vikramaditya Singh and surviving appellant Surendra Singh.

5. Trial Judge framed charges against all the accused persons under Sections 302/34 IPC. Accused persons denied the allegations levelled against them and claimed to be tried. During course of trial, depositions of P.W.-1 Ramji Singh (informant), P.W.-2 Lal Bahadur Singh (eye witness), P.W-3 Laxmi Shanker Pandey (eye witness), P.W-4 Keshav Singh (eye witness), P.W.-5

Dr. Virendra Kumar Verma (conducted postmortem) and P.W.-6 Faiyaz Ahmad (Investigating Officer) were recorded. Statements of all accused persons were also recorded under Section 313 Cr.P.C. wherein they again denied all the allegations and claimed false implication due to previous enmity. Accused persons also produced four witnesses in their defence namely D.W.-1 Prahlad, D.W.-2 Sudhendra Kumar Bhattacharya, D.W-3 Ravindra Prasad Singh, P.W-4 Rajendra Rai. Trial Judge found sufficient evidence to convict the accused persons under Sections 302/34 IPC and accordingly sentenced them to life imprisonment vide judgment and order dated 31.5.1983. It is this judgment which is under challenge before this court.

6. As stated earlier, this court is now concerned only with the appeal of sole surviving appellant Surendra Singh.

7. Heard Sri Prem Shanker, Advocate holding brief for Sri Lok Nath Shukla, Advocate learned counsel for the surviving appellant and Mr K. C. Pandey, learned AGA for the State.

8. Learned counsel for the appellant has contended that there are significant discrepancies between the original prosecution story reflected in the FIR and the eye witness account recorded during the course of trial. He has drawn the attention of the court that no bullet was found embedded on 'Neem tree' as said by the witnesses. He has also claimed that the ocular evidence is inconsistent with the medical evidence. He has further argued that narration of events by the prosecution witnesses is not able to account for the bullet injuries sustained by the deceased Ram Nayan Singh on his thigh. He has denounced the claim of motive saying that the motive has not been established by the prosecution at all during the course of trial.

9. It is further submitted that use of guns was never mentioned in the FIR though injury report discloses wounds were caused by pellets. It is further argued that the story of prosecution is not able to account for four firearms wounds on the back of deceased. The recovery of only one live cartridge at the place of occurrence is not consistent with the story of indiscriminate firing.

10. Per contra learned counsel for the State has argued that as many as four eye witnesses have supported the prosecution story. The testimony of these witnesses is without any blemish. He has submitted that minor discrepancies are not sufficient to discard the testimony of eye witnesses. He has further argued that the testimony of all eye witnesses is natural, trustworthy and consistent with the normal human conduct.

11. Prosecution story was first narrated in the FIR. The FIR says that the deceased Ram Nayan Singh was sitting in a tea stall situated at Bus stand of Village Rajwari of P.S. Chaubeypur, District Varanasi. Accused persons, including surviving appellant Surendra came there and shot dead the deceased Ram Nayan Singh. Details of the incident are enshrined in the FIR.

12. P.W.-1 Ramji has testified that deceased Ram Nayan Singh, the elder brother of P.W.-1 Ramji Singh (informant) was Deputy Sarpanch of Nyaya Panchayat, Village Rajwari at the time of incident. It is stated that Late Vikrama Singh @ Vikramaditya Singh and the appellant Surendra

Singh were both employed by the police department. They had acquired licenses for rifle, shot gun and revolver and had a close affinity with the Station House Officer Faiyaz Ahmad, (P.W.-6) the Investigating Officer of this case. P.W.-1 Ramji Singh has also stated that both family had antagonistic relationship with each other and this animosity resulted in various litigation between the two parties.

13. P.W-1 Ramji has stated that on the date of occurrence Late accused Gajendra Narain Singh @ Gajju and deceased Ram Nayan Singh had some quarrel with each other and deceased Ram Nayan Singh slapped Late appellant Gajendra Narain Singh @ Gajju during this imbroglio. The appellant Gajendra Narain Singh threatened to take revenge and left the place. This incident occurred right in the morning of the dreadful day. A bus stand exists in Village Rajwari and near that busstand there were tea stalls and meat shops around both sides of the road. House of Laxmi Shanker Pandey, P.W.-3 is also located at 10-15 paces away from the road near bus stand Rajwari. P.W-1 has clarified that he too was sipping tea at the shop of one Rahmal Madhav located on western side of the road at Rajwari bus stand. His slain brother Ram Nayan Singh was sitting on the tea stall of one Raja Ram. Lal Bahadur Singh (P.W.-2) and Keshav Singh (P.W.-4) were also sitting with him at a stone bench. Prior to this incident, deceased Ram Nayan Singh had had altercation with accused Late Gajendra Narain Singh @ Gajju and threat was extended by accused Gajendra Narain Singh @ Gajju. It is stated that within 15 minutes of that episode appellants Late Vikrama Singh @ Vikramaditya Singh and his three sons namely Late Raj Bahadur Singh @ Raju, Gajendra Narain Singh @ Gajju and surviving appellant Surendra Singh arrived at the bus stand. All of them were armed with firearm weapons. The appellant Vikrama Singh @ Vikramaditya Singh was armed with revolver, who urged his sons to kill Ram Nayan Singh upon which appellant Raj Bahadur Singh fired a shot at deceased Ram Nayan Singh at his chest but he somehow escaped and started running towards the hut nearby. Then accused persons Late Raj Bahadur Singh @ Raju, Late Gajendra Narain Singh @ Gajju and Surendra Singh opened fire at deceased Ram Narayan Singh. He sustained firearm injuries and fell down near the hut of Raja Ram adjacent to Raja Ram's tea stall.

14. This witness has narrated the whole story in a trustworthy manner. There are some minor discrepancies but appraisal of his evidence would reveal that the core of his testimony is intact despite searching cross examination. This witness has also expressed his disappointment with the conduct of Station House Officer, (P.W.-6) Faiyaz Ahmad who investigated this case. He has stated that a complaint was made on behalf of his family to Superintendent of Police (rural). He has also disclosed that accused persons were released on bail because the case diary was not sent to the court by the I.O. Faiyaz Ahmad, insinuating that accused persons were let off merely on their personal bond because of deliberate help provided to the accused persons by the Investigating Officer. Investigating Officer has also shown the existence of 'Mahua' tree in the site plan (Ex-Ka-9) while there was no Mahua Tree at the place of occurrence and they had referred only to Neem Tree wherein some shots were reportedly got embedded on its trunk. It is pertinent to point that during the course of testimony, I.O. (P.W.-6) has conceded that he had mistakenly shown a 'Mahua' tree in the site plan (Ex-Ka-9). He has also admitted that only Neem tree existed at the place of occurrence. The evidence given by Ramji Singh is natural, trustworthy and consistent with the

natural human conduct. The narration of events by him during the course of trial shows that he was present at the place of occurrence at the time of incident.

15. Similarly, P.W.-2 Lal Bahadur Singh and P.W.-3 Laxmi Shanker Pandey and P.W.-4 Keshav Singh have also supported the prosecution version. Prosecution evidence demonstrates that all of them were present at the time of occurrence.

16. P.W-2. Lal Bahadur Singh and P.W-4 Keshav Singh were infact sitting with the deceased Ram Nayan Singh at the tea stall of Raja Ram right at the time of incident. These witnesses have also disclosed the preceding incident wherein the deceased Ram Nayan Singh had slapped the appellant Late Gajendra Narain Singh @ Gajju. The main incident took place within 15-20 minutes after the earlier incident. Both these witnesses have also stated that the appellant Vikrama Singh @ Vikramaditya Singh had instigated his sons Surendra Singh, Gajendra Narain Singh @ Gajju and Raj Bahadur Singh @ Raju and all of them opened fire upon the deceased Ram Nayan Singh barring Vikrama Singh @ Vikramaditya Singh though he too was armed with revolver. The FIR is said to have been prepared within 15 minutes after the occurrence. Firearm weapons were mentioned in this FIR though shot gun was not specifically mentioned.

17. Learned counsel for the appellant has argued that the FIR does not disclose the previous incident occurred just 15 minutes prior to the main events wherein some brawl took place between the accused Gajendra Narain Singh @ Gajju and deceased Ram Nayan Singh. He has also argued that the FIR claims that the first firearm shot was fired at the chest of the deceased but later on prosecution resiled from this stand as no firearm injury was found on the chest.

18. Admittedly, deceased Ram Nayan Singh died on account of firearm wounds caused by rifle and shot guns in the morning of date of incident. This fact is supported by the evidence of Dr. V. K. Verma, P.W-5 who conduced the postmortem on the cadaver. Testimony of Dr. V. K. Verma as well as the postmortem report would disclose that the deceased died almost instantaneously in the wake of incident. The deceased received rifle wound on his neck. Six firearm shots of entry on the right side of the neck and exit wound from the left side of the neck resulting in several injuries in trachea, esophagus and damage to the blood vessels. Four firearm wounds of entry were found on the back and several wounds of firearm shots were found on the thigh. A tin piece was also found embedded on the wound of thigh.

19. Learned Trial Judge has concluded that the deceased fell down on the rough ground and if there was a tin piece lying on the earth, it would naturally get embedded on the person of the deceased and that merely presence of tin piece would not create any inconsistency between the oral testimony and medical reports. We have no reason to disagree with the conclusion of the trial judge.

20. Four eye witnesses have deposed before the trial court in a natural and trustworthy manner and narrated the entire incident before the trial court. There is absolutely no reason for them to spare real culprits and to falsely implicate the appellants. Incident occurred in broad daylight. The FIR was lodged within 75 minutes. It is therefore, evident that informant and witnesses did not

get any opportunity to concoct the prosecution story or the evidence. Inquest report (Ex-Ka-5) also discloses that corpse of deceased was found on the place of occurrence which also gets support from the sample of blood stained earth taken by the Investigating Officer and analyzed chemically by the forensic lab. There is no dispute about the place of occurrence. We concur with the conclusion of the trial Judge that had the corpse of deceased been transferred from another place to bus stand Rajwari they would have found at least some witnesses to disclose it. It has also come in evidence that Ram Nayan Singh was sitting on a stone bench facing north and as soon as the accused persons opened fire, deceased turned towards west and took few steps towards south and then ran towards hut of tea vendor Raja Ram located towards eastern side. Therefore, Ram Nayan Singh took steps in ante-clock wise manner and this action of deceased Ram Nayan Singh would account for the injuries on the neck as well as on the back because turning in this ante-clock wise fashion would ultimately expose the neck and back of the deceased towards the accused persons who were firing upon the deceased, unmindful of his physical position. We also concur with the conclusion of the trial Judge that the firearm assault was made upon the deceased at the tea shop of Raja Ram and that the deceased took few steps after receiving the injuries, then fell down and expired. We also believe that the place of occurrence has been established by the trustworthy evidence.

21. Learned counsel for the appellant has also argued that the time of death is uncertain because some undigested food was present in the stomach of deceased while fecal matter was also found in the intestine. This argument did not impress the trial judge and has no impact on us as well. The testimony of Dr. V. K. Verma (P.W.-5) has established that only one ounce of digested food was found in the intestine. Fecal matter was also available. The doctor has clarified that the deceased might have eased prior to the incident but failed to evacuate completely or it is also possible that he might have not gone to toilet at all. Evidence suggests that the deceased had returned rather late from a party after taking meals. He came back after midnight, therefore, it is not surprising that little digested food was found in the intestine meaning thereby that almost all digested food had passed into intestine by the time assault was made on deceased.

22. The postmortem report has also blown the arguments regarding inconsistency between the medical report and the time of occurrence. Medical reports and the testimony of P.W.-5 Dr. V. K. Verma reveal that the firearm wounds of entry was found on the right side of the back of neck and two firearm wounds of exit were also found on the left side of the neck. Both injuries are corresponding. Four firearm wounds of entry were found on right side at the back and four firearm wounds of entry have been shown on the right upper outer thigh. The nature of injuries and nature of wounds are consistent both with rifle as well as shot gun injuries. Report of doctor indicates two big shots were found in the abdomen cavity which is consistent with suggestion of wounds created by shot gun. The thigh injuries were also caused by shot gun, therefore, use of rifle and shot gun has been amply demonstrated by the prosecution evidence especially the postmortem report and the testimony of the doctor V. K. Verma, P.W.-5.

23. Learned counsel for the appellant has argued that the FIR (Ex-Ka-1) does not mention use of shot gun and it contains assertion only about rifle and revolver. Therefore, he argued that

there is significant inconsistency in the contents of the FIR and the testimony of the witnesses. He has reiterated his argument that the FIR does not contain the details of previous incident, alleged to have occurred 15 minutes prior to the main attack wherein deceased had slapped Late Gajendra Narain Singh @ Gajju (accused).

24. We are afraid that that this attempt to treat the FIR as an encyclopedia is not justified. The FIR was lodged by Ramji Singh (P.W.-1) who had witnessed the incident from a particular place. Most of the ordinary citizen are not even aware of the differences between the shot gun and rifle. The evidence suggests that the incident occurred for merely less than half minute. This disclosure has been made in paragraph no. 25 of the testimony of P.W-1 Ramji Singh meaning thereby that there was no occasion for the witnesses to carefully note the intricacies and complexities of various firearm weapons. The witnesses have also testified that all accused persons immediately left on motorcycle and scooter in the aftermath of the assault. Daring attack was made in broad-day light in presence of several persons. This incident could have frozen anyone. Mental status of person present on the spot could only be guessed. Some of the witnesses present near the deceased might have been fear-stricken and in such a scenario it is unreasonable to seek precise narration from ordinary Village- folks. We are convinced that the FIR need not contain minute details as it is generally recorded under circumstances of haste. It is not necessary that all details given in the sworn testimony in court by informant be given first in the FIR. Entire knowledge of informant is not required to be reflected in the FIR. If we carefully examine all the material on record, it would reveal that the FIR contains all relevant material and further witnesses have testified in a natural, credible and trustworthy manner.

25. The Apex court in **Panduranj Chandrakant Mhatre and others, (2010) 1 SCC (Cri) 413** has also held that the FIR has a limited value during criminal trial and it merely sets the criminal law in motion. The FIR is not expected to encyclopedia of events. So long, the FIR discloses the commission of cognizable offence and its details, it is sufficient for the purposes of criminal trial. In the present case, the FIR was lodged 75 minutes of the incident containing all major facts regarding the offence. In our opinion failure to mention use of shot gun in FIR is not fatal to the prosecution case.

26. Learned counsel for the appellant has argued that the witnesses produced by the prosecution are either related to deceased or his family or had antagonistic relationship with the accused. Therefore, their evidence should not be trusted.

27. We are not impressed by this arguments. Incident of murder usually does not take place amongst friends. Ordinarily, inimical terms or previous litigation or fights of various kind usually result in murder etc. In the instant case, both factors are present. Parties were certainly not on friendly terms. This fact is admitted to both the parties. In addition to that a previous incident took place 15 minutes prior to the main occurrence wherein the deceased slapped accused Gajendra Narain Singh @ Gajju and that perhaps was the immediate motivation for accused to retaliate in the heat of moment. Several eye witnesses have supported the occurrence and their evidence cannot be rejected merely on the ground of friendly relationship with the deceased.

28. In any case, the evidence of witnesses cannot be discarded merely on the ground that they are related or interested. There is no rule of law, which requires rejection of testimony of related witnesses.

29. In **Ram Gopal Vs State of Rajasthan (1998) 6 SCC 441**, Hon'ble Supreme Court has held that if witnesses are related to deceased, that is no reasonable ground to discard the testimony of otherwise reliable witnesses. Similarly, in **Chapho @ Jakeal Vs Kerala (1998) 6 SCC 602** also, the Hon'ble Apex Court has held that in the event independent witnesses are available and yet not produced even then this is not a reasonable ground to discard the testimony of otherwise trustworthy witnesses. Similarly in **Pandurang Chandrakant Mhatre and others Vs State of Maharashtra (supra)** has held that the dominant question to be considered is whether the witnesses, despite being interested, have spoken the truth and are creditworthy. Once it is found by the court, subsequent to analysis of such evidence that there is no reason to disbelieve such witnesses then the mere fact that the witnesses are interested, is not enough to reject the prosecution case on this ground alone.

30. Hon'ble Supreme Court in common judgment of **Hardev Singh Vs Harbhej Singh and others/Suba Singh and others 1997 SCC (cri),** has been held that the evidence of close relations cannot be rejected merely on the ground that they happened to be relatives. However, evidence of such witnesses should be scrutinized carefully. If the court is convinced that evidence of such witnesses is sufficient to establish the guilt of accused then the fact of interestedness alone cannot be a ground for rejecting the evidence of prosecution witnesses.

31. Hon'ble Supreme Court in **Bhupendra Singh and others Vs State of UP (2010) 1 SCC (Cri) 275**, has held that merely because eye witnesses are family members, their evidence cannot per se be discarded. When there is allegations of interestedness, the same has to be established. Mere statement that being relatives of deceased they are likely to falsely implicate accused, cannot be a ground to discard the evidence, which is otherwise cogent and credible.

32. In the present case, bald argument has been raised that the witnesses are related to deceased but that by itself is not evidence of lie. It is the duty of the party claiming partiality to establish the allegations of partisanship. There is no material on record to support the allegations that the informant and the witnesses have allowed the real culprits to go scotfree and falsely implicated the appellants merely on some vague claim of previous enmity.

33. Learned counsel has further raised argument regarding the failure of Investigating Officer to conduct prompt and efficient investigation. This argument need to be examined in the backdrop of allegations of prosecution that I.O. deliberately tried to derail the investigation. Prosecution side has been alleging the bias of Investigating Officer in favour of accused person. It is also argued that the FIR does not contain reference of shot gun. It is stressed on behalf of appellant that the witnesses did not mention this fact even in their statement under Section 161 Cr.P.C. These allegations cannot be given undue weights in the backdrop of specific allegations levelled by prosecution against the Investigating Officer right from beginning. Investigating Officer

himself has admitted that he wrongly showed Mahua tree in the site plan when there was no Mahua tree on the spot at all. As stated earlier, he did not send relevant record to the court, enabling appellants to secure bail on personal bond. Several other laches have also been pointed out. In any case, faulty investigation by itself cannot be a ground for acquittal of accused. Fact of the matter is that the FIR was lodged promptly. Investigation started early but the complainant did not have any control over the investigating machinery. Argument that the shot gun was not mentioned in the FIR would not effect the prosecution case adversely.

34. The Full Bench of this Court in **Gopal and Etc Vs State of UP, 1999 Cr. L. J 2501** has already established the following principle:-

"At the very outset, we want to say that it is very easy to find fault with anything. Even accurate computers are prone to commit faults and mistakes. Not only this, human mind cannot be read. Sometimes it works in the direction that it becomes adamant to help one party and tries its level best to spoil the case. It is well known, at least by the police officers, who investigate the case, also know that they should take prompt action and should immediately record the statement of the witnesses. They should not make cuttings and over-writings etc. in the police papers so as to create suspicion about the sanctity of the papers. They should fairly prepare the inquest report and police papers and should write the case diary with accuracy and correctly. These propositions of law and facts cannot be doubted. But if the police officers deliberately sleep over the matter, try to spoil the case and do not record the evidence of the witnesses immediately, the poor dead persons who have been killed cannot come out to say why you are spoiling the case. The bereaved family and the witnesses have only to remain silent spectators to what the police officers do. If they intervene, a judicial notice of the fact can be taken that they are humiliated, even beaten and implicated in false cases. Fear of police atrocities keeps them mum. They are also ignorant of the fact that what shall be the effect of delay and discrepancy. Therefore, also, they have nothing to intervene with the investigation. In our view, investigation of the case, if faulty, even mischievous or collusive should not be a ground to reject the ocular testimony of the informant who lodged the F.I.R. promptly. If the FIR is recorded soon or is recorded after four or five hours, why should the prosecution or the persons who have died 'suffer'. Each and every case has to be decided on its intrinsic evidence. If the eye-witnesses are believable the mere weakness of the investigation should not be a ground to reject their testimonies."

35. Apex Court in its judgment **Bishundeo Poddar and others Vs The State of Bihar, 2003 Crl. L. J. 1558** has held thus:-

"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 filed. The fate depends on the evidence which is on record."

36. Similarly, the Apex Court in its judgment of **Amar Singh Vs Balwinder Singh, 2003 Crl. L.J. 1282** has held that every failure or omission of Investigating Officer cannot render prosecution case doubtful or unworthy of belief.

37. We may disapprove the lackadaisical attitude of the Investigating Officer but that by itself is not sufficient to warrant acquittal of the appellant.

38. Appellant has also raised plea of alibi on behalf of appellant Late Vikrama Singh @ Vikramaditya Singh and Raj Bahadur Singh @ Raju. Both these appellants have died and therefore we are not concerned with their appeal. No useful purpose would be served by analyzing this plea. Suffice is to say that we are in agreement with the finding of the trial court on this score also whereby he has rejected completely the plea of alibi of both late Vikrama Singh @ Vikramaditya Singh and Late Raj Bahadur Singh @ Raju.

39. We have perused the record. Trial Judge has appraised the evidence adroitly. There is nothing on record to show that the conclusions drawn by the trial Judge are not sustainable.

40. In the result, we find that the appellants have rightly been found guilty of offence under Section 302/34 IPC. We, therefore, affirm the conviction and sentence imposed on the appellants. The appeal is hereby **dismissed**. The surviving appellant Surender Singh, if on bail is hereby directed to surrender before the Trial Court within 30 days from the date of this order to serve out the remaining sentence failing which the Trial Court would take steps in accordance with law for bringing him into custody and sending him to serve out the sentence.

Let a copy of the order be certified within ten days to the trial court for compliance within 15 days. Trial Court shall report compliance of this judgment within 15 days thereafter.

(2016) 9 ILRA 75
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 4355 Of 2006

Gulab **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
V.B. Rao, P.K. Rao

Counsel for Respondent:
Govt. Advocate

Held

The High Court **allowed the criminal appeal and set aside the conviction under Section 302 IPC**, holding that the prosecution had **failed to prove the presence of the appellant at the place of occurrence beyond reasonable doubt**. The Court found the **dying declaration unreliable and unsafe to form the sole basis of conviction**, as it materially contradicted the FIR and the statement under Section 161 CrPC regarding the manner of occurrence and the role of the accused. The Court also noted **serious inconsistencies in prosecution witnesses' testimonies, unexplained burn injuries on Shamshad Bano, delay in lodging the FIR, and non-examination of the doctor who certified the deceased's fitness for recording the dying declaration**. These defects created substantial doubt in the prosecution story. Hence, giving the benefit of doubt, the conviction and sentence were quashed and the appellant was directed to be released forthwith.

CASE LAW CITED

Bhajju @ Karan Singh v. State of Madhya Pradesh

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

1. The aforesaid criminal appeal has been preferred by appellant Gulab against the judgment and order of conviction dated 28.07.2006 passed by the Sessions Judge, Banda, in Sessions Trial No.26 of 2005, State Vs. Gulab and others) arising out of Case Crime no.54 of 2004, Police Station Badausa, District Banda, whereby appellant has been sentenced to life imprisonment under section 302 I.P.C. coupled with fine Rs. 10,000/-, default stipulates one year additional simple imprisonment.

2. We have heard Sushri Sakshi Keserwani and Sri Rajrshi Gupta, learned counsel for the appellant and Sri Saghir Ahmad, Sri J.K. Upadhyay and Kumari Meena, learned AGAs for the State and perused the record of this Criminal Appeal.

3. The factual evolution of this appeal comes into being with the recording of dying declaration (Exhibit Ka-7) of victim Abdul Hafeez alias Pappu son of Mumtaz on 20.04.2004 between 6.05 P.M. to 6.20 P.M.-by P.W.8 Raj Bahadur, Naib Tehsildar/Magistrate, Banda. Then course of events passes on to lodging of FIR at Police Station Badausa on 21.04.2004 at 22.30 hours regarding the occurrence allegedly taken place on 20.4.2004 in the morning around 05.30 a.m. at village Bagaichapurwa, Police Station Badausa, District Banda by the injured/deceased Abdul Hafeez @ Pappu with the allegations that the first informant (deceased) returned with his wife Shamshad Bano from her 'Maika' in village Kalahra within Police Station Kotwali Naraini, in the evening of 19.4.2004. Same day in the evening at about 10 p.m., informant's brother-in-law Gulab along with Raheem came to his house and stayed there whole night. On the following morning (20.4.2004), the first informant went to attend natures call and when returned from there, he saw his brother-in-law Gulab and his wife Shamshad Bano in compromising position on the bed, whereupon both of them caught him and in the meanwhile, Raheem, who was standing outside also came in, when Gulab poured kerosene oil on him with intention to kill him, Raheem gripped him while his wife Shamshad Bano set him on fire with the help of match-stick due to which he sustained severe burn injuries.

4. Contents of written report (Ext. Ka-1) were noted in the concerned check FIR at police station Badausa on 21.04.2004 at 22.30 hours at Case Crime no.54 of 2004, under Section 307 IPC. Check FIR is Exhibit Ka-3 on record.

5. On the basis of entries made in check FIR, case was registered against the accused-appellant in the general diary at serial no.32 at aforesaid case crime number under Section 307 IPC on 21.4.2004 at the same police station, which is Exhibit Ka-4 on record.

6. The case was investigated into by the Investigating Officer R.D. Chaudhary PW-7. He took steps by recording statement of various persons including prosecution witnesses Rasool Khan and the injured Abdul Hafeez @ Pappu. He prepared site plan of the place of occurrence on 22.4.2004 and proved the same as Exhibit Ka-6. He also prepared recovery memo of empty container of kerosene oil and partly burnt bed sheet, which is Exhibit Ka-2 on record.

7. Thereafter, investigation was taken over by Ajay Prakash Srivastava, PW-10 on 23.04.2004. On the basis of information received from Mumtaz, father of the deceased, the case was converted from Section 307 IPC to Section 302 IPC.

8. In this context, relevant general diary entry at serial no.6 dated 23.4.2004 at 6.55 a.m. was made. Thereafter, the Investigating Officer Ajay Prakash Srivastava PW-10 proceeded to prepare inquest of deceased Abdul Hafeez @ Pappu at village Bagaichapurwa, Police Station

Badausa, District Banda. Preparation of inquest commenced at 8.10 a.m. and completed at 9.30 a.m. Inquest report is Exhibit Ka-9.

9. In the opinion of inquest witnesses, it was thought proper to send dead body of the deceased Abdul Hafeez @ Pappu for postmortem examination so that real cause of death could be ascertained. In the process, certain relevant papers were prepared, which are Exhibits Ka-10, Ka-11, Ka-12, Ka-13 and Ka-14, respectively. Thereafter postmortem examination on the cadaver of the deceased was conducted by Dr. T.R. Sarsaiya PW-7 on 23.04.2004 at 3.30 P.M., wherein following ante-mortem injuries were noted:

Superficial to deep burn on whole body except both feet, skin peeled off its places, singeing on scalp, eyebrow and axillary and eyelash and pubic hair. Red line on both foot.

10. In the opinion of the doctor, cause of death was stated to be shock due to ante-mortem burning. This postmortem report has been proved as Exhibit Ka-5.

11. Thereafter record proceeds to suggest that the investigation was transferred to the third Investigating Officer, Satya Pal Singh- P.W.9, who also recorded statement of various prosecution witnesses and after completing various formalities filed charge sheet against accused Gulab, Raheem and Shamshad Bano, which is Exhibit Ka-8.

12. Consequent thereupon, the case was committed to the Court of Sessions where the accused Gulab and the two other co-accused persons were heard on point of charge and prima facie ground was found existing for framing charge under Section 302/34 IPC. The charge was read over and explained to the accused, who abjured charge and opted for trial.

13. Thereafter, the prosecution was asked to adduce its testimony, whereupon the prosecution examined as many as ten witnesses on its behalf. Brief sketch of the same is being made herein below:

14. Mumtaj PW-1 is the father of deceased Abdul Hafeez @ Pappu. He is witness of fact and he has stated that at the relevant point of time, when the incident took place, he had gone to some another village for selling cloth-being cloth merchant- and he returned his village around 4:00 p.m. on 20.4.2004, when only he came to know about the incident.

15. Rasool Khan PW-2 is witness of fact and he has testified to fact that deceased got the written report scribed by Lallu Khan and then handed it over to him for giving it at Police Station Badausa. He has proved the written report Exhibit Ka-1.

16. Mehadi Hussain PW-3 is also witness of fact. He disposed about fact that he saw Gulab and Raheem running away from house of Mumtaz. While fleeing away, they said that Abdul Hafeez @ Pappu was set on fire. Thereafter, he reached at the place of occurrence where he saw Abdul Hafeez @ Pappu and his wife Smt. Shamshad Bano lying in burnt condition.

17. Lallu Khan PW-4 is scribe of written report. He has stated in his examination-in-chief that father of Abdul Hafeez @ Pappu dictated him the report and Abdul Hafeez @ Pappu made his signature thereon.

18. Constable Shiv Daya PW-5 has prepared Check FIR and registered the case against accused-appellant in the relevant general diary and has proved the same as Exhibit Ka-3 and Ka-4, respectively. Dr. T.R. Sarsaiya PW-6 conducted the postmortem examination on the dead body of deceased Abdul Hafeez @ Pappu on 23.4.2004 and has proved the same as Exhibit Ka-5. He has also proved material Exhibit 1 and 2, respectively. In his one line cross-examination, he has stated that the timing of death may vary by six hours on either side. S.I. R.D. Chowdhary PW-7 is the first Investigating Officer of this case. He has taken various steps during course of investigation and has proved Exhibit Ka-6, Ka-2 and Ka-3 besides material Exhibit 3 and 4, respectively. Naib Tehsildar Ram Bahadur PW-8 has recorded dying declaration of deceased on 20.4.2004 and has proved the same as Exhibit Ka-7. Satyapal Singh PW-9, is the third Investigating Officer of this case, who besides recording statement of several prosecution witnesses also filed charge sheet Exhibit Ka-8, against the accused-appellant. Ajay Prakash Srivastava PW-10 is the second Investigating Officer of this case. He has also proved various steps taken by him during the course of investigation and has elaborated about the same before the trial court.

19. Thereafter, evidence for the prosecution was closed and statement of appellant Gulab was recorded under Section 313 Cr.P.C., wherein he has termed his implication false on account of enmity and has categorically stated that the deceased sustained burn injuries at his home. There was some dispute between the deceased Abdul Hafeez @ Pappu and his wife Shamshad Bano about which he has no idea. Shamshad Bano too sustained burn injuries. Though the deceased was taken to the hospital by his family members but Shamshad Bano remained lying in the house. At the time of the incident, he was at his home in his village Kalahra, Police Station Kotwali Naraini, which place is at a distance of 25 Kms. away from the house of deceased. Shamshad Bano is his sister-in-law (Saali). He was not present on the spot. He was informed that a report has been lodged against him.

20. The defence in turn has filed certain documentary evidence. Certified copy of application under Section 156(3) Cr.P.C. moved by Raseedan mother of Shamshad Bano, is Exhibit Kha-1. Certified copy of order dated 16.06.2004 passed thereon by the CJM, Banda, is Exhibit Kha-2. Certified copy of complaint filed before Chief Judicial Magistrate, Banda is Exhibit Kha-3.

21. The defence also led oral evidence of one Ram Narain Gupta D.W.1, who at that point of time, was Chief Pharmacist, Sadar Hospital, Banda. He was produced by the accused-appellant for proving fact that Shamshad Bano, wife of deceased was medically examined at Sadar Hospital, Banda on 20.4.2004 at 6:15 p.m. by Dr. S.P. Gupta. He claims himself to be acquainted with the hand writing of Dr. S.P. Gupta. He has proved injury report of Shamshad Bano as Exhibit Kha-4, wherein following injury on person of Shamshad Bano has been noted on medical examination:

Superficial to deep burn on both side of right and left upper limb including right hand. Front of chest and abdomen, back of chest and adtidona perineum region also burnt. Front and back of both thighs burnt. Both buttocks also burnt.

22. In the opinion of the doctor, injury was caused by burn and she was kept under observation.

23. After hearing arguments pros and cons of the learned counsel for the parties the learned trial court declined to accept defence version and recorded conviction against him under Section 302 IPC and sentenced him to life imprisonment coupled with fine Rs.10,000/- with default stipulation that the accused-appellant will suffer additional one year simple imprisonment.

24. Consequently, this appeal.

25. We have been persuaded by learned counsel for the appellant that it is virtually a case of no evidence and motive assigned for committing the crime is altogether missing. The prosecution has failed to prove presence of the appellant on the spot and has tried to create false evidence just to rope in, the appellant in this case. It is surprising that the victim Abdul Hafeez @ Pappu put his thumb impression on the dying declaration- Exhibit Ka-7- purportedly recorded on 20.4.2004 in the evening, whereas, the written report on 21.4.2004 has been signed by the victim-Abdul Hafeez @ Pappu. This shows contrivance on part of the prosecution to falsely create evidence against the accused-appellant. Even oral testimony of prosecution witnesses of fact carries serious and substantial contradictions and, in case, each witness of fact is taken to be true within its exclusive sphere, the testimony of the other one becomes unnatural, wholly unreliable and unworthy of credit.

26. It is quite surprising that a person who allegedly sustained burn injuries over almost whole body will ever dictate such written report like the present one (Exhibit Ka-1). The first information report is afterthought and outcome of deliberation of the first informant in order to cover his own guilt towards his wife. Record shows that the injured was first taken to the police station Badausa and from where he was directed to be taken to hospital before lodging the first information report. It means that the alleged incident had come in the knowledge of the police around 8:00 a.m. on 20.4.2004 itself, therefore, interference of police from this stage onward cannot be ruled out. How the dying declaration was in fact arranged, has not been proved by the prosecution. The version of the incident contained in the first information report is entirely different from the one recorded in the so-called dying declaration, therefore, dying declaration itself is not admissible and not relevant under circumstances and the same can not be read in evidence. Circumstances and testimony will in variably lead one to believe that the dying declaration has been outcome of connivance between PW-1 father of informant on the one hand and the police/administrative authority, on the other hand dying declaration is highly tainted.

27. The testimony of scribe Lallu Khan PW-4 itself is overwhelmingly explicit and exposes its voluntariness on point that the deceased was not in a position to speak even a single word and he

was unable to make any reply to any question put to him. It emerges from testimony that Mumtaz PW-1, the father of deceased was whispering in the ear of deceased which fact under circumstances signifies dramatic and fanciful pseudo gesture to originate false conversation, for the reason that the deceased never spelt any word before the scribe.

28. Similarly, Mehandi Hussain PW-3 is a partisan witness and his testimony is self contradictory. On material points, he testified not only presence of appellant near the place of occurrence at the relevant point of time, but he also stated that parents of deceased were present on the spot when he reached place of occurrence around 5.30 a.m. Obviously, both the parents were not present at the place of occurrence. Testimony of other witnesses of fact and particularly testimony of Mumtaz PW-1, the entire testimony on record, when cumulatively scrutinized and taken to be true, does not inspire confidence. The place where the FIR was written is highly doubtful. No bandage or dressing was ever seen by Lallu Khan PW-4, the scribe, on the person of the injured (Abdul Hafeez) while he wrote the report. Hollowness of the prosecution case is proved by fact that the prosecution though cleverly tried to manage the situation at its best to implicate the appellant in this case, but it failed miserably to produce the doctor who certified mental and physical fitness of the injured for recording his dying declaration. The prosecution failed to come out with any specific explanation of non production of doctor. Testimony on record suggests that the report had already been written around 3:00 p.m. on 20.4.2004 but FIR was lodged at 22.30 p.m., the same day and no worthy cause for such delay was given by the prosecution. The fact is that the incident of burning had come to the notice of the concerned police station at 8 a.m. in the morning of 20.4.2004 itself. There is every possibility of deliberation by police with the first informant side.

29. Learned counsel further chiseled his contention by adding that DW-1 has proved injury on the person of Shamshad Bano- the wife of deceased. Injury found on the person of Shamshad Bano remained unexplained, which under circumstances tantamounts to suppression of vital fact by the prosecution. The first information report also does not contain any such description, even the Investigating Officer remained aloof to this vital fact, whereas, the fact is that PW-3 in his examination-in-chief on page-18 of paper-book has specifically stated that he found Shamshad Bano badly burnt in the house along with Abdul Hafeez @ Pappu, who was also seriously burnt.

30. Learned counsel summed up that in such backdrop of facts, there is every possibility of false implication of the accused-appellant in this case and dying declaration becomes in herently weak and outcome of tutoring. The learned trial court did not appraise facts as well as relevant evidence on record and recorded casual finding of conviction which conviction is not sustainable in the eye of law.

31. Sri Saghir Ahmad, learned AGA while replying to aforesaid contention submitted that finding of conviction is based on material on record and the appraisal of facts and testimony is most consistent and is very much sustainable in the eye of law. The deceased himself has dictated the written report by help of Mumtaz- P.W.1. His dying declaration was promptly recorded without inordinate delay on 20.4.2004 around 6.10 p.m. itself and it has to be seen whether the burning was

accidental or homicidal? It is obvious that act of burning was homicidal and was committed by none other than the accused-appellant. The dying declaration was recorded only after the doctor certified fitness of the injured and then only competent authority i.e. Naib Tehsildar recorded the dying declaration, which carries element of truth and appears to be voluntary and free from any flaw and there is no legal bar that such dying declaration cannot be base for conviction. In support of his claim, learned AGA relied on a decision of Hon'ble Apex Court reported in **(2012) 4 Supreme Court cases 327** in the case of **Bhajju @ Karan Singh vs. State of Madhya Pradesh.**

32. Learned AGA further added that in such type of cases, like the present one certain in consistencies are bound to surface on account of varying circumstances, but these inconsistencies are neither substantial nor hitting at the root of the prosecution case. There is no motive for false implication of the accused appellant and sparing the real culprits.

33. We have also considered above rival submissions.

34. In view of rival contentions raised by both the sides and in the backdrop of particular facts and circumstances of this case the core consideration that engages our attention for determination of this appeal relates to fact whether the incident in fact was caused by the accused-appellant and dying declaration recorded in this case carries weight or its suffers from infirmity of its own?

35. At the inception, we may observe that in this case, there is no eye-witness account of the incident except evidence coming to fore from the injured/deceased Abdul Hafeez @ Pappu himself. Therefore, attendant circumstances of this case running parallel to facts alleged also carry weight and are to be evaluated vis-a-vis testimony of prosecution witnesses of fact and particularly testimony of PW-1, PW-2, PW-3 and PW-4, respectively.

36. Before proceeding further with the case, it would be appropriate to take note of fact that in this case, the five children of PW-1 Mumtaj- who happens to be father of the deceased Abdul Hafeez @ Pappu- were residing in the same house at the relevant time of the incident. The eldest among them was stated to be Iqbal 12-13 years old.

37. We may proceed with the crux of contents narrated in the first information report. It emerges out that on 19.04.2004, the deceased Abdul Hafeez @ Pappu returned with his wife Shamshad from her Maiyka in village Kalahra within police station Kotwali Naraini and the same day in the evening/night at about 10:00 p.m., informant's brother-in-law Gulab along with Raheem came to his house and stayed there whole night. On the following morning (20.4.2004), the first informant/deceased Abdul Hafeez @ Pappu went to attend natures call and when came back he saw Gulab and Shamshad Bano lying on a cot inside the house in compromising position, whereupon both Gulab and Shamshad Bano caught hold of him and in the meanwhile Raheem, who was standing outside also came in and Gulab poured kerosene oil on him with intention to kill him, Raheem tightened grip on him and his wife set him on fire by using matchstick due to which he

sustained burn injuries. This report stops here with account of incident and does not contain any further development that followed incident of burning.

38. Obviously, this written report was lodged at police station Badausa at 22.30 hours on 21.4.2004 and pursuant thereto, the Investigating Officer also arrived on the spot and recorded statement of injured under Section 161 Cr.P.C., wherein the aforesaid contents of first information report have been repeated with same alacrity and a slight description also surfaced about onward development that followed burning incident till the patient was taken to Banda Hospital. The point worth consideration crops up that in such a case when written report was stated to have been written at the instance of the injured himself on 21.4.2004, then how and why the written report abruptly stopped by describing fact of fire being caused to the injured- thus causing serious burn injuries. Admittedly, written report does not entail such further description nor even any whisper about subsequent development that had already taken place a day prior to the writing of this report and particularly the fact of admission and treatment at District Hospital Banda where the dying declaration of the injured had been purportedly recorded. Even more surprising is the fact that statement of injured/deceased under Section 161 Cr.P.C. though recorded on 21.4.2004 subsequent to lodging of FIR was admittedly subsequent to recording of his dying declaration, but it describes the entire incident in substantially different manner than that was stated in the dying declaration- Exhibit Ka-7. Dying declaration disapproves involvement of three persons in the act of causing burn injuries and it selects only the appellant who ignited fire on him. Utterly surprising!

39. Obviously, three persons have been said to have committed the offence. All the three persons have been assigned specific role both in the first information report and in the statement of deceased Abdul Hafeez @ Pappu under Section 161 Cr.P.C. that Gulab poured kerosene oil on the deceased, and Raheem, co-accused tightened his grip on the deceased and Shamshad Bano co-accused- wife of deceased- set him on fire by help of matchstick. This incident has been dittoed in written report (Exhibit Ka-1) and in the statement of deceased, but perusal of dying declaration Exhibit Ka-7 on the face describes the incident in a totally different manner ascribing different and specific role to only the present accused Gulab. Certainly, dying declaration distorted whole incident originally set-up by the prosecution.

40. Upon being questioned, as to how fire engulfed him (Abdul Hafeez @ Pappu), he has stated that it was around 6:00 a.m. he has returned after answering natures call when he saw his brother-in-law Gulab and his wife in compromising position, whereupon, the injured objected to the same, then his brother-in-law said to him that in case his wife is not sent with him, he will shoot him (deceased). Thereafter the accused poured kerosene oil on the deceased and set him on fire and both the accused Gulab and Shamshad Bano wife of the deceased Abdul Hafeez @ Pappu left the room.

41. The prosecution could not come out with any categorical explanation about such anomaly and distortion in the description of incident appearing in the dying declaration and varying substantially and materially from the statement of the deceased Abdul Hafeez @ Pappu himself recorded on 21.4.2004, subsequent to recording of dying declaration. This description of incident in

dying declaration materially contradicts the description and style of incident alleged in the first information report, as well.

42. Admittedly, the wife of deceased also sustained severe burn injuries on several part/limbs of her person at the same time. She was medically examined at the hospital on 20.4.2004 at 6.50 p.m. She was brought there by her mother Raseedan. As per medical examination of Shamshad Bano, superficial to deep burn on both sides of right and left upper limb including right hand. Front of chest and abdomen, back of chest and altidoma perineum region also burnt. Front and back of both thighs burnt. Both buttocks also burnt. This injury report has been proved by DW-1. This report is indicative of concealment of vital fact by the prosecution.

43. There is no worthy cause to disbelieve fact of this medical examination in view of cogent testimony of the prosecution witnesses of fact that at the time of occurrence when PW-3 Mehandi Hussain reached at the place of occurrence he saw Abdul Hafeez @ Pappu and his wife Shamshad Bano lying over there in burnt condition. This testimony has surfaced in the examination-in-chief of PW-3. In his cross-examination, he has gone to the extent of justifying that he took Abdul Hafeez @ Pappu and Shamshad Bano in a bullock-cart and conveyed them over to Badausa Hospital and Abdul Hafeez @ Pappu was alive but was unable to speak and his wife Shamshad Bano was also burnt and was unable to speak. He has stated on page-19 of paper book that at that point of time Abdul Hafeez @ Pappu appeared to be on the verge of death. At this stage, it would be relevant to consider factual aspect of capacity of injured Abdul Hafeez @ Pappu to speak or not to speak under attendant circumstances.

44. At this stage, we may consider testimony of prosecution witnesses of fact particularly PW-1, PW-2, PW-3 and PW-4. Mumtaj PW-1 has stated in his examination-in-chief that he left his home and returned only after 4:00 p.m. when only he was told by Abdul Hafeez @ Pappu that accused Raheem, Gulab and Shamshad Bano poured kerosene oil on him and set him on fire. He was also told that Shamshad and Gulab were seen by him (deceased) on one cot in compromising position. It means that condition of Abdul Hafeez @ Pappu was better at 4:00 p.m. on 20.4.2004.

45. Record reflects that, as per testimony of PW-8 Raj Bahadur, dying declaration was recorded by him after 6:00 p.m. and in his testimony, it has been specifically stated that Abdul Hafeez @ Pappu was talking to persons present over there in the hospital. The point arises for consideration relating to certain possibilities that when the father of injured/deceased was also present in the hospital and injured was able to speak freely to the person present over there, then how and why, no attempt was made to get the first information lodged and no attempt, whatsoever was made by the police to record any statement of the injured under Section 161 Cr.P.C. at that particular point of time. Why this soothing opportunity was not utilized?

46. Obviously, at that point of time, the occurrence had come in the knowledge of not only the administration but also in the knowledge of the police station. We are very much dismayed at such intriguing aberration in statement of the injured deceased Abdul Hafeez @ Pappu recorded under Section 161 Cr.P.C. and the dying declaration recorded by Naib Tehsildar PW-8. Dying

declaration assigns role of causing burn injury and assigns role of setting him (Abdul Hafeez @ Pappu) on fire by accused Gulab alone. Admittedly, two different versions of same incident run parallel to each other without any proper explanation and one knows better that two parallel lines never converge on same point. It means that the things have not been made clear about serious development of the incident and subsequent thereto. Either of the two versions may be stressed and sought to be believed but not both the versions.

47. We may observe at the cost of repetition that this dying declaration was apparently recorded on 20.4.2004 in the evening between 6.05 P.M. to 6.20 P.M. but no first information report was lodged though the victim was in a position to speak freely but the first information report was lodged after a lapse of more than 24 hours on 21.4.2004 at 22.30 hours at police station Badausa. After recording of dying declaration, if the events had streamlined in its natural course then obviously the first information report would have contained at least whispering of dying declaration at district hospital, Banda but the first information report abruptly ended with the description of incident itself and nothing more on incidental aspect was referred in it.

48. At this stage, we may observe that FIR is not an encyclopaedia that each and every detail should be mentioned in it, but under facts and circumstances of the case, such omission becomes shrewd enough indicating deliberation. It is obvious that statement of Abdul Hafeez @ Pappu recorded under Section 161 Cr.P.C. includes larger chunk of details of the incident and the subsequent development, but it materially varies with the description of incident from the one contained in the FIR and in the dying declaration. Obviously, the prosecution failed through and through to meet such piquant situation - its own creation.

49. It is obvious that the doctor who certified mental condition of the injured for recording the dying declaration has not been produced by the prosecution whose testimony under facts and circumstances would have brought truth to the surface. It is strange that the name of the doctor who certified physical and mental condition does not figure in the dying declaration (Exhibit Ka-7).

50. It has been vehemently contended on behalf of the appellant that the dying declaration (Exhibit Ka-7) contains thumb impression of the deceased, whereas, the written report (Exhibit Ka-1), which was lodged after a lapse of about 30 hours of the recording of dying declaration was signed by the deceased. Then how and why the dying declaration was not so signed. The contention has been raised to the exactitude that this indicates manipulation by the prosecution in creating false evidence. In so far as this contention is concerned, obviously, self-contradictory facts point out something fishy and smack of manipulation in arranging dying declaration. However, we refrain from expressing our view on point that false evidence was tried to be created.

51. It is obvious that varying description of occurrence particularly in the statement of victim under Section 161 Cr.P.C. and in the dying declaration throws more doubt on the truthfulness of the dying declaration than it being voluntary and fair. Therefore, the fact that the deceased was in a fit state of mind and he gave such a dying declaration recorded by Naib Tehsildar gives room to doubt for such obvious reasons and the exclusive manner and style of incident was

entirely changed in it. Thus dying declaration suffers from infirmity of its own being inconsistent with the foundation of the case particularly the manner of assault and act of causing burn injury.

52. On careful perusal of the entire record, we could not find either any such circumstance or testimony, which may impel us to allude to any inference on point that this dying declaration is either truthful and voluntary act of the deceased. No doubt, dying declaration is made by a person in extremities and he being on the verge of death is not supposed to meet his creator with a lie in his mouth. But this principle carries force only in the event when such dying declaration is free from any infirmity either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming forth to the notice of Court. Therefore, caution prevails and requires corroboration of dying declaration. Peculiarity of this case and divulgence of parallel story, particularly manner of causing burn injury and involvement of accused persons whether one or many etc. requires due consideration, therefore, under circumstances we are unable to accept the dying declaration to be either voluntary or truthful version of the victim.

53. In such a backdrop of things, it was emergent on the part of prosecution to have produced the doctor to testify the capacity both mental and physical of the deceased whether he was fit to make statement or not at the relevant point of time when the dying declaration was recorded. But doctor was not produced and no worthy reason for non production of doctor has been given, either. For such lapse only the prosecution is to be blamed and none else. There are other inconsistencies appearing in the testimonies of this case, which also make big dent in the prosecution case.

54. On point of presence of both the accused Gulab and Raheem on the place of occurrence, there is no worthy testimony on record, which may establish their actual presence on the spot. In this regard, it is obvious that Mumtaz PW-1, father of the deceased had left the house at 4 a.m. on 20.4.2004 and had gone to sell cloth in the neighbouring village and returned only around 4 p.m. and then only he came to know about the incident. In his cross-examination, it emerges out that in the night of 19.04.2004/20.04.2004, his wife had gone to village Goshiyari for attending party. Thus, it is obvious that even wife of the first informant was not present in the house when the incident took place.

55. It has also come in the testimony of Mumtaz PW-1 in paragraph 5 on page 14 of paper book that apart from deceased Abdul Hafiz @ Pappu, he had three sons and two daughters more and the eldest son Iqbal was around 12-13 years old. As per his testimony, it comes out that all the five children did not tell anything to Mumtaj. Under circumstances, it is unbelievable that five children were inside the house when the burning incident took place in the morning still they did not spell anything about the incident. Both wife and husband had been badly burnt and they had been taken to the hospital even then children of Mumtaz were unaware of such development. This particular fact is exclusive circumstance of this case and it goes, out and out against the prosecution. Certainly, prosecution is concealing facts as to how the incident occurred.

56. The testimony of PW-3 Mehandi Hussain as given in his examination-in-chief and cross-examination on the whole shows that he testified fact that both Gulab and Raheem fled away from the place of occurrence and they were saying "Pappu ko aag laga di hay' and when he arrived, he saw Abdul Hafeez @ Pappu and Shamshad Bano lying over there in burnt condition and at that point of time, it was 5.30 a.m. in the morning and parents of Abdul Hafeez @ Pappu were saying that Raheem tightened grip over Abdul Hafeez @ Pappu, Gulab poured kerosene oil and Shamshad Bano set Abdul Hafeez @ Pappu fire on. The fact of parents of Abdul Hafeez @ Pappu (deceased) being present on the spot is altogether false, because PW-1 had gone to sell the cloth, when the incident took place and wife of PW-1 had gone to another village for attending party. But this witness has testified on presence of parents of injured/deceased on the spot and has spelt conversation done by them. He has stated that he went inside the house of Abdul Hafeez @ Pappu. He was lying on the ground but he was unable to speak and so was condition of his wife Shamshad. He also stated that Abdul Hafeez @ Pappu seemed on the verge of death. He took Abdul Hafeez @ Pappu and Shamshad in a bullock-cart to hospital, Badausa and neither Abdul Hafeez @ Pappu nor Shamshad Bano uttered a single word on way to hospital.

57. He (PW-3) has also stated on page-19 of the paper book that mother of Abdul Hafeez @ Pappu was present on the spot when he reached at the house of Abdul Hafeez @ Pappu. Again he testified that he stayed at Badausa till 8.30 a.m. and thereafter he returned with his bullock-cart. While he was in the process of returning, father of Abdul Hafeez @ Pappu also arrived at Badausa. This testimony is improbable that Abdul Hafeez @ Pappu also arrived at Badausa around 8.30 A.M. because P.W.1 Mumtaz, father of deceased has admittedly stated to have returned home at 4.00 P.M.

58. Therefore, it is obvious that PW-3 has been brought in by the prosecution to establish presence of both the accused at the place of occurrence, but for his contradictory statement regarding presence of parents of injured first on the spot in the morning and then again around 8.30 a.m. at Badausa Hospital, he is not worthy of credit on point of testimony regarding presence of accused Gulab and Raheem on the spot. Therefore, presence of aforesaid accused on the spot is not established.

59. Here we have occasion to evaluate testimony of PW-4 Lallu Khan, scribe. He has also stated in his examination-in-chief that at the time of writing of the written report, Abdul Hafeez @ Pappu was not in a position to utter even a single word. It has been further testified that by making some whispering in the ear of injured Abdul Hafeez @ Pappu, the father of the injured Abdul Hafeez @ Pappu dictated the report to the scribe. However, Abdul Hafeez @ Pappu did not utter a single word in the presence of this scribe.

60. Obviously, testimony of this witness (PW-4) also supports fact that Abdul Hafeez @ Pappu was unable to speak at the time of writing of the written report. His cross-examination on page-22 of the paper book is quite relevant, for various reasons. It emerges out from perusal of the same that Abdul Hafeez @ Pappu was burnt all over body then the point is that how could he put

his signature on the written report when he was wholly burnt and he did not make any signature on the dying declaration recorded almost 30 hours before lodging of FIR.

61. In this context, perusal of first information report shows that signature of Abdul Hafeez @ Pappu was not brought on the proper place meant for it but it was made on the middle of page at lower end. May be that signed paper of Abdul Hafeez @ Pappu was obtained for the purpose of writing such report as Abdul Hafeez @ Pappu was able to make such specific signature full length, then how and why such signature was not obtained 28 hours ago on the dying declaration, which was recorded prior to the lodging of FIR. FIR was lodged at 10.30 p.m. on 21.4.2004 and the dying declaration was recorded on 20.4.2004 between 6.05 to 6.20 p.m.

62. Further, this scribe came to know about the burning incident only at the instance of father of Abdul Hafeez @ Pappu and no one else told him about any such incident. He has again stated that Abdul Hafeez @ Pappu did not speak even in least during his stay. The utter surprise is that he has stated that he cannot say if the injured was able to say anything and he cannot say whether the injured understood him or not while he talked to him and the last line of cross-examination of PW-4 carries wide implication, which pertains to fact that whatever was whispered in the ear of deceased Abdul Hafeez @ Pappu by his father neither nodded in the affirmative nor in the negative. Then obviously, this last line makes substantial dent in the written report itself.

63. Above scrutiny of fact and testimony is fair enough to establish that the written report is not description of injured Abdul Hafeez @ Pappu. Obviously, upto this stage, we have every reason to believe that Abdul Hafeez @ Pappu was not able to utter any single word upto this stage. Then how such dying declaration like the present one contained in Exhibit Ka-7 was recorded, becomes a guess to be answered by the prosecution. This question mark on the dying declaration being voluntary and truthful could have been proved by the testimony of doctor, who certified mental and physical condition of Abdul Hafeez @ Pappu for recording dying declaration. But we have discussed above no doctor was ever produced. Therefore, this dying declaration also does not beacon any guidance to arrive at correct position. We can express that such a dying declaration cannot be said to be voluntary or truthful version of the deceased. In this peculiar background, the aforesaid citation of Hon'ble Apex Court in the case of **Bhajju vs. Karan Singh** (supra) does not lend any support to the case of prosecution.

64. Not only this, in so far as lodging of the written report is concerned, but also we come across testimony that PW-2 Rasool Khan took the written report to the police station on 20.4.2004, as testified in his examination-in-chief. He has stated on page-16 of the paper book that he reached Badausa Hospital around 8:00 a.m. and 10 minutes prior to that they had reached the police station. Abdul Hafeez @ Pappu was examined by the doctor at Badausa and was referred for Banda. Abdul Hafeez @ Pappu was wholly burnt and thereafter Abdul Hafeez @ Pappu was admitted in district hospital, Banda, from where he was referred to Kanpur.

65. However, he has stated on the same page that despite burn injuries being caused to Abdul Hafeez @ Pappu, he was speaking as usual. But this testimony, when read in line with the

other testimony of witnesses of fact as above, is rendered wholly unreliable. On page-17 in the last paragraph of his cross-examination, PW-2 has stated that Mumtaz got written report scribed by Lallu Khan and then he gave written report to him and this report was written at Badausa Hospital and was received by him at 9 a.m. and thereafter he took this report to the police station.

66. At this stage, we may again refer to testimony of PW-4 Lallu Khan. He has stated that on 21.4.2004 when he was called by father of informant, Mumtaz at Badausa for writing the report and he arrived at Badausa near post office where some tea shops were being run in the vicinity and there at the dictation of father of Abdul Hafeez @ Pappu, he wrote the report and after the report was written, Abdul Hafeez @ Pappu made his signature on it. Under circumstances, this statement tells a different story as to how the injured reached at the post office and what was his condition when he made his signature on written report Exhibit Ka-1.

67. In the cross-examination, he (PW-4) has stated that the whole physique of the injured was burnt and the report was written at 3.00 p.m. In the last line of his testimony as we have already observed, this witness cannot say whether the injured understood him or not or whether he was in a position to understand anything or not. Relevant query arises that PW-2 says that this written report was got written at Badausa Hospital and was handed over to him around 9:00 a.m. for giving the same at the police station (Page No.-17 of paper book) and PW-4 says that he wrote this report at 3.00 p.m. on 21.4.2004 near post office then it is obvious that neither PW-2 nor PW-4 are worthy of credit. What a surprise that no injury report of injured Abdul Hafeez @ Pappu has been brought on record.

68. On close scrutiny of testimony on record and facts of this case we come across certain unexplained facts, particularly unnatural conduct of prosecution witnesses, which under circumstances remained unanswered- by the prosecution.

69. It is admitted fact and circumstance that Mumtaz P.W.1 had left home on 20.4.2004 around 4.00 a.m. for selling cloth and had gone over to the neighbouring village and the incident took place on 20.4.2004 around 6.00 a.m. After the incident a number of persons had arrived and accompanied the injured/deceased to the hospital. It was around 8 a.m. in the morning (of 20.4.2004). But no one cared to inform about the incident to Mumtaz who was not far away from his village. His (PW-1) testimony on the whole reveals that he returned home at 4.00 P.M. on 20.4.2004, when only he came to know about the incident. Then he went to the hospital to meet his injured son Abdul Hafeez. His son told him about the incident in the hospital. It means the injured, at that point of time, was mentally and physically fit to talk to people, but there is no whisper, on record, that he was so fit to indulge in talk- when in such precarious situation (superficial to deep burn on whole body except both feet). This particular aspect signifies well thought out manipulative plan of some interested person like Mumtaz himself to falsely rope in- the appellant- by creating absurd story of physical indulgence.

70. Further, testimony of Constable Shiv Dayal, PW-5 who made entries in the concerned Check FIR and GD on 21.4.2004 at police station Badausa stated in his cross examination that the

injured was never taken to the hospital after burn injury was caused to him. This testimony is in sheer contrast to what has been stated by PW-2 (as appearing in his cross-examination of page 16 of the paper book) that 10 minutes prior to 8 a.m. they had reached the police station. It means that police had prior information of the incident around 8 a.m. on 20.4.2004 itself. Therefore, it is obvious that all the prosecution witnesses have tried to improve on all aspects whether it be substantial or trivial but on all counts, their testimony erodes at the roots of prosecution case. Moreover a holistic view of their testimony never inspires any confidence and does not appear to be consistent, but eccentric. Their testimony is full of embellishment and material contradictions. Therefore, prosecution witnesses of fact are not worthy of credit.

71. At this juncture, we may count on motivating cause responsible for the incident and so alleged by the prosecution. Motive behind the crime was stated to be the 'sight' of physical indulgence between Gulab and Shamshad Bano when both were seen in compromising position on a bed by the deceased and this particular fact was -quod erat demonstrandum i.e.- which was to be demonstrated- for the prosecution.

72. The legal ontology as the motivating cause of the incident bases its claim in the act of physical indulgence between Gulab and Shamshad Bano inside the room on a bed on 20.4.2004. It is noticeable that apart from statement of deceased, recorded as dying declaration, not a single word has been spelt on 'such indulgence' or sustained illicit relationship by any of the prosecution witnesses. But this phenomenal claim, in form of physical indulgence, made by the prosecution falls flat for reason that prosecution has not been able to establish positively presence of appellant-Gulab- on the spot at the relevant point of time inside the room - the place of occurrence.

73. Further noticeable, that we have already disowned sanctity of dying declaration made by Abdul Hafeez @ Pappu for various reasons. Since evidence on record unerringly points out that presence of accused Gulab on the spot has not been proved satisfactorily by the prosecution, the attempt so made by the prosecution has boomeranged and has eroded credibility of the prosecution witnesses itself. It emerges from testimony that presence of only Shamshad Bano and Abdul Hafeez @ Pappu was there on the spot. Therefore, we can approve presence on the spot only of these two persons as the only injured persons in the incident and here we accentuate that factum of burn injury caused to Shamshad Bano in the same occurrence on 20.4.2004 is shrouded in mystery. Indeed, the prosecution failed to unravel the truth. This abysmal silence and non-explanation of injuries on person of Shamshad Bano has proved fatal for the prosecution. Non-explanation of injuries on person of Shamshad Bano by the prosecution stands rectified and substituted by the answer given by Shamshad Bano in her statement under Section 313 Cr.P.C., regarding the cause of injury- that Abdul Hafeez tried to set her on fire and in the process he got burnt. Specific explanation given in statement under Section 313 Cr.P.C. by Shamshad Bano thus supplies the lacuna created by the prosecution. Nature and magnitude of burn injuries (Exhibit Kha-4) caused to Shamshad Bano are not trivial but extending over several parts/limbs of her person.

74. It appears that theory of physical indulgence was deliberately introduced in order to establish presence of Gulab on the spot, that is why we see deviation in description of act of

indulgence as appearing in the FIR on the one hand and in the dying declaration, on the other hand. Description of absorbing physical indulgence between Gulab and Shamshad Bano is apparent both in the FIR and in the statement of the deceased, under Section 161 Cr.P.C., whereas, this absorbing physical indulgence has been confined in the dying declaration, to the extent that both Shamshad Bano and Gulab were lying together on the bed when both were 'sighted' by the deceased- Abdul Hafeez @ Pappu. This aberration creates major and substantial contradiction in the statement of deceased under Section 161 Cr.P.C. (recorded on 21.4.2004) and the dying declaration recorded on 20.4.2004 given by the deceased. This apparent twist in the two statements smacks of lot of deliberation done by P.W.1 Mumtaz- because he happens to be father of the deceased and he may have an eye on the property of Shamshad Bano which she would inherit in her capacity as such, therefore, imputation of absorbing physical indulgence was deliberately made with intent to disinherit her.

75. For such specific reasons fact of physical indulgence as cause generic becomes obfuscated and obscure and loses legal significance. In this way claim of illicit relationship evokes no response from us.

76. Now, we may observe at this stage, that even the site plan does not indicate as to where the accused Gulab and Raheem stayed whole night on 19.4.2004 in the house of Abdul Hafeez @ Pappu when they had arrived at 10.00 P.M. Admittedly, Mumtaj has five children excluding Abdul Hafeez @ Pappu- the deceased- but no intention or mark has been made in the site plan, Exhibit Ka-6 as to where was their position inside house during night. Non mention of such aspect may on the face appear to be of little importance, but it reflects on some manipulation being made in the prosecution story and presence of accused on the spot. Had they (Gulab and Raheem) been present and stayed in the house on 19.4.2004 then the I.O. could have easily mentioned the same.

77. We may also observe that as per prosecution testimony itself, Shamshad Bano also sustained burn injuries and her medical examination report Exhibit Kha-4 cannot be given a go-bye on the asking and which carries importance in proportion equal to the injuries of the deceased. How she sustained burnt injuries on large part of her physique, has not been explained by the prosecution.

78. Even the Investigating Officer has tried to evade the question of presence of Shamshad Bano when PW-7 S.I. R.D. Chaudhary has stated in his cross-examination on page-26 that he could not find the wife of injured on the spot as she had absconded. He also stated that he tried to know whereabouts of injured's wife on 22.4.2004. But on being questioned by the defence about the places where he made any such search and mentioned places in the case diary, whereupon he relented and stated that he did not write the places where he made search for wife of the injured and the extent of falsity has been accelerated by stating that during course of investigation, he did not come across fact that wife of the injured has sustained burn injury.

79. Thus, the entire prosecution story appears to be an outcome of some dramatic incident and the real cause of incident remains unknown to all. Entire testimony of prosecution witnesses of

fact rules out possibility of any speaking gesture ever made by the deceased while injured and alive. It appears that he was not in a position to utter any single word but the prosecution hastily tried to prove the same by adopting clever manoeuvring both in the hospital and at the police station but that attempt itself proved fatal to the prosecution case. May be that the statement of the deceased recorded under Section 161 Cr.P.C.- when he was alive be lapsus lingue a slip of the tongue but that aspect when compared with the substance and contents of dying declaration strikes astonishment that a person in extremis would ever make such contradictory statements to two different authorities, therefore, we are unable to infer any possibility of lapsus lingue in case of the injured.

80. Thus, presence of the appellant on the spot is not proved. Injury to Shamshad Bano remained unexplained. Specific presence of parents of injured at the place of occurrence at the relevant point of time (occurrence) is not established. The five children of Mumtaj- PW-1 who were residing in the same house have neither been examined nor their statement recorded nor any worthy explanation given for such inaction by the prosecution. The anomaly in the writing of the written report is alarming and the varying description regarding mental and physical fitness of injured as appearing in testimony of witnesses of fact, is also highly doubtful. Role of the Investigating Officer, upon careful perusal of the testimony of the prosecution witnesses, is found to be suspicion and testimony of the prosecution witnesses on the whole is full of embellishment.

81. In view of above prolix discussion, we are of categorical acknowledgment of fact that the trial court while appraising facts and testimony on record, failed to take note of actual purport of the circumstances qua testimony and facts and erroneously recorded finding of conviction which on the face appears to be vague and perverse. Moreso, on the same evidence, two co-accused persons, namely, Shamshad Bano and Raheem were allowed to be exonerated of the charge, whereas, the accused-appellant Gulab has been convicted on the piece of same evidence placing reliance on dying declaration of Abdul Hafeez @ Pappu which is dangerous and fatal, because dying declaration in the absence of some substantive corroboration in this case suffers from inherent infirmity of its own and as such not reliable and on the face inconsistent and incongruous.

82. Consequently, the contention raised by the learned counsel for the appellant carries force and the same is accorded approval by us. The appeal is allowed. The impugned judgment and order of conviction dated 28.07.2006 passed by the Sessions Judge, Banda, in Sessions Trial No.26 of 2005, State Vs. Gulab and others) arising out of Crime no.54 of 2004, Police Station Badausa, District Banda is hereby set aside.

83. In this case, appellant is in jail. He be set free forthwith, if not wanted in connection with any other case after complying with the provisions of Section 437-A Cr.P.C.

84. Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

(2016) 9 ILRA 92
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 4667 Of 2014
&
Criminal Appeal No.- 4741 Of 2014

Ayyub **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Sudhanshu Srivastava

Counsel for Respondent:
Govt.Advocate

Held

The High Court allowed the appeals and acquitted the appellants Ayyub and Shaukeen, holding that the conviction under Sections 366/34 and 376(2)(g) IPC was unsustainable. The Court found that the FIR was lodged after an unexplained delay of 20 days, which cast serious doubt on the genesis of the prosecution case and created the possibility of embellishment and false implication due to enmity. It further held that the prosecutrix's testimony was not trustworthy, as it contained material omissions and contradictions regarding the alleged kidnapping, administration of stupefying substance, confinement, and rape. The medical evidence also did not support the prosecution case since no injuries were found and the prosecutrix was above 18 years of age. Accordingly, the trial court's findings were held to be erroneous and against the weight of evidence, and the conviction and sentence were set aside.

CASE LAW CITED

Jai Prakash Singh v. State of Bihar, 2012 (77) ACC 245
Khedu Mohton v. State of Bihar, AIR 1971 SC 66

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

1. The aforesaid appeals filed separately on behalf of accused-appellants are directed against the judgment and orders dated 7.11.2014 passed by the First Additional Sessions Judge, Court No.1, Saharanpur in S.T. No.402 of 2012 (State Vs. Mumtaj @ Muntyaz and others), whereby the appellants have been convicted under sections 366/34, 376(2)(G), IPC and sentenced to undergo rigorous imprisonment of 10 years each on both the counts. They have also been fined with Rs.2,000/- each on both the counts. In default of payment of fine they have been directed to

undergo further rigorous imprisonment of two years on both the counts. Both the appellants, by the same judgment, have been acquitted from the charges framed against them under sections 363, 323/149 and 120B, IPC. Non-appellants/co-accused Mumtaj @ Muntyaz and Shaukeen S/o Mannu have also been acquitted from all the charges framed against them.

2. Heard learned counsel for the appellants, learned A.G.A. for the State and perused the record of the case.

3. The facts of the present case giving rise to the present appeal may be summarized as under:-

4. That Yaseen gave a written report dated 13.5.2011 addressed to S.H.O. P.S. Deoband, District Saharanpur stating therein that on 23.4.2011 at 7.00 a.m. his daughter (hereinafter referred as the victim) had gone to attend the call of nature in the grove nearby the village. When she was on her way towards Talheri, appellant Shaukeen tricked her to inhale stupefying substance, co-accused Mumtaj alias Chhota, Nakli, Ayyub and Shaukeen S/o Mannu took his daughter in unconscious state to an unknown destination by Ambassador Car of white colour. Sattar, Shahbaz and other villagers had seen the incident and chased them, but they succeeded in escaping from there. He made an extensive search for his daughter and also informed the police of P.S. Deoband, but his report was not lodged. He prayed for suitable action against the accused persons.

5. At this check FIR was scribed at P.S. Deoband on 13.5.2011 at 10.30 a.m., Case Crime No.295/11 under sections 363, 366, IPC was registered and investigation was handed over to S.I. Indrapal Singh, who examined the witnesses, inspected the spot, arrested the accused persons and recovered the victim got her medically examined, thereafter her statement under Section 164, Cr.P.C. was recorded and charge sheet was submitted.

6. The appellants, co-accused Mumtaj @ Muntyaz, Shaukeen S/o Mannu were charged under sections 366/149, 323/149, 376(2)(G), IPC jointly. They were further charged under sections 363, 120B, IPC. They denied the charges and claimed to be tried.

7. In order to prove the charges on behalf of prosecution besides documentary evidence eight witnesses were examined. In the defence one witness was examined.

8. Case of the defence was of simple denial.

9. Yaseen, PW-1 is the first informant and father of the victim. He has proved written report, Exhibit Ka-1 and substantiated the prosecution version.

10. Victim, PW-2 has stated that she knew Shaukeen, Nakli, Ayyub, Mumtaj and Shaukeen S/o Mannu. Two years ago when she was going to relieve herself in the field nearby the grove, Shaukeen asked her to help in lifting a bundle of the grass. When she helped him, he tricked her to smell something to make her semi-unconscious. Other accused took her in the Ambassador Car of

white colour. They had taken her to Ambala, kept on a Rathan, there Nakli, Ayyub and Shaukeen had committed rape with her, others used to beat her. When after a month Shaukeen S/o Mumtaj brought her to Deoband railway station, they were caught by the police. She has proved her statement recorded under section 164, Cr.P.C, Exhibit Ka-3.

11. Abdul Sattar, PW-3 has supported the prosecution version.

12. Constable Dharampal Singh, PW-4 is the scribe of check FIR. He has proved the check FIR, Exhibit Ka-4, copy of the report of the General Diary, Exhibit Ka-5.

13. Dr. Surendra Singh, PW-5 is the Radiologist under whose supervision she was X-rayed. He has proved X-ray report, Exhibit Ka-6.

14. Dr. Mamta Sodhi, PW-6 has medically examined the victim on 23.5.2011. She has found no mark of injury either on her person or on her private parts. She was found by her to be habitual to sexual intercourse. She has proved medical examination report, Exhibit Ka-7 and supplementary report Exhibit Ka-8. She has opined that age of the victim was above 18 years.

15. Sanjeev Kumar, PW-7 has proved the extract of family register, Exhibit Ka-9.

16. S.I. Indrapal Singh, PW-8 is the Investigating Officer. He gave details of the steps taken in the course of investigation and proved site plans and charge sheet, Exhibit Ka-10 to Ka-14.

17. The accused persons in their statements recorded under Section 313, Cr.P.C. have denied the facts stated by the prosecution witnesses.

18. In the defence Faiyaz Ahmad, DW-1 has been examined, who has deposed that Ayyub was teacher in Almahadul Islami Institution. On 23.4.2011 he was present in the Institution and stayed in the hostel.

19. Learned trial Judge after hearing the arguments had convicted the present appellants and acquitted rest as above.

20. In support of the appeal the learned counsel for the appellants have submitted that there was love affair between the appellant and the victim. All four accused were father and sons. Due to enmity they have been falsely implicated. It was not natural and probable that father and sons, real brothers together would commit rape on the same time with the same girl. His next argument is that FIR was lodged with 20 days' delay without any explanation. His third argument is that medical evidence does not support the prosecution version. His fourth argument is that there are material contradictions in the testimonies of the prosecution witnesses.

21. On behalf of State-Respondent these arguments have been repelled and it has been submitted that learned trial Judge has recorded correct findings of facts, well substantiated from the

record, he has given cogent reasons in support thereof. Appeals are devoid of merit and deserves to be dismissed. During the arguments following points for determination arise:-

1. Whether FIR was lodged with delay without satisfactory explanation, if so its effect;

2. Whether evidence of prosecutrix is trustworthy, if so its effect;

3. Whether case of defence is made out on the test of preponderance of probability and judgment suffers from illegal findings.

Point No.1

22. According to prosecution version, prosecutrix was kidnapped on 23.4.2011 at 7.00 a.m. FIR was lodged on 13.5.2011 at 10.30 a.m. Explanation tendered by the first informant is that after coming to know of kidnapping of his daughter he had gone to police station, gave the written report, which was lodged. Subsequently, on 23.5.2011 when her daughter was recovered, he gave another written report.

23. Question is whether to accept this explanation or consider the plea raised by the defence. Hon'ble Apex Court has attached great importance to prompt lodging of FIR vide **Jai Prakash Singh Vs. State of Bihar, 2012 (77) ACC 245.** In the case of **Khedu Mohton and others Vs. State of Bihar, AIR 1971 SC 66** Hon'ble Apex Court has given way to verify the truthfulness of the explanation for the delay in FIR tendered by the prosecution. According to the Hon'ble Apex Court it is a simple thing to contend, but it has to be established by calling for the necessary records from the police station to substantiate the explanation.

24. In the present case during the cross examination first informant has claimed that first written report was handed over by him at the police station. It was very easy for the prosecution to call the clerk constable, who was at the duty on that day at the relevant time, but this has not been done. In such a serious matter prosecution has not cared to produce the link evidence, in absence thereof I do not think the explanation given by the first informant, PW-1 is satisfactory, thus, FIR has been lodged with great delay, which admits possibility of embellishments, consultation and on account of enmity false implication. The effect of this is very genesis of prosecution version becomes doubtful. Point no.1 is decided accordingly.

Point No.2

25. Yaseen, PW-1, father of the first informant has not seen the occurrence. Abdul Sattar, PW-3 has claimed to have seen the incident of kidnapping. He is real elder brother of the first informant Yaseen that means uncle of the victim. Had he seen the occurrence, he would have raised the alarm. Abadi was near. It was not difficult to chase the kidnappers by taking help of the police, but in the present case he pretends to chase the car on foot. Thereafter informed his younger brother, who did nothing as found it at point no.1, therefore, evidence of Abdul Sattar is of no significance.

26. Only statement of prosecutrix requires careful scrutiny. She had not disclosed the fact to the Magistrate, that she was going to the field to attend the call of nature. This omission also finds place in her statement recorded under Section 161, Cr.P.C. Other material omission is that she had not stated before the Investigating Officer that she was tricked into inhaling some stupefying substance before she was kidnapped. She has stated in her statement recorded under section 164, Cr.P.C. that after she went to help Shaukeen in lifting a bundle of grass, he closed her mouth and made her sit in the car. Here also she has not stated about inhalation of stupefying substance. Her statements about sojourn at Ambala are also in consistence. According to her, Mumtaj and Shaukeen son of Mumtaj did not say anything to her. She was found at Ambala by her uncle Sattar. At that time she was with Shaukeen. These omissions and contradictions touch the prosecution version on the point of kidnapping, her sojourn in confinement and commission of rape. When asked about contradictory statements, she has stated that police had threatened her to depose so. I do not think her explanation is correct. Police has shown her to have been recovered by them at railway station, Deoband with Shaukeen. On material facts statement of prosecutrix is contradictory as also inconsistent.

27. Medical evidence consisting of statement of Dr. Mamta Sodhi, PW-6 along with exhibit Ka-7, Ka-8 reveals that there was no mark of external injury on her person. No mark of injury was found on her private parts. She was found habitual to sexual intercourse. She was aged above 18 years of age. When considered in the light of arguments submitted by learned counsel for the appellants, the grounds raised by them appear to be well substantiated and I do not think statement of prosecutrix, PW-2 is trustworthy. Learned trial Judge has not appreciated her evidence in accordance with law and material on record. Point no.2 is decided accordingly.

Point No.3

28. Though in view of findings recorded in reference to point nos.1 & 2, this point does not require to be adjudicated upon, however, to place correct factual position on record I notice that co-accused Nakli had lodged an FIR about the kidnapping of the niece of Mumtaj against Kallu. Though the first informant has denied that he had lodged the first information report at the behest of Kallu, but his simple denial when taken into consideration with the observations made in reference to point nos.1 & 2 is examined, his denial appears to be empty denial with no truth therein.

29. As above, appeals have substance and the impugned judgment is full of erroneous findings, against weight of material on record and law. It cannot be sustained, hence, appeals are **allowed**. Impugned judgment and orders as also conviction and sentences of the appellants are set aside. Appellants Ayyub and Shaukeen are acquitted from the charges framed under sections 366/34, 376(2)(g), IPC. They are in jail. If they are not wanted in any other case, they be released forthwith provided they file a personal bond and two sureties each in the like amount in view of the provisions contained in section 437-A, Cr.P.C.

30. Office is directed to communicate this order to the court concerned and to send back the record to the court below.

(2016) 9 ILRA 97
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 5421 Of 2009

Jitendra Singh Gangwar @ Nanku ...Appellant
Versus
State Of U.P. ...Respondent

Counsel for Appellant:
Sarvesh, Durvijai Singh, Kamlesh Kumar Gangwar, S.S.Chauhan

Counsel for Respondent:
Govt.Advocate

Held

The High Court allowed the criminal appeal and set aside the conviction under Section 302 IPC, acquitting the appellant Jitendra Singh Gangwar @ Nanku by extending the benefit of doubt. The Court held that the prosecution failed to prove the charge beyond reasonable doubt, as the alleged eyewitnesses PW-1 and PW-2 were found unreliable and appeared to be chance/interested witnesses, whose testimonies materially contradicted their statements under Section 161 Cr.P.C. The Court further noted that the site plan did not clearly show the exact place from where the shot was fired, no blood marks were found at the alleged spot despite the injured allegedly lying there for about 30 minutes, and the prosecution theory of one gunshot was inconsistent with medical evidence showing two entry and two exit wounds. On cumulative appreciation of evidence, serious doubts arose in the prosecution story, and therefore the conviction was held unsustainable.

CASE LAW CITED

None

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

1. By way of instant Criminal Appeal, accused-appellant Jitendra Singh Gangwar @ Nanku son of Babu Ram Gangwar resident of Kanasi, Police Station Nawabganj, District Farrukhabad, has challenged the judgment and order of conviction dated 21.08.2009 passed by the Special Judge (SC/ST Act), Farrukhabad, in Special Sessions Trial No. 20 of 1997 arising out of Case Crime No. 02 of 1997 under section 302 I.P.C., Police Station Nawabganj, District Farrukhabad, whereby the appellant has been sentenced to life imprisonment coupled with fine Rs.10,000/-. The half of amount of fine shall be paid to the successor of the deceased Vijay Singh @ Vijendra.

2. Heard Sri Arun Kumar Shukla Advocate assisted by Sri Anvir Singh, learned counsel for the appellant, Sri J.K. Upadhyay learned AGA for the State and also perused the record.

3. The brief facts giving rise to this appeal as unfolded from the record indicate that the first informant Satya Prakash son of Dafedar resident of Kanasi, Police Station Nawabganj, District Farrukhabad, lodged written report on 03.01.1997 at 6.20 P.M. at Police Station Nawabganj, alleging therein that the appellant Jitendra Singh @ Nandu son of Babu Ram Gangwar resident of Kanasi, Police Station Nawabganj, District Farrukhabad, was insisting 3-4 days prior to the incident (in question), that informant's brother Vijay Singh should accompany him to Delhi with him. On refusal to go to Delhi, he (accused) objected. On 03.01.1997 at about 5.00 P.M., Jintendra Singh climbed on his roof and from where, he used vituperative language and threatened to life, whereupon informant's brother came out of his house and reached in front of Jitendra Singh's house in the street, when Jitendra Singh possessing country made pistol fired on his brother, which fire hit Vijai Singh in stomach of his brother due to which he fell down on the ground. In the meanwhile, informant's elder brother Ram Prakash, his Bhabhi-Sajeevan, Bhagyawati and a number of other villagers arrived on the spot. They challenged the appellant whereupon the appellant secured his escape good possessing country made pistol in his hand. First informant took his injured brother to the police station. Report be lodged and appropriate action be taken. This written report is Ext. Ka-1.

4. Relevant entries were made in the concerned check first information report the very same day at 6.20 P.M. at Case Crime no.02 of 1997 under section 307 I.P.C. and section 3(2) (5) SC/ST Act at Police Station Nawabganj, District Farrukhabad. Check FIR is Ext. Ka. 2.

5. On the basis of entries so made in the concerned check FIR, relevant entries were made in the concerned G.D. and a case was registered against appellant at aforesaid case crime number under the aforesaid Sections of I.P.C. as well as SC/ST Act, respectively. Copy whereof is Ext. Ka-3.

6. Investigation of the case was taken over by Shri Avaish Ahmad PW-4, who proceeded to the spot, enquired into the matter and at the instance of Smt. Sajeevan and villagers, prepared site plan Ext. Ka. 4. Since condition of injured was serious, he was referred to Kanpur and his statement could not be recorded. The statement of injured was recorded only on 17.01.1995.

7. Relevant to mention that medical examination of Vijay Singh @ Bijendra Singh was done by Dr. S.C. Tiwari, at Dr. R.M.L. Hospital, Farrukhabad on 03.01.1997 at 7.40 P.M. wherein following injuries were noted:

(1) A gunshot wound of entry 0.75 cm x 0.75 cm x not probed in epigestric region 5 cm above umbilicus, margins are lacerated ecchymosed and inverted, charring is present bleeding is present.

(2) A gun shot wound of exit 1 cm x 0.75 cm x not probed on right gluteul region, margins are lacerated, ecchymosed & everted. Bleeding present. Adv. x-ray.

(3) A gun shot wound of entry 0.5 cm x 0.5 cm x communicating to wound of entry on inner part of thumb on left hand, margins are lacerated, ecchymosed and inverted, bleeding present . Adv. X-ray.

(4) A gunshot wound no exists 0.8 cm x 0.8 cm x communicating to wound of entry on outer part of thumb of left hand, margins are lacerated, ecchymosed and everted. Bleeding present. Adv. Xray.

8. General condition of patient was poor. Patient was admitted. Injury was kept under observation caused by fire arm. Duration was fresh. Injury report is Ext. Ka- 6.

9. Thereafter, the condition of the injured victim became serious. He was referred to Hallet Hospital Kanpur. Investigating Officer sent Sub Inspector S.S. Mishra to enquire from injured and Smt. Bhagyawati. It transpired that Vijay Singh @ Bijendra Singh died on 10.02.1997. Therefore, relevant entries were made in the concerned case diary. The investigating Officer also converted the case from section 307 I.P.C. to section 302 I.P.C.

10. Record reflects that in this case, as soon as information of death of injured Vijay Singh @ Bijendra Singh was given to the concerned police station at Kanpur, Pooran Singh PW-6, who at that point of time on 11.02.1997, was posted as Sub Inspector, Police Station Swaroop Nagar. As per testimony of Pooran Singh PW-6, he held inquest of Vijay Singh @ Bijendra Singh on 11.02.1997 which is Ext. Ka-7. This witness has also proved preparation of various papers for sending dead body of deceased to mortuary at Kanpur, for post mortem examination, where post mortem examination on dead body of Vijay Singh @ Bijendra Singh was conducted on 11.02.1997 at 3.45 P.M. The doctor found as many as five ante mortem injures which are extracted herein below:

(1) Stitched wound 20 cm long, stitch present on abdomen, wound extending from xiphisternum to pubic region in middle.

(2) Stitched wound 1 cm on right side of umbilicus 1 cm left side with catheter.

(3) Stitched wound 1-1/2 with drainage tube on right side 6 cm away right side of umbilicus.

(4) Bed sore present below hip bone.

(5) Stitch wound neck 2 cm size on right side of neck 2 cm below right ankle of mandible.

11. In the opinion of the doctor, cause of death was due to shock and septicemia. The post mortem examination report is Ext. Ka.-12.

12. The Investigating Officer after completion of investigation filed charge sheet against the accused appellant under section 302 I.P.C. and section 3(2)(V) SC/ST Act, which is Ext. Ka-5 on record.

13. Thereafter, the case of appellant was committed to the court of Session from where it was made over for trial to the aforesaid trial Court. The trial court after hearing the appellant on point of charge recorded its satisfaction for prima facie case and framed charges under section 302 I.P.C. and section 3(2)(5) SC/ST Act. Charges were read over and explained to the appellant who denied charges and opted for trial. Thereafter the prosecution in order to prove guilt was asked to adduce its testimony whereupon the prosecution produced in all 6 witnesses. A brief reference of the same is hereunder.

14. Satya Prakash PW-1 has claimed himself eyewitness and has proved written report Ext. Ka-1. Sajeevan PW-2 like PW-1, claims herself to be eye witness of the incident. Constable Lajja Ram PW-3 has made relevant entries in check FIR and concerned general diary. Avais Ahmad PW-4 is Investigating Officer of this case. He has described the manner in which the investigation of the case was completed and has also proved the site plan Ext. Ka-4. He has proved charge sheet Ext. Ka-5 filed against the appellant. Dr. S.C. Tiwari PW-5 has examined the injured Vijay Singh @ Bijendra Singh and has proved injury report Ext. Ka-6. S.I. Pooran Singh PW-6 held proceeding for preparation of inquest report of deceased Vijay Singh @ Bijendra Singh and he has proved the same as Ext. Ka- 7 besides proving a number of various papers prepared by him for sending the dead body for the post mortem examination.

15. Thereafter the evidence for prosecution was closed and statement of accused was recorded under section 313 Cr.P.C. wherein he has specifically stated that he did not vote for Ram Prakash in the election of Gram Pradhan, therefore, he has been falsely implicated in this case. The defence led ocular testimony of one Mukesh Kumar DW-1.

16. The trial court after considering the materials on record, disagreed with the contention of defence that the accused is innocent and passed the impugned judgment and order of conviction and imposed aforesaid sentence against the accused- appellant.

17. Consequently, this appeal.

18. It has been vociferously claimed on behalf of the appellant that the appellant is innocent and he has not committed any offence. He never fired on the victim-deceased. The incident was not witnessed by any person. Claim has been made to the effect that all the prosecution witnesses of fact are altogether false. The prosecution witnesses of fact being relatives of deceased are chance witnesses and, therefore, their testimony is partisan besides being contradictory to each other. The site plain Ext. Ka-4 does not show specifically the place from where the appellant is stated to have

fired on the deceased. No blood marks, whatsoever were found on the spot where the deceased was lying for about ½ hour.

19. The fact is that the deceased himself was possessing country made pistol for protection of his money and while he was opening and closing this pistol, it went off causing injury to the deceased. The motive imputed for committing crime is absurd and weak. Statement of prosecution witnesses of fact- PW-1 and PW-2 namely Satya Prakash and Sajeevan, respectively is in material contrast to their statement given before the trial court and to the Investigation Officer under section 161 Cr.P.C. The appellant has no reason to cause death of the deceased Vijay Singh @ Bijendra Singh.

20. The learned AGA while refuting the aforesaid submissions, elaborated that the case of the persecution has been consistently established and proved against the accused before the trial court by cogent evidence given by the prosecution witnesses of fact and by entirety of testimony. Place of occurrence is in neighbor-hood, in-front of house of the accused and the same is certain. There is no ambiguity regarding identity of place of occurrence. The Investigating Officer, prepared the site plan at the instance of PW-2 Sajeevan, Bhagyawati and villagers. Both Satya Prakash PW-1 and Sajeevan PW- 2 have seen the occurrence and their testimony is unimpeachable.

21. We have considered the rival contentions and perused the record. In the wake of rival contentions and allegations made by the prosecution against the appellant, core consideration that engages our attention for determination of this appeal relates to fact whether the incident was caused by the appellant and the charge has been proved beyond reasonable doubt against him or not?

22. In this context, we notice that the first information report regarding the incident was lodged by Satya Prakash PW-1 wherein, allegations were made against the appellant that he was insisting for taking informant's younger brother Vijay Singh @ Bijendra Singh to Delhi 3-4 days prior to the incident which was refused by Vijay Singh @ Bijendra Singh and the informant. Thereafter on 03.01.1997 at about 5 P.M. , the appellant climbed on his roof and used vituperative language, whereupon Vijay Singh @ Bijendra Singh came out of his house and reached in front of the doors of Jitendra Singh's house in the street where the appellant opened fire on him due to which he sustained injury and fell down on the ground. Satya Prakash informant, Sajeevan wife of Ram Prakash, Bhabbi of injured along with other villagers also arrived on the spot and they saw the incident. On challenge being made by them, the accused made his escape good.

23. In this context, we notice that on the face of eye account testimony of the incident, motive becomes irrelevant. However, some circumstantial help can be drawn from motive so attributed. In this case, the motive may not be strong but it may have some inkling for raising grudge against the victim by the accused. Upon perusal of testimony of both the eye witnesses Satya Prakash and Sajeevan PW-1 and PW-2, respectively, we notice that both have supported the incident that it took place around 5.00 P.M. on 03.01.1997.

24. However, it has come in examination in chief of PW-2 Sajeevan that she heard sound of firing. She claimed that she was pursuing her Devar Vijay Singh @ Bijendra Singh along with her husband Ram Prakash and Dewar Satya Prakash and sister-in-law (Dewrani) Bhagyawati. As per their testimony, as soon as shot was fired, it hit the victim who fell near Churni (trough). On being challenged, the accused appellant fled away from the scene of occurrence. Both these witnesses have been cross-examined wherein we find material contradictions which raises doubt on their presence on the spot. Their testimony as emerging from their cross examination, suggests that only one fire was shot, however, injury report of victim Ext. Ka-6 suggests otherwise. On the face of it, two gun shot wounds of entry and two gun shot wounds of exit, have been noted on medical examination by Dr. S.C. Tiwari PW-5. On this point, he has been cross examined and he has specifically suggested that two entry wounds and two exit wounds of gunshot were found on examination. Both these injuries have been found to be on separate parts of body of the deceased. Injury no. 1 was found to be " A gunshot wound of entry 0.75 cm x 0.75 cm x not probed in epigestric region 5 cm above umbilicus, margins are lacerated ecchymosed and inverted, charring is present bleeding is present." Injury no. 2 "A gun shot wound of exit 1 cm x 0.75 cm x not probed on right gluteul region, margins are lacerated, ecchymosed & everted. Bleeding present. Adv. x-ray.". Injury No. 3 "A gun shot wound of entry 0.5 cm x 0.5 cm x communicating to wound of entry on inner part of thumb on left hand, margins are lacerated, ecchymosed and inverted, bleeding present . Adv. X-ray." Injury no.4 "A gunshot wound no exists 0.8 cm x 0.8 cm x communicating to wound of entry on outer part of thumb of left hand, margins are lacerated, ecchymosed and everted. Bleeding present. Adv. Xray."

25. Theory of one shot fire is virtually admitted to the prosecution. In this scenario, it is upon the prosecution to establish as to how these injuries were caused. We discover from testimony of Satya Prakash PW-1 that when the accused appellant fired shot on his brother (victim) it first hit his hand and then hit his stomach. This particular fact does not find favour from the first information report which only specifies that shot was hit in stomach.

26. At this stage, we come across several statements made by both the witnesses of fact to the Investigating Officer under section 161 Cr.P.C. which engage our attention at this juncture and particularly on point whether PW-1 and PW-2 were in fact eye witnesses of the incident. We may deal with testimony of Satya Prakash PW-1 who has been confronted by the defence in his cross examination regarding his testimony on page 11 of the paper book on point that as soon as the victim came out of his house, he along with the other family members followed the victim, has not been stated in the first information report. Thus, the fact that PW-1 followed the victim appears to have been an afterthought and improved before the trial court. He has also admitted on the same page that site inspection of the spot was not done at his instance.

27. Obviously, whole testimony of Satya Prakash PW-1, though appears to be natural and consistent on point of occurrence that he also witnessed the incident but it is obvious that site plan was not prepared by the Investigating Officer on the pointing out of PW-1. We have also carefully perused the concerned case diary for availing some assistance regarding any such statement, as made before the trial court by this witness and similarly made to the Investigating officer then we did not come across any such statement. Obviously, it emerges out that PW-1 has not stated anything to the Investigating officer on point of occurrence and particularly fact that he witnessed the incident and the incident took place before him. In the wake of above, we have no better conclusion than to believe and accept contention of defence that PW-1 did not witness the

incident. It appears that he arrived on the spot only after the incident had already taken place. The testimony of PW-1 regarding description of occurrence in absence of any supporting statement to the Investigating officer, cannot be believed.

28. Now, aforesaid testimony when compared with testimony of Sajeevan PW-2 becomes suspicious, sketchy and inconsistent, for reason that her statement regarding occurrence as recorded by the Investigating Officer under section 161 Cr.P.C. is exposed to hollowness. In her examination in chief, she has stated that on the fateful day around 5.00 P.M. Jitendra Singh was abusing from his roof, whereupon, Vijay Singh @ Bijendra Singh came out of his house and he was followed by this witness, her husband, her brother-in-law Satya Prakash, her sister-in-law Bhagyawati, then they heard sound of firing. The accused Jitendra Singh fired on Vijay Singh @ Bijendra Singh - victim which hit him and he fell near (Churni) trough. A number of persons had gathered on the spot. On being challenged, accused appellant Jitendra Singh fled away from the scene of occurrence, then a report was scribed by one Anil and injured was taken to police station by bullock-cart.

29. She (PW-2) has been cross examined at length and on page 15 of the paper book, she has been confronted as to how they followed the victim upto the place of occurrence. She has stated that if her statement as given in the trial court in examination in chief does not tally with the description given to I.O. regarding the incident, then she cannot assign any reason for the same. She has denied her statement recorded by the Investigating Officer that she ever gave statement that Jitendra Singh called Vijay Singh @ Bijendra Singh at his home and then shot him. Although she has stated that Jitendra Singh fired in her presence but she has further denied the suggestion that at the time of firing, she was inside her house. She has specifically denied statement recorded by the Investigating Officer that on hearing sound of firing, they came out of their house and saw Vijay Singh @ Bijendra Singh lying near trough (churni) and the fire had hit him on his stomach.

30. She has stated in her cross examination that on her arrival on the spot, Vijay Singh @ Bijendra Singh was speaking. She has denied her statement recorded by the Circle Officer that she ever gave any such statement that victim was not speaking. Her statement given in examination in chief regarding her being eye witness has been specifically denied by the Investigating Officer Avais Ahmad PW-4, therefore, what emerges from her cross examination becomes crystal clear that she came out of her house only when she heard sound of firing and this specific fact has been testified by the Investigating Officer in his cross examination on page 21 of the paper book, when she has denied her statement that she never gave such statement like one that on hearing sound of firing, they came out of their house and proceeded towards spot where they saw Vijay Singh @ Bijendra Singh lying near trough (Churni). He was shot on his stomach. The Investigating Officer has further confirmed that she (PW-2) has never given any statement that her husband Ram Prakash ever chased accused Jitendra Singh. She has also not given any statement to the Investigating Officer that a number of villagers had gathered on the spot and they challenged accused Jitendra Singh. Thus, it is obvious that PW-1 and PW-2 both witnesses of fact have not seen the act of firing though they insist to have seen the occurrence. It appears that they arrived on the spot just a little after the incident of firing had taken place.

31. In this regard, we may record that the Investigating Officer Avais Ahmad PW-4 prepared site plan of the occurrence at the instance of PW-2 Sajeevan and villagers but it is obvious that PW-2 had not seen the occurrence and her statement has been contradicted by the Investigating Officer that number of villagers had arrived on the spot, therefore, the villagers and Sajeevan PW-2 would not have been in a position to specify actual spot from where the accused opened fire on the deceased Vijay Singh @ Bijendra Singh.

32. At this stage, we may refer to the site plan of the occurrence Ext. Ka-4 wherein no specific spot has been shown from where the accused fired on the deceased Vijay Singh @ Bijendra Singh. It has been stated that the accused fired from Varanadah, but actual position of the accused has not been shown. PW-4 has not stated in his cross examination that the place marked by "X" is place where injured was standing. Therefore, it is not specific as to where the accused was standing when he fired on deceased Vijay Singh @ Bijendra Singh. However, it is gathered from the testimony that after fire hit Vijay Singh @ Bijendra Singh and he fell down on the ground, he remained there for about 30 minutes and report was written in village and then injured was taken in bullock-kart to the police station. Normally, in such circumstances, no family member will ever allow his close relative to remain lying on the ground after he has been shot for 30 minutes and will first get the report written. It is life of the person which gets primacy over all other acts.

33. It is also a fact that for about 30 minutes, the injured was lying on the ground and he was hit by gun shot but no blood mark was found on the spot by the Investigating Officer. Therefore, all these facts when cumulatively weighed, create lot of doubt on fact that PW-1 and PW-2 were not eye witnesses of the occurrence.

34. It is cardinal principle of criminal jurisprudence that in case prosecution has not been able to establish charge by proving the same beyond reasonable doubt, then the case goes in favour of accused and he is entitled to benefit of doubt. In this case, the testimony of both the eye witnesses of fact appear to be testimony of chance witnesses and they being relatives are interested in giving false testimony which fact stands exposed when we come across their testimony recorded under section 161 Cr.P.C. The site plan does not specify place from where firing was made and lastly, theory of one fire is highly doubtful in view of two gun shot injuries in form of entry wounds and exit wounds, which have been found on the person of victim on his medical examination on 03.01.1997 on the date of occurrence itself when he was lying on the spot.

35. In the wake of above analysis of facts and circumstances of the case evidence on record, contentions raised on behalf of the appellant are upheld by us. Consequently, this appeal is allowed. The impugned judgment and order of conviction dated 21.08.2009 passed by the Special Judge (SC/ST Act), Farrukhabad, in Special Sessions Trial No. 20 of 1997 arising out of Case Crime No. 02 of 1997 under section 302 I.P.C., Police Station Nawabganj, District Farrukhabad is hereby set aside by us.

36. The accused-appellant is in jail in this case. He is acquitted of aforesaid charges under aforesaid sections of I.P.C. He be released forthwith if not wanted in connection with any other case after compliance of provisions of Section 437A Cr.P.C.

37. Let a copy of this judgment/order be certified to the court concerned to its intimation and necessary follow up action.

(2016) 9 ILRA 105
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 2900 Of 2016

M/s Shivalik Engineering Works ...Appellant
Versus
Geeta Devi & Anr. ...Respondents

Counsel for Appellant:
Udai Chandani

Counsel for Respondents:
Govt.Advocate

Held

The High Court dismissed the employer's appeal and upheld the award of ₹6,81,551 as compensation for the death of the workman under the Employees' Compensation Act. It held that the deceased died during and in the course of employment, and there was no evidence of any wilful disobedience of safety instructions that could absolve the employer of liability. The Court further clarified that mere negligence of the workman does not disentitle his dependants from compensation, as the Act is a beneficial social welfare legislation. It also held that the amount privately paid by the employer could not be treated as compensation except to the extent permitted under Section 8(1) proviso, i.e., three months' wages. Since the Commissioner had correctly assessed age, wages, and compensation, and no substantial question of law arose, the appeal was dismissed.

CASE LAW CITED

Jaya Biswal & Ors. v. Branch Manager, IFFCO Tokio General Insurance Co. Ltd. & Anr., 2016 (1) TAC 713 (SC)
Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali, (2007) 11 SCC 668
Mackinnon Mackenzie & Co. (P) Ltd. v. Ibrahim Mohd. Issak, (1969) 2 SCC 607
Malikarjuna G. Hiremath v. Branch Manager, Oriental Insurance Co. Ltd., AIR 2009 SC 2019

(Delivered by Hon'ble Krishna Murari, J.)

1. This first appeal from order under Section 30 of the Employees Compensation Act (for short the 'Act') has been filed by the employer challenging the judgment and award dated 30.08.2016 passed by Employees' Compensation Commissioner awarding a sum of Rs.6,81,551/- as compensation on account of death of workman-Bhola Prasad.

2. Background facts, in brief, are as under.

3. The appellant is a registered partnership firm engaged in the business of work contract and material supply of electrical and engineering items relating to transformers etc. Appellant entered into a contract for erection of electricity poles and its transmission work with the respondent no. 2, Anpara Thermal Power Plant. Deceased-Bhola Prasad was engaged to work in the execution of the Project by the appellant. On 25.02.2015, at about 6 p.m., when the electricity poles were being erected for laying the transmission lines, one of the pole fell down on Bhola Prasad causing grievous injuries and while being taken to the hospital, he died on the way. Claim petition was filed by the claimant-respondent no. 2, wife of the deceased-workman on the allegation that the death occurred during the course of and within the employment with the appellant. It was further pleaded that at the time of death, Bhola Prasad was aged about 25 years and his monthly salary was Rs.9000/- per month. On these allegations, a compensation to the tune of Rs.8,73,880/- along with penalty and 12% interest was claimed.

4. Proceedings were contested by the appellant on the allegations that the death was caused due to self inflicted injuries, inasmuch as he did not follow the rule and the directions for the purpose of securing the safety, as such, the employer was not liable to pay any compensation. It was also pleaded that the accident was a result of negligence of the workman himself and, thus, there was no liability. The appellant also stated that after the accident took place, along with local leaders, a huge mob assembled and resorted to 'chakka jam', and under the pressure of the authorities and the police, in order to maintain peace, a cheque of Rs.1,00,000/- and a sum of Rs.4,00,000/- in cash was given to the claimant by the appellant-employer, and thus also, liability, if any, stood discharged. The appellant also filed a compromise deed dated 25.02.2015 evidencing the amount paid to the claimants by way of settlement. On the basis of the pleadings of the parties, the Commissioner framed following four issues.

"1. Whether the deceased employee was employed as a workman.

2. Whether the death was caused in course of employment.

3. Whether the workman was drawing wages of Rs.9,000/- per month and was aged 24 years on the date of accident.

4. Whether the claimant was entitled to compensation, and if yes, the quantum and whether any interest and penalty is liable to be imposed."

5. After analysing the evidence adduced by the parties, the Commissioner returned a finding that deceased was engaged as a workman by the appellant. On issue no. 2, the Tribunal held that the death was caused on account of an accident arising out and in the course of employment. In the absence of any documentary evidence to substantiate the fact that the appellant was getting salary of Rs.9000/- per month, the Tribunal presumed the minimum wages of Rs.6415.50/- prescribed by State of U.P. for unskilled workman as his notional income and finding his age to be

24 years, determined a sum of Rs.7,07,097.14/-. In view of the fact that certain compensation was given by the employer to the claimants, in accordance with the provisions of Section 8 of the Act, the Tribunal deducted amount equal to three months' wages and, accordingly, determined the compensation of Rs.6,81,551/-.

6. The first submission advanced by the learned counsel for the appellant is that Commissioner failed to appreciate that there was negligence on the part of the deceased himself as he defied the specific directions not to climb the pole while the concrete was wet and, thus, the accident was a result of his own negligence and wilful disobedience of an order expressly given and the act was in violation of the safety procedure prescribed and, thus, there was no liability upon the appellant to pay the compensation.

7. Appellant-employer examined Dinesh Chandra Pathak as D.W. 1, who stated that for fixing the pole, firstly a hole is dug in the earth then pole is put in the hole and thereafter a mixture of concrete is filled in the hole. He further stated that to maintain the balance of the pole, strings are attached to the pole on all the four sides. The strings are attached with such a technique that when the workman pulls it, the knot opens. On the fateful day, when the deceased-workman pulls the string, the knot did not open. Despite clear instructions not to do so, the deceased-workman started climbing on the pole to open the knot and has fell down along with the pole, which caused injuries on his head.

8. On analysing the oral evidence adduced on behalf of the appellant-employer and also the pleadings, the Commissioner held that there was no evidence of disobedience of any order expressly given by a person with authority to the deceased-workman not to climb the pole nor there was any evidence to demonstrate that workmen were explained the safety procedure before they were made to do the work and, thus, it was not a case of any wilful negligence on the part of the deceased-workman so as to absolve the appellant from the liability of paying the compensation.

9. From a perusal of record and analysis of the evidence brought on record of this appeal, we also do not find any pleadings or evidence to establish that any person with authority had given directions to the workman not to climb the pole or the workman was ever explained the safety procedure to be followed. On the contrary, it was pleaded in the written statement that other workmen shouted and asked the deceased-workman not to climb the pole as it was risky, but the same does not establish that any authority had given directions to the workman not to climb the pole or he was acting in violation of any safety procedure explained to him to be followed while executing the work. In the absence of any evidence, we do not find any fault with the finding of the Commissioner in this regard and, thus, the first argument advanced by the learned counsel for the appellant has no force.

10. Apart from above factual position that there was no negligence on the part of the workman, but even if there was negligence, it would not dis-entitle the claimants from claiming compensation under the Act. Section 3 of the Act does not create any exception of any kind which permits the employer to avoid his liability even if there was negligence on the part of the workman.

Employees Compensation Act is a social welfare legislation meant to benefit the workers and their dependants in case of death of a workman due to accident caused during and in course of their employment and should be construed as such.

11. The above view taken by us finds support from recent decision of the Hon'ble Apex Court in the case of **Jaya Biswal & Ors. Vs. Branch Manager, IFFCO, Tokio General Insurance Company Ltd. & Anr., 2016 (1) TAC 713 (SC)**.

12. In the said case, Hon'ble Apex Court repelled the argument that claimants would not be entitled for compensation, in case, the death was caused due to own negligence of the workman. In paragraph 14 of the reports, it has been held as under.

"The next contention which needs to be dispelled is that the appellants are not entitled to any compensation because the deceased died as a result of his own negligence. We are unable to agree with the same. Section 3 of the E.C. Act does not create any exception of the kind, which permits the employer to avoid his liability if there was negligence on part of the workman. The reliance placed on the decisions of this Court on Contributory negligence like the Three Judge Bench decision in the case of Mastaan (supra) is wholly misplaced as the same have been passed in relation to the Motor Vehicles Act, 1988, and have no bearing on the facts of the case on hand. The E.C. Act does not envisage a situation where the compensation payable to an injured or deceased workman can be reduced on account of contributory negligence. It has been held by various High Courts that mere negligence does not disentitle a workman to compensation. Lord Atkin in the case of Harris v. Assosciated Portland Cement Manufacturers Ltd. observed as under:

"Once you have found the work which he is seeking to be within his employment the question of negligence, great or small, is irrelevant and no amount of negligence in doing an employment job can change the workman's action into a non-employment job ... In my opinion if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurred only by that way of doing it he is entitled to compensation."

The above reasoning has been subsequently adopted by several High Courts. In the case of Janaki Ammal v. Divisional Engineer,the High Court of Madras held as under:

"Men who are employed to work infactories and elsewhere are human beings, not machines. They are subject to human imperfections. No man can be expected to work without ever allowing his attention to wander, without ever making a mistake, or slip, without at some period in his career being momentarily careless. Imperfections of this and the like nature form the ordinary hazards of employment and bring a case of this kind within the meaning of the Act."

While no negligence on part of the deceased has been made out from the facts of the instant case as he was merely trying his best to stop the truck from moving unmanned, even if

there were negligence on his part, it would not disentitle his dependents from claiming compensation under the Act."

13. The second submission advanced on behalf of the appellant is that cause of accident was on account of an overt act of the workman totally unconnect with his employment, thus, there is no liability to make payment of any compensation.

14. Liability of employer to make payment of compensation is provided under Section 3 (1) of the Act, which reads as under.

"3. Employer's liability for compensation.- *(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter."*

15. Hon'ble Apex Court while interpreting Section 3 (1) in the case of **Shakuntala Chandrakant Shreshti Vs. Prabhakar Maruti Garvali, 2007 (11) SC 668** held as under.

"15. The said Act was enacted to provide for payment by certain classes of employer's to workmen for compensation against injury by accident. The term 'accidental injury' has not been defined under the Act. The liability of the employer for payment of compensation, however, would arise if a personal injury is caused to a workman by accident arising out of and in the course of his employment. What is necessary for attracting the charging provision contained in Section 3 of the Act is that (i) an injury must be caused to a workman; (ii) such injury must have been caused by an accident; and (iii) it arose out of or in the course of his employment."

16. In the case of **Mackinnon Mackenzie & Co. (P) Ltd. Vs. Ibrahim Mohd. Issak, 1969 (2) SCC 607**, the Hon'ble Apex Court has held that provisions of the Act would stand attracted, in case, injury by accident arises, both out of and in the course of employment. Explaining the words 'in the course of the employment' and 'arising out of employment', it has been observed as under.

"The words 'in the course of the employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered'. In other words there must be a casual relationship between the accident and the employment.

The expression 'arising out of employment' is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. To put it differently if the accident had occurred on account of a risk which is an incident of the employment,

the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."

17. Applying the aforesaid test laid down by the Hon'ble Apex Court to the facts of the case, we find that accident took place not only in the course of employment, but was arising out of employment as well. The facts and the evidence clearly establish that there was connection between the death of the workman and his employment and, thus, the appellant employer cannot wriggle out from its liability to make payment of compensation. Thus, the second argument advanced by the learned counsel for the appellant has also no legs to stand and is not liable to be sustained.

18. The next submission advanced by the learned counsel for the appellant is that in view of the fact that a sum of Rs.5 lacs was already paid to the claimants, the Tribunal committed a manifest error of law in imposing damages and the same is in violation of the Section 4-A of the Act.

19. The argument is not at all sustainable in view of specific finding recorded by the Tribunal that since some amount was paid to the claimants as financial assistance, there is no justification to impose any penalty.

20. It is next submitted that since admittedly a sum of Rs.1 lac was paid by cheque and Rs.4 lacs in cash to the claimant under the pressure from the public and police authority, the said amount was liable to be deducted from the compensation determined by the Commissioner, which he has failed to do so by misinterpreting the provisions of Section 8 of the Act.

21. Provisions of Section 8 of the Act, relevant for the purpose of the case, are reproduced hereunder.

"8. Distribution of compensation.-

(1) No payment of compensation in respect of a workman whose injury has resulted in death, and no payment of a lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation.

[Provided that, in the case of a deceased workman, an employer may make to any dependant advances on account of compensation of an amount equal to three months' wages of such workman and so much of such amount as does not exceed the compensation payable to that dependant shall be deducted by the Commissioner from such compensation and repaid to the employer.]

(2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.

(3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him."

22. A plain reading of the aforesaid provision goes to show that any payment made directly by an employer to the claimant shall not be deemed to be a payment of compensation unless it is deposited with the Commissioner and a receipt is issued by him in this regard. The only exception is contained in the proviso to sub-Section (1) of Section 8 to the effect that only an amount equal to three months' wages of such workman, if the same does not exceed to the compensation payable, shall be deducted by the Commissioner from such compensation.

23. In the case in hand, though there is an admission by the claimant-respondent of having received a sum of Rs.1 lac through cheque and Rs.4 lac in cash from the employer, but in view of the provisions contained in Section 8 of the Act, the same cannot be deemed to a payment of compensation and Commissioner rightly deducted a sum equal to three months' wages of the workman from the compensation determined in accordance with the proviso. The receipt, on which the reliance is being placed upon by the appellant, was not executed by the Commissioner, but it was signed by the In-charge of police station Anpara, Member of Zila Panchayat, village Pradhan and certain members of the public. The document even did not contain the signature of the claimant-respondent, and only a photocopy thereof was filed in evidence.

24. In the circumstances, we do not find any fault in the findings recorded by the Commissioner that only a sum of 3 months' wages was liable to be deducted from the amount of compensation payable in view of proviso to Section 8 (1) of the Act.

25. Lastly, it was submitted that the impugned order is contrary to the law laid down by the Hon'ble Apex Court in the case of **Malikarjuna G. Hiremath Vs. Branch Manager, Oriental Insurance Co. Ltd. & Anr., AIR 2009 SC 2019**.

26. In the aforesaid case, the fact was that the workman, who was driving the vehicle on the directions of the insured, had gone to Gurugunta from Siraguppa. Thereafter, he went to Amreshwara temple and while he was sitting on the steps of the pond in the temple, slipped and died due to drowning. In such circumstances, the Hon'ble Apex Court held that the death was not arising out of employment and, thus, liability could not be fastened either on the insurer or the insured. The facts of the said case are clearly distinguishable from the facts of the present case, where the accident took place not only out of employment, but also in the course of employment.

27. In our considered opinion, the award cannot be held contrary to the law laid down in the said case by the Hon'ble Apex Court. On the contrary, the ratio of the decision applies with full force in favour of the claimants in the facts and circumstances of the case.

28. On an analysis of the award, we find that the Tribunal also did not commit any fault in recording the finding that the deceased was aged 24 years on the basis of the date of birth recorded in the mark sheet of the Secondary examination, 2004. The determination of notional income on the

basis of the minimum wages prescribed by State Government, in the absence of any evidence to establish the wages of the deceased-workman, also cannot be faulted with.

29. Thus, we do not find any illegality in the methodology adopted by the Commissioner for determining the compensation and the same is strictly in accordance with the provisions of the Workmen's Compensation Act, 1923 and no illegality is reflected therefrom.

30. In view of above facts and discussions, we are of the considered opinion that no substantial question of law is involved in the appeal.

31. The appeal accordingly stands dismissed in limine.

32. However, in the facts and circumstances, we do not make any order as to costs.

(2016) 9 ILRA 113
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2016

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

First Appeal From Order No.- 2897 Of 2016

Mahadev & Ors. **...Appellants**
Versus
Jagarnath & Ors. **...Respondents**

Counsel for Appellants:
Hari Mohan Srivastava, Neeraj Srivastava

Counsel for Respondents:
Govt.Advocate

Held

The High Court dismissed the First Appeal From Order as not maintainable. It held that an appeal under Order 43 Rule 1(t) CPC lies only against an order refusing to readmit an appeal under Order 41 Rule 19 or to rehear an appeal under Order 41 Rule 21. In the present case, the impugned order was neither under Rule 19 nor Rule 21; rather, the original appeal had been dismissed as abated under Order 22 Rule 4(3) CPC due to failure to substitute the deceased respondent for about two and a half years. Therefore, since the statutory provision invoked did not apply, the FAFO was held to be not maintainable and was accordingly dismissed.

CASE LAW CITED

None

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Shri H.M. Srivastava, learned counsel for the appellant.

2. This First Appeal From Order has been filed under Order 43 Rule 1(t) of the Civil Procedure Code, whereby a belated application filed by the appellant, for recall of an order dated 03.09.1996, was dismissed on the ground that it was not accompanied by any affidavit in support of the application under Section 5 of the Limitation Act for condonation of delay.

3. The order dated 03.09.1996, an appeal filed by the appellant was ordered to abate on the ground of non substitution of the respondent therein.

4. The provision which has been invoked in this F.A.F.O., namely Order 43 Rule 1(t) is quoted herein below:-

*"**Order 43 Rule 1(t):**- an order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to rehear, an appeal"*

5. For an F.A.F.O. to lie under Order 43 Rule 1(t), the order appealed against must either be an order under Order 41 Rule 19 or one under Order 41 Rule 21.

6. The order impugned is not an order under Rule 41 of Order 41 because the application before the Court below was filed by the plaintiff-appellant and not the respondent. The said Rule 21 deals with applications filed by a respondent, against whom an ex parte decree has been passed. The appellant in the instant case was the appellant-applicant before the Court below.

7. Rule 19 of Order 41, which alone may be applicable in the instant case empowers the Court to readmit an appeal dismissed under Rule 11 Sub-rule 2. The said sub rule reads as follows:-

"(2) If on the day fixed or on any day to which the hearing may be adjourned the appellant does not appear when the appeal is called for hearing, the Court may make an order that the appeal is dismissed."

8. Thus, Rule 17 of Order 41 deals with the dismissal of an appeal for the appellant's default.

9. As already noticed herein above, the appeal of the appellant had been dismissed as abated since no application to substitute the deceased/respondent had been filed despite a period of two and a half year having elapsed since his death. The order of the appellate Court was thus, an order passed under Order 22 Rule 4(3).

10. It is therefore, clear that the order sought to be recalled was not an order passed under either Rule 19 or Rule 21 of Order 41 and therefore Order 43 Rule 1(t) cannot be invoked to challenge it.

11. The instant FAFO is therefore, not maintainable under Order 43 Rule 1(t).

12. It is accordingly dismissed.

(2016) 9 ILRA 115
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Reference No.- 11 Of 2010
&
Income Tax Reference No.- 12 Of 2010

M/S Rama Medical Stores ...Applicant

Versus

The Commissioner Income Tax Lucknow ...Opposite Party

Counsel for Applicant:
R.R. Kapoor, S.D. Singh

Counsel for Opposite Party:
C.S.C., RK Upadhyay

Held

The High Court answered both reference questions in favour of the Revenue and against the assessee, holding that the penalty orders under Section 271B were within limitation under Section 275(1)(c) of the Income Tax Act, 1961. The Court clarified that Section 275(1)(c) provides two independent periods of limitation: (i) till the end of the financial year in which the proceedings during which penalty action was initiated are completed, or (ii) six months from the end of the month in which penalty proceedings are initiated, whichever period expires later. These two periods are not to be read conjunctively. Since the notices for penalty were issued on 2.4.1990 and 26.6.1990, and the penalty orders were passed on 30.10.1990, the orders were held to be within time. The Court further emphasized that where statutory language is clear, it must be interpreted according to its plain meaning without adding words or creating a casus omissus.

CASE LAW CITED

CIT v. Bankey Lal Hira Lal, (1973) 92 ITR 587 (All)
Shanbhag Restaurant v. Deputy CIT, (2004) 266 ITR 393 (Kar)
Subodh Kumar Bhargava v. CIT, (2009) 309 ITR 31 (Del)
Karan Vir Singh Gossal v. CIT, (2012) 349 ITR 692 (SC)
Madan Roller Flour Mills v. CIT, (2008) 301 ITR 1 (P&H)
Dadi Jagannadham v. Jammulu Ramulu, AIR 2001 SC 2699

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. At the instance of Assessee, Income Tax Appellate Tribunal, Allahabad (hereinafter referred to as "Tribunal") under section 256(2) of Income Tax Act 1961 (hereinafter referred to as "Act 1961') has referred following two questions, involved in both these cases, for opinion of this Court:

"(1)Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that for imposing penalty under section 271B of I.T Act, 1961, its initiation in the course of assessment proceedings, is not necessary within the meaning of Section 275(b)(c) of the above Act?

(2) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the penalty order passed by the learned Assessing Officer on 30.10.1990 was within the period of limitation laid down in Section 275 of I.T Act, 1961?"

2. Since both these cases relate to Assessment Years 1988-1989 and 1989-1990, involve similar questions, they have been heard together, and are being decided by this common judgment.

3. It is not disputed that notices dated 2.4.1990 and 26.6.1990 were issued to Assessee under section 271B of Act, 1961 requiring to show cause, why penalty be not imposed under the aforesaid provision, in respect of above mentioned Assessment Years for failure of Assessee in getting its accounts audited under section 44AB of Act.

4. Assessee replied notices vide letter dated 30.7.1990. Explanation furnished by Assessee did not find favour with Assessing Officer and accordingly it passed penalty order imposing penalty of Rs.24,768/- and Rs.27,990/- vide order dated 30.10.1990.

5. In appeal, Commissioner of Income Tax(Appeals) (hereinafter referred to as "CIT(A)' cancelled penalty for both the years on the ground that assessment for both years processed by Assessing Officer under section 143(1)(a) of Act, 1961 having been completed on 31.3.1989 and 31.3.1990, penalty under section 271B, could not have been levied, since Assessing Officer failed to initiate proceedings during the course of assessment proceedings.

6. The Order deleting penalty, passed by CIT(A) took recourse to provision of Limitation under section 275(1)(c) of Act, 1961.

7. When matter was brought before Tribunal at the instance of Revenue, it took the view that penalty proceedings were initiated well within the period of limitation and CIT(A) erred in law in holding otherwise and deleting penalty. Tribunal recorded its finding as under:

"The penalty proceedings having been initiated on 22nd of June, 1990 and 2nd of April, 1990, both the penalty orders passed on 30th October, 1990 are very much within the time

frame i.e within 6 months from the end of the month in which action for imposition of penalty was initiated. "

8. Assessee came to this Court under section 256(2) for seeking a direction to Tribunal to make reference and vide order dated 19.8.2006, this Court required Tribunal to refer the above mentioned questions for our opinion.

9. Shri S.D.Singh, learned Senior Counsel appearing for Assessee at the outset stated that though in question 1, there is a reference of Section 275(b) but in fact the matter has to be considered in the light of Section 275(1)(c) and therefore, we have corrected question no.1 and proceed to consider the aforesaid question in the context of limitation prescribed under section 275(1)(c) which reads as under:

*"**275.**(1) No order imposing a penalty under this Chapter shall be passed-*

(a) .....

(b).....

(c) in any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later."

10. The aforesaid provision contains two clauses: first is, after the expiry of financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, and, second is, within six months from the end of the month in which action for imposition of penalty is initiated. It further says that out of two, whichever is later shall apply.

11. Shri S.D.Singh, learned Senior Counsel submitted that both clauses in sub section (c) of Section 275(1) have to be read together and thus will be attracted to a case where penalty proceedings have been initiated during the process of assessment and limitation is end of financial year in which assessment proceeding is completed or six months whichever is later. This submission in our view is apparently misconceived and nothing but a complete misreading of Section 275(1)(c).

12. As we have already said, words "whichever period expires later" contemplates two periods of limitation. According to us, one is when action for "imposition of penalty" is initiated, the end of financial year of such proceeding when completed, and, secondly, when action for "imposition of penalty is initiated", it is six months there from, and, then whichever period expires later. For example, if penalty proceeding is initiated during the period of assessment, it is expiry of financial period in which the assessement proceedings are completed. Second, if notice for penalty is not issued during the course of assessment proceedings, instead thereafter, then it is six months

from the date of such notice. These are two different periods of limitation and "whichever is later" will govern limitation for penalty under section 271-B. If both these periods would have to be read conjunctively, the words 'whichever period expires later' not only would render redundant but in many a cases, it would create a situation where it will be difficult to find a reasonable period of limiation for complettion of penalty proceedings. The language of statute is simple and clear. We thus find no jusification to read both independent clauses, conjunctively or together, as suggested or argued by Shri Singh, learned Senior Counsel.

13. Learned Senior Advocate has relied on certain authorities but we find that some are inapplicable to the issue raised in this reference and some are against the proposition advanced by learned Senior Advocate on behalf of Assessee. We discuss the authorties cited at Bar in detail as under.

14. The earliest authority is ***Commissioner of Income-Tax, U.P versus Bankey Lal Hira Lal (1973) 92 ITR 587(All)***. Therein penalty proceedings were initiated under section 271(1)(c), that is concealment of income represented by cash credit entries in the accounts of four creditors during previous year, relevant to the assessment year 1963-64. Therein assessment had completed on 30.11.1963. A notice under section 271(1)(c) was issued on 25.4.1964 and thereafter order imposing penalty was passed. An objection was raised that penalty proceedings must have commenced before conclusion of assessment proceeding. It was argued that penalty proceedings were initiated by issue of a notice to show cause but since it was done after completion of assessment, hence illegal. Penalty for the purpose of Section 271(1)(c) is attracted where there is a case of concealment of particulars of income by Assessee or it has deliberately furnished in accurate of such income. This Court relied on a pari materia provision contained in Section 28(1) Indian Income Tax Act 1922 considered in ***Commissioner of Income Tax versus S.V.Angidi Chettiar (1962) 44 I.T.R 739*** wherein Court held that proceedings to levy penalty are not to be commenced by Assessing Officer before completion of assessment proceedings. To attract penalty under section 271(1)(c) only satisfaction of Assessing Officer in the assessment proceedings that there existed a case where conditions specified in clauses (a), (b) or (c) are specified, have to exist, since that is a condition for exercise of jurisdiction. Referring to Section 275(1) of Act, 1961, Court in ***Commissioner of Income Tax, U.P versus Bankey Lal Hira Lal (Supra),*** held that Section in its essential content is a provision prescribing period of limitation for making a penalty order. It is not a provision prescribing point of commencement of penalty proceedings. It is concerned with the order which concludes penalty proceedings. It further held, when it refers to "completion of proceedings in the course of which the penalty proceeding is commenced", in substance it identifies the former proceeding for the purpose of defining point of time from which period of limitation for making penalty order must be computed. This Court specifically noticed a Bombay High Court Judgement in ***Shakti Offset Works versus Inspecting Assistant Commissioner of Income Tax (1967) 64 I.T.R 637***, which took a similar view to what has been canvassed before us by Shri Singh, learned Senior Counsel but disagreed and dissented therewith. Bombay High Court took the view that initiation of penalty proceeding cannot be held over until after the completion of assessment and that section 271(1) and section 275 indicate that penalty proceeding has to be commenced before completion of assessment proceeding. This Court observed that Bombay High

Court seems to have considered that satisfaction of Income Tax Officer in the course of assessment proceeding itself constitute commencement of penalty proceeding, which is not correct. Disagreeing with this view of Bombay High Court, this Court said:

"if these observations are capable of being understood to mean that the Income Tax Officer must, besides recording his satisfaction, take further action by the issue of a notice to the Assessee before completing the assessment, we are unable with respect to agree with the proposition so laid down."

15. Court clarified in ***Commissioner of Income Tax, U.P versus Bankey Lal Hira Lal (Supra)*** that penalty proceeding commenced when action under section 271 is taken and Section 275 does not deal with the question, when such proceeding can be considered to commence, hence for the purpose of determining commencement of penalty proceeding, there is no need to look into Section 275. For that purpose section 271 should be looked into and when action is commenced therein, then for the purpose of limitation Section 275 would come into picture.

16. Karnataka High Court in ***Shanbhag Restaurant versus Deputy Commissioner of Income Tax (2004) 266 ITR 393 (Kar)*** has considered Section 275(1)(c) holding that it comprises of two parts. First part provides that no order imposing penalty under Chapter XXI could be made, in cases, which do not fall under section 275(1)(a) and (b) after the expiry of financial year in which proceedings in the course of which action for imposition of penalty, has been initiated, are completed. Second part relates to cases which prohibit passing of an order imposing penalty after expiry of six months from the end of the month in which action for imposition of penalty is initiated. It further says that out of the two parts, whichever period would expires later, would enure to the benefit of Revenue, and would apply. Having said so Court said that for the purpose of first part, financial year in which proceedings in the course of which action for imposition of penalty, is required to be understood as the proceedings relating to assessment order. The financial year in which proceedings in the course of which action for imposition of penalty has been initiated can be understood as the proceedings relating to imposition of penalty. It said that financial year in the first part of Section 275(1)(c) must be understood as the financial year where assessment order is made in the course of which proceedings for penalty could be initiated. Therein assessment order was made on 25.2.1994, hence, Court held that limitation contemplated in the first part expired on 31.3.1994. If the first part is not appplied, then comes the second part, Court said that a notice for imposition of penalty if issued under section 271, it would be period of six months there from which will cover the second part. In that case, notice was issued under section 271, for imposition of penalty on 8.6.1994 and penalty order was passed on 31.12.1994. Court held that order of penalty is within the period of six months under second part, hence within limitation, and upheld the same.

17. We are in respectful agreement with the aforesaid view which is clearly applicable in the case in hand also.

18. Similar view has been taken by Delhi High Court also in ***Subodh Kumar Bhargava versus Commissioner of Income Tax (2009) 309 ITR 31 (Del).*** Court has explained conditions by giving illustrations in paragraph 13 and 14 and we are reproducing the same as under:

"13. There may be cases which fall under section 275(1) (c) in which action for the imposition of penalty is initiated in the course of some other proceedings.There may also be cases under section 275(1)(c) in which the action for imposition of penalty is initiated, but not in the course of some proceedings. In the former category of cases, both the periods of limitation may be applicable, whereas in the latter category, only the second period of limitation of six months from the end of the month in which action for imposition of penalty is initiated, would apply. To illustrate this, let us take the first category of cases. This is that category where the action for imposition of penalty is initiated in the course of some other proceeding. In such a situation, it is obvious that both the period of limitation would come into play. One would be reckoned from the date on which the other proceedings are completed upto and including the end of the financial year in which that date occurs. The other period of limitation would be that which applies irrespective of the date of completion of the " other proceedings" and which is relatable simply to the date on which action for imposition of penalty is initiated.The period of limitation in such a case would be six months from the end of the month in which the action for imposition of penalty is initiated. It is clear that where penalty proceedings are initiated in the course of some other proceedings, the Legislature has provided for for two different periods of limitation. However, so that there is no confusion with regard to which of the two would apply, the Legislature has added the expression "whichever period expires later" at the end .To explain this ,let us take two examples:

Example 1:

Assumes that the action for imposition of penalty is initiated on March 15, 2007, in the course os some proceedings which are completed on March 25, 2007. On the basis of the forst part of section 275(1)(c), the period of limitation would end on March 31,2007, being the end of the financial year in which the proceedings in the course of which action for the imposition of penalty was initiated, is completed.However, taking recourse to the provisions of the second part of section 275(1) (c), the end of the period of limitation would be September 30, 2007. This would be so because the action for imposition of penalty was initiated on March 15,2007, implying thereby that the end of the month would be on March 31,2007. The period of six months from such date would end on September 30,2007. Thus, in this example, we are faced with two dates on which limitation would end. But, because of the expression " whichever period expires later", the period of limitation would have to be taken as September 30,2007, which is relatable to the date on which action for imposition of penalty was initaited and not to the date on which the proceedings, in the course of which action was initiated, are completed.

Example 2:

Let us assume that action for imposition of penalty is initiated on April 15,2007, in the course of proceedings which are completed on May 25,2007. Under the first part of section

275(1)(c), the period of limitation for passing an order imposing penalty would end on March 31,2008, being the end of the financial year in which the proceedings, in the course of which action for imposition of the penalty had been initiated, are completed. However, in terms of the second part of section 275(1) (c), the period of limitation would end on October 31,2007. This is because, the period of six months would have to be reckoned from the end of the month in which action for imposition of penalty was initiated. Action for penalty in this example was initiated on April 15 ,2007.The end of the month would be April 30,2007. Consequently, the period of six months from this date would end on October 31, 2007. Thus, in this example, we are once again faced with two periods of limitation; the period ending on March 31, 2008 being the end of the financial year relatable to May 25,2007, the date on which the proceedings were completed and October 31, 2007, being the date relatable to the initiation of the penalty proceedings. Once again, applying the expression " whichever period expires later", the period of limitation for this example would be March 31,2008.

14. The above two examples illustrates cases where the applicable period of limitation would be relatable either to the date of initiation of the penalty proceedings or to the date of completion of the proceedings in the course of which action for the imposition of penalty has been initiated. But there is a third / residuary category of cases where the initiation of action for imposition of penalty is not in the course of some proceedings. In such cases, the first part of section 275(1) (c) would have no application and it is only the period of limitation prescribed in the second part which would apply.Since only one period of limitation would be applicable,the expression" whichever period expires later" would have to be read as that very perod of limitation. The present case undoubtedly falls under section 275(1)(c) and, that too, under the second part thereof. Therefore, on a plain reading and on a logical analysis of the relevant provisions of the said Act, the period of limitation during which an order imposing a penalty could have been passed in the present case would be a period of six months beginning from the end of the month in which the action for imposition of penalty was initiated. We have already noticed above that the show - cause notice under section 274 read with section 271B of the said Act was issued on July 31,2003. Since that happened to be the end of the month also, the period of six months would have to be reckoned from that date. That would take us to January 31, 2004. Thus, the penalty order could have been passed on any date up to and including January 31,2004. The penalty order came to be passed on February 17, 2004, which would be hit by the bar of limitation."

19. The next decision cited at the Bar is ***Karan Vir Singh Gossal versus Commissiner of Income Tax & Another(2012) 349 ITR 692(SC).*** There the question up for consideration before Court was, whether levy of interest under section 234-A/234B of Act 1961 is mandatory or not. Relying on five Judges Bench decision of this court in ***Commissioner of Income Tax versus Anjum M.H.Ghaswala (2001) 252 ITR 1,*** Court held that interest under aforesaid provision is mandatory. Having said so, Court further proceeded to hold that there was no need for Assessing Officer to specifically recite in the order of assessment that penalty proceedings should be initiated as contended by Assessee. It further said as under:

" The recitation by Assessing Officer directing institution of penal proceedings is not obligatory and penal proceedings could be initiated for such default without a specific direction from the Assessing Officer."

20. The aforesaid judgment does not help us for interpretation of period of limitation under section 275(1)(c).

21. In ***Madan Roller Flour Mills versus Commissioner of Income Tax (2008) 301 ITR 1 (P&H)***, a Division Bench of Punjab and Haryana High Court had also an occasion to consider limitation under section 275(1)(c) in respect of penalty notice issued under section 271B. In reference thereto Court held that firstly so far as 271B is concerned, it does not require that initiation can only be during the course of some proceedings as no such phraseology is used therein. Chapter XXI of Act 1961 deals with penalty. Penalties under sections 271(1) and 273(1) are required to be initiated during the course of any proceedings in view of phrase "in the course of any proceedings" used in these sections. All other penalties in Chapter XXI can be initiated independently of any other proceedings. Something which is not required under section 271B cannot be super imposed by referring to Section 275. Having said so, Court therein found that assessment therein was completed on 31.3.1989 while Clause(c) was inserted in Section 275 with effect from 1.4.1989 and therefore had no application in that case. The aforesaid judgment which has been relied by Shri Agrawal, learned counsel for Revenue, therefore, does not help him for the purpose of construction of period of limitation under section 275(1)(c) of Act, 1961.

22. Looking to the facts of the present case, we find that assessments were completed on 31.3.1989 and 30.3.1990 in respect to assessment years 1988-89 and 1989-90. Notices for penalty in respect of assessment year 1988-89 was issued on 2.4.1990 and for assessment year 1989-90, issued on 20.6.1990. Penalty orders were passed in both the cases on 30.10.1990. In our view, penalty orders are within the period of limitation.

23. Now we may refer to some authorities cited by learned Senior Counsel on behalf of Assessee which in our opinion would not help him for answering the questions which are up for consideration in this reference.

24. Shri S.D.Singh, learned Senior Counsel has relied on a judgment in ***Commissioner of Income Tax versus E.C.C Project Pvt.Ltd. (2015) 374 ITR 44(All)*** which was decided on the question that no penalty would be leviable under section 271B of Act, 1961 where Assessing Officer has failed to record its satisfaction in the assessment order for levy of penalty. We find that even on this aspect, there is an authority of Supreme Court in ***Karan Vir Singh Gossal versus Commisisoner of Income Tax and another (Supra)*** which appears to have gone unnoticed noticed by this Court in the above case. It has proceeded to observe something which is contrary to law laid down by Supreme Court in ***Karan Vir Singh Gossal versus Commisisoner of Income Tax and another (Supra)***. Even otherwise, we find that the question of point of limitation under section 275(1)(c) has not been specifically considered ***Commissioner of Income Tax versus E.C.C. Project***

Pvt. Ltd.(Supra) therefore, that judgment would have no application for the issue to be considered in this Reference.

25. Next is a Division Bench of this Court in ***Bhola Nath Carpets Pvt.Ltd. versus Commissioner of Income Tax (2008) 299 ITR 413(All)*** but therein Court has considered applicability of Section 275(1)(b) and not 275(1)(c) as it has specifically said:

"we are not concerned herein with Clause-c of sub section (1) of Secton 275 of Act".

26. Shri Singh, learned Senior Counsel has also placed reliance on Supreme Court judgment in **M/s Frick India Ltd. versus Union of India (1990) 1 SCC 400** which was a case under Central Excise Act and has no application to the question raised in present reference. Similary there is another decision in ***Dipak Babaria and another versus State of Gujrat (2014) 3 SCC 502*** which is relied in support of the proposition, when a particular thing should be done in a particular manner, it must be done in that way. The exposition of law is well established but we find no application thereof to the case in hand.

27. In view of above discussions, we are of the view that there are two independent periods of limitation prescribed under section 275(1)(c). If what argued by Shri Singh, learned Senior Counsel, that both period should be read conjunctively, it would not only render the words "whichever is later" redundant but also do violence to simple phrase used by legislature in the aforesaid provision. It is a well settled principle of interpretation that plain reading of a statute must be preferred if it is clear. It must be read as it is and neither anything should be added nor ignored or omitted. We should not assume that legislature has left any scope of imagination or a provision must be read by applying casus omissus.

28. With respect to principles of interpretation of statutes in such matters, a Division Bench of this Court in **Surendra Vs. State of U.P. and others 2007 (6) AWC 6229** observed as under:

"Where the language of statute is clear and unambiguous there is no room for reading or interpreting statute in a manner, which may add a few words therein on the assumption that the legislature has left a vacuum need to be bridged by judicial interpretation. It is not the function of the Court to read something in the provision of law, which is not there, or find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intention of the legislature might be."

29. A Constitution Bench in **Behram Khurshed Pesikaka Vs. State of Bombay AIR 1955 SC 123** rejecting to interpret a law on the supposed difficulty of prosecution in improving the case, observed as under:

"The difficulty in the way of the prosecution proving its case need not deflect the Court from arriving at a correct conclusion. If these difficulties are genuinely felt it would be for

the legislature to step in and amend the law. It would not be the function of the Court to read something in the provisions of the law, which is not there, or to find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intentions of the Legislature might be. (Para-17)

30. It is settled principle of interpretation, where the words used are clear and unambiguous, Court is bound to construe them in their ordinary sense and it is not the function of Court to add words or expression for supposed assumption of what would have been the intention of the legislature. Court is not entitled to go beyond so as to supply an omission as if to play the role of a political reformer or counsel to the legislature.

31. A Constitution Bench in **Dadi Jagannadham Vs. Jammulu Ramulu and others AIR 2001 SC 2699**, in para 13, observed as under:

"The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

32. The Cardinal rule of construction is to find out intention of legislature in the words used by legislature itself. Court, in order to find out intention of the statute framing authority must look into the statute itself without any assistance from any other external factor unless there is some doubt or ambiguity in the construction of statute itself. It would be appropriate to remind, in the words of Lord Brougham, in **Robert Wigram Crawford Vs. Richard Spooner, 4 MIA 179 (187) (PC):**

"..if the legislature did intend that which it has not expressed clearly; much more, if the Legislature intended some thing very different; if the Legislature intended pretty nearly the opposite of what is said, it is not for judges to invent something, which they do not meet within the words of the text (aiding their construction of the text always, of course, by the context)."

33. Court in **S. Gurmej Singh Vs. sardar Pratap Singh Kairon AIR 1960 SC 122** also held that Courts are not to keep busy themselves with "supposed intention" or "with the policy underlying the statue" but must construe statute from plain meaning of the words used therein.

34. In **Aron Soloman Vs. A. Soloman & Co. Ltd. (1897) AC 22 (38) (HL) 5** Lord Watson observed- *"In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."* The aforesaid passage has been quoted

with approval in **R.L.Arora Vs. State of Uttar Pradesh, AIR 1964 SC 1230 (1244), Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. Vs. Workers Union AIR 1969 SC 513 (759), Hansraj Gordhandas Vs. H.H.Dave AIR 1970 SC 755 (759), Sri Umed Vs. Raj Singh AIR 1975 SC 43 (63/64), Commissioner of Sales Tax, U.P. Vs. Super Cotton Bowl Refilling Works AIR 1989 SC 922 (930), State of Madhya Pradesh Vs. G.S.Ball and Flour Mills AIR 1991 SC 772 (785) and Harbhajan Singh Vs. Press Council of India AIR 2002 SC 1351 (1356).**

35. We are aware that the rules of the interpretation are not rules of written or codified law and are not to be followed like rules enacted by legislature in Interpretation Act as observed in **Superintendent and Remembrance of Legal Affairs, West Bengal Vs. Corporation of Calcutta AIR 1967 SC 997.** The principles of interpretation serve only as a guide. A casus omissus cannot be supplied by Court. There is no presumption that a casus omissus exists. Court should avoid creating a casus omissus where there is none. It would be appropriate to recollect observations of Devlin, L.J. in **Gladstone Vs. Bower (1960) 3 All ER 353 (CA),** *"The Court will always allow the intention of a statute to override the defects of working but the Court's ability to do so is limited by recognized canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked.* ***We cannot legislate for casus omissus."***

(emphasis added)

36. Court in **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and others, AIR 1978 SC 548 (561)** quoted with approval, following observation of Lord Simonds in **Magor & St. Mellons R.D.C. Vs. Newport Corporation, (1951) 2 All ER 839 (841):**

"The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited."

37. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real casus omissus, it is equally evident that it should not interpret a statute so as to create casus omissus when there is really none. In **Vemareddy Kumaraswamy Reddy and another Vs. State of Andhra Pradesh 2006(2) SCC 670** Court reiterated that while interpreting a provision, Court only interprets the law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process.

38. In the present case, Section 275(1)(c) is very clear. In the light of above discussions, we answer both the questions in favour of Revenue and against Assessee.

39. The reference stands ***disposed of*** accordingly.

(2016) 9 ILRA 126
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 250 Of 2000

M/S Vertex Chemical Industries ...Appellant
Versus
Income Tax Appellate Tribunal, Lko. ...Respondent

Counsel for Appellant:
Manu Ghildiyal, S P Gupta, S.D.Singh

Counsel for Respondent:
C.S.C., A N Mahajan, B.J.Agrawal, Dhananjai Awasthi, R.K.Upadhyay

Held

The High Court dismissed the income tax appeal and upheld the Tribunal's order restoring the assessment made by the Assessing Officer. It held that a statement recorded under Section 132(4) of the Income Tax Act during search and seizure is an important piece of evidence and can validly be relied upon for making additions, though it is not always conclusive by itself. The Court clarified that where the assessee later retracts or explains such statement, the tax authorities must consider that explanation along with books of account and surrounding material. In the present case, the Assessing Officer had not made additions mechanically on the surrendered amount alone, but examined the books, seized documents, and explanations, and then made a reasoned addition of ₹8,12,360, which was less than the surrendered amount. Since the findings of the Tribunal were based on proper appreciation of evidence, both substantial questions of law were answered against the assessee and in favour of the Revenue.

CASE LAW CITED

Kailashben Manharlal Chokshi v. CIT, (2010) 328 ITR 411 (Guj)

Shree Ganesh Trading Co. v. CIT, (2013) 14 Taxman 262 (Jhar)

Pullangode Rubber Produce Co. Ltd. v. State of Kerala, (1973) 91 ITR 18 (SC)

CIT v. Radha Kishan Goel, (2005) 278 ITR 454 (All)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This is an appeal under Section 260-A of Income Tax Act, 1961 *(hereinafter to be referred as 'Act, 1961')* arising from the judgment and order dated 26.07.1999, passed in Income Tax Appeal No. 1885 (Alld) of 1992, by Income Tax Appellate Tribunal, Allahabad Bench, Allahabad *(hereinafter to be referred as 'Tribunal')* relating to Assessment Year 1990-91.

2. It was admitted on following two substantial questions of law:

"(a) Whether on the fact that cash book of appellant was found duly and completely posted, and no discrepancy was found in it, Tribunal was justified in holding that proviso to Section 145(1) of Income Tax Act is applicable and Assessing Authority was justified in estimating sales and taking out average gross profit of Assessee firm.

(d) Whether Tribunal was justified in holding that assessment should be made on the amount surrendered by Assessee on estimation basis at the time of search."

3. Appellant Assessee *(hereinafter to be referred as 'Assessee')* filed return for the Assessment Year *(hereinafter to be referred as 'A.Y.')* 1990-91, showing total income of Rs. 1,83,750/-.

4. Assessing Authority took into consideration the material collected in search and seizure operation conducted at the residential and business premises of Assessee on 22.08.1989 and 23.08.1989 wherein cash, jewellery and some incriminating documents were seized. An order under Section132(5) of Act, 1961 was passed on 15.12.1989 creating a tax liability of Rs. 19,08,468/- including penalty under Section 271(1)(c) of Act, 1961. Assessing Officer examined seized books and loose papers in the light of explanation submitted by Assessee and thereafter, computed income vide order dated 07.03.1992 as under:

S.N.	Particulars	Amount in Rupees	
	Net profit as per P & L A/c.	Rs.	71,049/-
1	Depreciation for separate consideration	Rs.	63,725/-
2	Income Tax	Rs.	1,12,705/-
3	Out of car maintenance 1/4th disallowed	Rs.	3,409/-
4	Out of car repairs	Rs.	2,720/-
5	Out of telephone disallowed	Rs.	1,000/-
6	Out of travelling expenses	Rs.	1,000/-
7	Extra profit as discussed as above	Rs.	55,838/-
8	Addition as per Annnexure AK-5 as discussed above	Rs.	7,030/-
9	Addition as per Annnexure AK-4 as discussed above	Rs.	30,030/-
10	Amount surrendered as discussed	Rs.	4,30,367/-

	above		
11	Stock surrendered as discussed above	Rs.	10,000/-
12	Profit surrendered U/s 132(4)	Rs.	50,000/-
		Rs.	**8,71,873/-**

Total Income b/f Rs. 8,71,873/-

Less: Admissible depreciation as under:

Depreciation as claimed Rs. 63,725/-
Less: 1/4th disallowed on
car UGW-7115 Rs. 4,210/-

Rs. 59,515/-
Rs. 8,12,358/-
or
Rs. 8,12,360/-

Thus the total income comes to Rs. 8,12,360/- on which assessment was completed. Tax effect was as under:

Total Income Rs. 8,12,358/-
Less: Firm's tax Rs. 1,95,414/-
Rs. 6,16,916/-

5. Assessee preferred appeal before Commissioner of Income Tax (Appeals)-I, Kanpur *(hereinafter to be referred as 'CIT(A)')* which was partly allowed and CIT(A) deleted addition of Rs. 4,30,367/-, 10,000/- and 50,000/- respectively. Besides relief in addition of Rs. 63,030/- and 55,838/- was also granted. The appeal was allowed granting a total relief of Rs. 6,10,235/-.

6. Aggrieved by the aforesaid order of CIT(A), Revenue preferred appeal No. 2117 (Alld)/1992 before Tribunal which has been allowed vide impugned judgment dated 29.09.2000 and reversing order of CIT(A), Tribunal has maintained and restored assessment order passed by Assessing Officer.

7. Sri S.D. Singh, learned Senior Advocate contended that various additions have been made relying on the statement of one of the partner of Assessee firm during search and seizure operation, though, subsequently Assessee retracted and took the stand that such statement was incorrect. He argued that on mere statement of Assessee given during search and seizure operation, additions could not have been made unless corroborated, since such statement per-se is not admissible in evidence. Reliance is placed on judgments in **(2010) 328 ITR 411 (Guj) Kailashben Manharlal Chokshi Vs. Commissioner of Income Tax, (2013) 14 Taxman 262 (Jhar) Shree Ganesh Trading Co. Vs. Commissioner of Income Tax, Dhanbad, (1973) 91 ITR 18 (SC) Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and another and (2005) 278 ITR 454 (AII) Commissioner of Income Tax Vs. Radha Kishan Goel.**

8. Learned Senior Counsel stressed upon the fact that no discrepancy in books of account of Assessee was found by Assessing Officer. With regard to Rs. 9 lacs, satisfactory explanation was furnished. No discriminating evidence regarding purchase or stocks was found, other than shown by Assessee in its return. He also pointed out that in similar circumstances in the case of M/s. Vertex Organics (a sister concern of Assessee firm) where also raid was conducted on same dates, Tribunal accepted contention of Assessee and confirmed order of CIT(A) and rejected Revenue's appeal for Assessment Year 1990-91. Copy of this order has been filed as Annexure No. 4 to the memo of appeal.

9. The counsel for Revenue on the contrary submitted that statement given during search operation is admissible in evidence and if there is nothing otherwise, such statement can be relied on for the purpose of making assessment against Assessee.

10. We have heard counsel for the parties at length and perused record.

11. It is not disputed before us that Assessee M/s. Vertex Chemical Industries is a partnership firm in which Sri Brij Lal Bhatia and his wife Smt. Usha Bhatia are partners. At the time of search and seizure, Sri Brij Lal Bhatia, one of the partner, made a statement, recorded by Authorized Officer under Section 132(4) of Act, 1961, and relevant extract thereof reads as under:

''मैं दो फर्मों जिनमें एक फर्म में मैं भागीदार हूँ और एक में मेरी पत्नी भागीदार है – इस दोनों फर्मों में 9 (नौ) लाख रूपए अघोषित आय के रूप में ैननतमदकमत करना चाहता हूँ। किस फर्म की कितनी अघोषित आय किस वर्ष में है यह मैं कागज देखने के बाद बताऊँगा। यह अघोषित आय ैजवबा अचल सम्पत्ति और दूसरे ेमज में प्दअमेजमक है। मैं इस नौ लााख की अघोषित आय पर आयकर अदा करूँगा। मैं यह स्वेच्छा से यह ैननतमदकमत 132(4) के अधीन कर रहा हूँ।''

12. Various additions were made by Assessing Officer in the light of aforesaid statement wherein he ultimately found justification of addition of Rs. 8,12,360/- for Assessment Year in question. Contention of learned counsel for appellant is that on such statement, addition is not justified.

13. Section 132(4) of Act, 1961 reads as under:

*"**Section 132(4)** - The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing **and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.***

Explanation.--For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the ***possession or control of any person*** *in the course of a search,* ***it may be presumed--***

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true ; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

14. Aforesaid provision makes it very clear that statement recorded on oath during the course of search and seizure by Authorized Officer may be used in evidence in any proceeding under Act, 1961. When something can be used as an evidence, meaning thereby, it is a relevant material to support a finding to be recorded in a particular manner. Such evidence, however, by itself, may not be a conclusive proof of everything, in every case. Whether such statement by itself is credit worthy to draw an inference or requires some further corroboration, depends on facts and circumstances of each case, the documentes and material collected etc. It is founded on the objective consideration by Assessing Authority and in every case neither it can be said that mere statement is sufficient to draw an inference nor it can be said that corroboration is always required.

15. Tribunal has found substance in approving finding of Assessing Officer with regard to additions of different amount, and has held that there was a transaction of Rs. 63,030/- which sought to be explained by stating that it represented receipts of M/s. Vikram Chemical Industries from customers in the capacity of Karta but that explanation was not found correct in view of noting in papers (AK-5) showing that amount have been received in excess. Tribunal has also noted that Sri Brij Lal Bhatia surrendered a sum of Rs. 50,000/- being undisclosed profit from the Firm, M/s. Vertex Chemicals i.e. Assessee for five years from A.Y. 1985-86 to 1989-90 and also surrendered Rs. 10,000/- as unexplained stock found at the time of search. On the date of search, ledger was found written upto June 1989 and same was the position of sale register of firm. Cash book was written up to 21.08.1989. Assessee was not maintaining stock register and bills in respect of purchase and sales, hence the same were not verified.

16. It is in these circumstances, Assessing Officer estimated sales at Rs. 63 lacs against sales disclosed as Rs. 62,36,678/- and applied a gross profit rate ranging from 9.2% to 11.27% during A.Y. 1987-88 to 1990-91. That is how it made addition of Rs. 55,838/-. Tribunal therefore, upheld addition of Rs. 55,834/- and Rs. 63,030/- and held that CIT(A) wrongly deleted the same.

17. With regard to addition of Rs. 4,30,367/-, Rs. 10,000/- being difference on account of stock, out of surrender of Rs. 9 lacs, Tribunal has said in para 7 of judgment as under:

"Regarding the addition of Rs. 4,30,367/- and Rs. 10,000/- being the difference on account of stock out of surrender of Rs. 9 lacs, and Rs. 10,000/- being in respect of unexplained stock, we find that the surrender was made during the course of search in respect of two firms and the Assessee himself was required to state as to what amounts pertained the learned CIT(A) does not appear to be justified in deleting the balance amount merely because the A.O. could find unexplained stock to the extent of Rs. 4,69,633/- whereas the surrender was not only with reference to investment in stock but also with reference to immovable property and other assets and during the course of search, surrender was in view of cash, jewellery and incriminating documents seized. Therefore, without referring the same, the learned CIT(A) is not justified in deleting the balance amount of Rs. 4,30,367/- as to that extent, the A.O. not find unexplained investment in stock. Similarly, the CIT(A) failed to appreciate than the amount of Rs. 50,000/- was surrendered by the Assessee being the profit of the firm M/s. Vertex Chemicals for five years from the Assessment Year 1985-86 to 1989-90 and the same could not be proved by the documentary evidence, therefore, the surrender was rightly considered as pertaining to the year of search and the same holds true in respect of Rs. 10,000/- being unexplained stock surrendered at the time of search. Under the facts and circumstances, the learned CIT (A) is not justified in deleting Rs. 4,30,363/- and Rs. 50,000/- and Rs. 10,000/-. Therefore, his order cannot be sustained with regard to the same."

18. These findings are not shown incorrect. The contention of learned Senior Counsel that accounts were found duly maintained and in order, is not correct. It is coupled with fact that there was voluntary disclosure by one partner of Assessee Firm. Hence, there was no reason, not to act upon evidence collected under Section 132(4) of Act, 1961.

19. There is no material on record to show that statement was obtained by Authorized Officer under any duress or during odd hours or there was any other justification in infer that statement recorded was not voluntary.

20. Various authorities cited on behalf of Assessee, we find, have considered the matter in the light of particular facts involved in those cases, hence do not help appellant in any manner.

21. In **Pullangode Rubber Produce Co. Ltd. (supra)** there was no issue with regard to a voluntary statement recorded by Authorized Officer during search and seizure operation. The question was, whether entries contained in the account books on the face of it could have been accepted. Therein entries contained in the accounts maintained by Assessee sought to be explained by Assessee differently, so as to reduce his liability. Court held that entries in the account books of Assessee amounts to an admission that amount in question has been laid out or expended for particular purpose though it may not be said to be excess. It is open to the person who made admission to show that it is incorrect. Relevant observations made by Court read as under:

"it is no doubt true that entries in the account books of the Assessee amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year. ..... It is open to the person who made the admission to show that it is incorrect."

22. The exposition of law is well established that an admission is the best evidence. It is however, always open to the person making admission to explain the same but whether explanation is credible or not would depend upon the material placed by such person who endeavour to explain his admission. Mere fact that an admission was explained, does not mean that admission will loose its nature of important piece of evidence. Competent authority who has to assess evidence, for valid reasons, can prefer to rely on admission and reject explanation.

23. In the present case, account books having not being found maintained in ordinary course of business and supporting material was also not maintained by Assessee, the alleged explanation of Assessee has rightly been rejected by Assessing Officer and Tribunal has also rightly affirmed the same. The judgment in **Pullangode Rubber Produce Co. Ltd. (supra)** therefore of no help to Assessee.

24. Then comes Division Bench judgment of this Court in **CIT Vs. Radha Kishan Goel (supra).** Therein question up for consideration was whether Tribunal was justified in holding that conditions laid down in explanation 5(2) of Section 271(1)(c) were fulfilled and no penalty was leviable therein. It was not a case where any statement was recorded by Authorized Officer during search and seizure operation under Section 132(4) of Act, 1961. In fact, after search and seizure conducted at the premises of Assessee on 30.08.1988, when cash, jewellery and other articles and things were found and seized, Assessee during the course of assessment proceedings, moved an application before Commissioner of Income Tax (hereinafter to be referred as 'CIT') agreeing to settle dispute. Thereupon, CIT made an endorsement that penalty proceedings under Section 271(1)(c) may not be applicable where additional income is discovered as the said income stood surrendered in the statement under Section 132(4) of Act, 1961 for which returns were due to be filed within statutory period. Since penalty still was levied hence dispute was with regard to justification of imposition of penalty. Court considered applicability of explanation 5 of Section 271(c) viz-a-viz the statement made under Section 132(4) of Act, 1961 and thereafter held as under:

"From a perusal of Explanation 5, it is evident that in circumstances, which otherwise did not attract the penalty provisions of section 271 (1)(c) of the Act, now a deeming provision was introduced as to attract the penalty provisions to those cases as well. But an exception is provided in clause (2) of Explanation 5 where the deeming provision will not apply if during the course of search the Assessee makes the statement under sub-section (4) of section 132 of the Act that the money, bullion, jewellery etc. found in his possession has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in section 139 of the Act and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any in respect of such income. The exception appears to be to provide an opportunity to the Assessee to make a clean and fair confession and to surrender his income and also to deposit the tax and interest thereon which may result in an agreed assessment. The paramount intention appears to be that in case of fair and clean confession and surrender of his income during the course of

search further litigation may be avoided and the Revenue may get the tax and interest etc. at an earliest and the Assessee may be saved from further litigation.

Under section 132 (4) of the Act, it is the authorised officer, who examine on oath any person, who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer.

It is a matter of common knowledge, which can not be ignored that the search is being conducted with the complete team of the officers consisting of several officers with the police force. Usually telephone and all other connections are disconnected and all ingress and egress are blocked. During the course of search person is so tortured, harassed and put to a mental agony that he loses his normal mental state of mind and at that stage it can not be expected from a person to pre-empt the statement required to be given in law as a part of his defence.

In these circumstances, we are of the view that under section 132 (4) of the Act unless authorised officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance of Explanation 5(2) of the Act. We are also of the opinion that in case there is nothing to the contrary in the statement recorded under section 132 (4) of the Act, in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business, which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money bullion, jewellery etc. Thus, we are of the opinion that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explanation 5 (2) inapplicable.

25. Real dispute was, when explanation 5(2) would be attracted. Court said, when a statement was recorded under Section 132(4) of Act, 1961, the person making statement is not expected to disclose on his own one or more facts but basically such a person replies to the questions asked by Authorized Officer since he examines such person on oath. It cannot be said that such person would state those things which are not asked by Authorized Officer. In absence of any question specifically raised by Authorized Officer with regard to the manner in which disclosed income was derived, it was not expected from person concerned who made statement to give facts in this regard. If such facts are disclosed subsequently, it cannot be said that explanation 5(2) of Section 271(c) is not complied with. Thus, aforesaid judgment does not help appellant in answer questions which we are required to adjudicate.

26. In the judgment of Gujarat High Court in **Kailashben Manharlal Chokshi (supra)**, therein search and seizure operation was conducted at the premises of Assessee on 04.11.1988. Statement under Section 132(4) of Act, 1961 was recorded in late night. Assessee made a disclosure of Rs. 7 lacs which

included Rs. 4 lacs towards unaccounted investment of house property, Rs. 1 lac towards unaccounted cash and Rs. 1 lac towards unaccounted investment in Gold ornaments. In January 1989, Assessee retracted to the said disclosure and claimed that disclosure was of only Rs. 50,000/-, Assessee submitted before Assessing Officer that disclosure of Rs. 7 Lacs was made under pressure and coercion, hence no cognizance of it should be taken while making assessment. Assessing Officer held that Assessee cannot retract from its disclosure, and made addition. In appeal, CIT(A) confirmed such addition and Tribunal also concurred. It is in these circumstances substantial question of law, came up for consideration before Gujrat High Court in **Kailashben Manharlal Chokshi (supra)**, was:

"Whether on the facts and circumstances of the case, the Tribunal was right in law in confirming the addition of Rs. 7 lakhs as disclosed in the statement under section 132(4) of the Act but retracted thereafter?"

27. Gujarat High Court held that in normal circumstances, it would not interfere in the findings of fact recorded by Revenue Authorities and Tribunal, but it can always look into the facts whether explanation tendered by Assessee at the time of assessment has been considered by authorities below or not. An addition, if made merely on the basis of statement recorded under Section 132(4) of Act, 1961 and no cognizance taken of subsequent explanation or retracted statement, such approach on the part of Revenue Authorities is not legal. Court found as a matter of fact, therein, that statement of Assessee was recorded under Section 132(4) of Act, 1961 at mid night. In such circumstances, it was too much, to give any credit to statement recorded at odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded in such odd hours, particularly when such statement is retracted. Observations to this effect in the judgment are reproduced as under:

"So far as the case on hand is concerned, the glaring fact required to be noted is that the statement of the Assessee was recorded under section 132(4) of the Act at midnight. In normal circumstances, ***it is too much to give any credit to the statement recorded at such odd hours.*** *The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours. Moreover,* ***this statement was retracted*** *after two months."*

(Emphasis added)

28. Court held that mere fact that statement was not retracted immediately but later on, may be an afterthought and might have come after legal advice but still retraction has to be viewed, may be in the light of statement furnished by Assessee along with affidavit and if a proper explanation comes in respect of all the items under which disclosure was made, the same has to be considered and if no discrepancy is found therein, should have to be accepted.

29. In our case, the aforesaid judgment has no application. The reason is that here is not a case of retraction by Assessee but during the course of assessment, documents produced by him have been examined threadbare and thereafter, reasons for addition have been given. This approach is evident from the fact that Assessing Officer has not mechanically made addition of Rs. 9 lacs which was disclosed in the

statement under Section 132(4) of Act, 1961 but actual addition is only Rs. 8,12,360/- which shows due application of mind on the part of Assessing Officer, which has been affirmed by Tribunal.

30. The last decision cited is a Division Bench judgment of Jharkhand High Court in **Shree Ganesh Trading Co. (supra)** where also a statement under Section 132(4) of Act, 1961 was recorded which was subsequently retracted. Judgment clearly shows that retraction of Assessee virtually remain unconsidered, inasmuch as, it was rejected without giving any reason whatsoever. With regard to the evidenciary value of statement recorded under Section 132(4) of Act, 1961 and manner in which it has to be considered, Court has said as under:

"We are of the considered opinion that ***statement recorded under section 132(4) of the Income Tax Act, 1961 is evidence but its reliability depends upon the facts of the case and particularly surrounding circumstances.*** *Drawing inference from the facts is a question of law. Here in this case, all the authorities below have merely reached to the conclusion of one conclusion merely on the basis of assumption resulting into fastening of the liability upon the Assessee. The statement on oath of the Assessee is a piece of evidence as per section 132(4) of the Income Tax Act and when there is incriminating admission against himself, then it is required to be examined with due care and caution."*

(Emphasis added)

31. The aforesaid judgments therefore, unequivocally lay down an exposition of law consistently that a statement recorded under Section 132(4) of Act, 1961 is an admission of Assessee and an important piece of evidence, but if subsequently Assessee provides an explanation or retracts from his earlier statement by supporting material to show that disclosure made in statement under Section 132(4) of Act, 1961 should not be accepted, Revenue Authorities are bound to consider such explanation or retraction or material brought on record by Assessee and thereafter, decide whether any addition is to be made in the light of statement under Section 132(4) of Act, 1961 or it require some dilution or a total rejection by accepting explanation or retraction of Assessee. The subsequent explanation or retraction or material placed by Assessee can neither be brushed aside nor ignored nor can prevail per-se on the statement under Section 132(4) of Act, 1961, so as to render it worthless.

32. In the present case, Assessing Officer has not made additions merely on such statement. It was looked into the explanation, account books and other material placed before it and then made addition of certain amount which is admittedly less than the amount of disclosure under Section 132(4) of Act, 1961. Tribunal has rightly affirmed the same.

33. We, therefore, answer both the questions against Assessee and in favour of Revenue and confirm the order passed by Tribunal.

34. The appeal accordingly lacks merit and hence is **dismissed** with cost.

(2016) 9 ILRA 136
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2016

BEFORE

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

Misc. Bench No.- 16981 Of 2016

Bharat Sanchar Nigam Limited ...Petitioner
Versus
Union Of India ...Respondent

Counsel for Petitioner:
Rajeev Kumar Sinha

Counsel for Respondent:
C.S.C., A.S.G.

Held

The Court disposed of the writ petition holding that recovery of cess under the Building and Other Construction Workers' Welfare Cess Act, 1996 cannot be made merely on the basis of a provisional assessment. It was held that the competent authority was under a legal obligation to pass a final assessment order first, after considering the petitioner's objections, and only thereafter recovery proceedings could validly continue. Accordingly, the petitioner was permitted to file objections within 15 days, the authority was directed to pass a final assessment within three weeks, and no coercive recovery steps were to be taken till then, subject to the petitioner's cooperation.

CASE LAW CITED

Builders Association of India v. Union of India

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

1. Heard Sri Rajeev Kumar Sinha, learned counsel for the petitioner and the learned standing counsel for the State that has initiated recovery proceedings against the petitioner and a recovery certificate dated 06.07.2016 has been issued which is under challenge in the present writ petition on the ground that the foundation of the recovery namely, the order order dated 10.10.2014 does not conform to the provisions of the Building and Other Construction Workers' Welfare Cess Act, 1996 and the Rules framed thereunder.

2. The contention is that firstly, the petitioner was not involved in any such construction activity for the past one decade so as to get assessed for payment of any payment of cess. Secondly, no proper notices were served on the petitioner and thirdly, there is no final assessment with regard to the cess as per the 1996 Act hence any recovery pursuant to the provisional assessment is without any authority in law.

3. Counter affidavit has been filed on behalf of the State where it is alleged that notices had been dispatched to the petitioner and when the petitioner failed to give any response then the Assessing Officer proceeded to provisionally assess the quantum of cess on the basis of information available on record vide order dated 10.10.2014. It is further stated in the counter affidavit that consequent to issuance of notice to deposit after provisional assessment, the petitioner submitted a reply dated 23.02.2015. However, since no cess was deposited, the competent authority was left with no option but to issue a recovery certificate.

4. It is further stated in para-14 of the counter affidavit that the petitioner did not submit the details of the work executed by the petitioner nor any objections were filed earlier pursuant to the notice issued, therefore, no final assessment order could be passed. The fact that no final assessment order has been passed is, therefore, admitted in the counter affidavit.

5. It is here that the learned counsel for the petitioner submits that the petitioner cannot be relegated to the alternative remedy of appeal as an appeal would lie against the final assessment order and not a provisional assessment notice.

6. It is also contended that in the absence of any power to make provisional assessment, the exercise is without any authority in law. Having failed to pass a final order in spite of the objections of the petitioner, the recovery proceedings are vitiated.

7. Learned counsel for the petitioner has relied on the Division Bench judgment of the Delhi High Court in the case of **Builders Association of India Vs. Union of India and another,** reported in **ILR (2007) Delhi 1143.** Learned counsel for the petitioner has invited the attention to the contents of para-36 of the said judgment to urge that the said judgment also indicates that final assessment has to be made whereafter a statutory appeal can be filed.

8. Having considered the submissions raised and having perused the aforesaid documents which have been placed on record as well as the contents of the counter affidavit filed on behalf of the State, we find that the imposition of the cess is based only on a provisional assessment and the recovery sought to be made on the ground that since the petitioner did not furnish details, therefore, the authority was left with no option but to proceed with the recovery.

9. The fact remains that the 1996 Act provides under Section 3 that after final assessment, the amount so assessed, can be calculated which would be subject to any advance payment of cess in this regard.

10. The collection of cess by way of recovery therefore, can be made after a final assessment order is passed which is, however, subject to appeal under the provisions of 1996 Act. Therefore, the absence of final assessment having not been successfully disputed by the learned standing counsel, we find that the respondent No.3 authority, was under an obligation to make a final assessment before proceeding to issue a recovery certificate.

11. Consequently, in the circumstances indicated above, the petitioner shall file its objection apart from whatever has been stated earlier, within fifteen days from today. The said objection shall be considered and a final assessment order shall be passed by the respondent No.3 within three weeks thereafter. The recovery so initiated shall, therefore, be subject to outcome of any such final orders that shall be passed by the authority as directed hereinabove. The respondent No.3 shall not undertake any coercive steps for recovery till such final orders are passed provided the petitioner files its objection and cooperates with the assessment proceedings.

12. The petition is disposed of with the said directions.

(2016) 9 ILRA 139
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2016

BEFORE

THE HON'BLE RAJAN ROY, J.

Review Petition No.- 329 Of 2010

Smt. Mohd. Jahan Begum & Anr. (M/S 349/2007) ...Petitioner
Versus
Board Of Revenue, U.P. Allahabad & Ors. ...Respondents

Counsel for Petitioner:
Vikas Singh, Jaspreet Singh, Karunanidhi Yadav

Counsel for Respondents :
R N Gupta, Apoorv Tewari, Mohd. Adil Khan, Mohd. Shadab Khan, Rajat Rajan Singh

Held

The High Court dismissed the review petition, holding that although it has inherent power to review its own judgments under Article 226 as a court of plenary jurisdiction, such power is limited to error apparent on the face of the record, discovery of new evidence, or other analogous sufficient reasons. The Court rejected the preliminary objection regarding maintainability and limitation, observing that no specific limitation period under Article 124 of the Limitation Act applies to review of writ judgments, and that the petition had been filed within a reasonable period. On merits, the Court held that the issues relating to Section 49 of the U.P. Consolidation of Holdings Act, Section 34 of the Tenancy Act, Section 6 of the Limitation Act, minority, and succession rights had already been considered in the original writ judgment, and the review petition was merely an attempt to seek a rehearing on merits, which is impermissible in review jurisdiction. Accordingly, no error apparent on the face of record was found and the review was dismissed.

CASE LAW CITED

Shivdeo Singh v. State of Punjab
Rajender Singh v. Lt. Governor, Andaman and Nicobar Islands
State of Rajasthan v. Surendra Mohnot
Sudama Devi v. Commissioner
Moran Mar Basselios Catholicos v. Mar Poulose Athanasius

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Shri Prashant Chandra, learned Senior Advocate assisted by Shri Jaspreet Singh, Advocate for the applicants-petitioners and Shri S.K. Kalia, learned Senior Advocate, Shri M. A. Khan, Senior Advocate and Shri Anil Tiwari, Senior, Senior Advocate assisted by Shri Rajat Rajan Singh, Mohd. Adil Khan, Mohd. Shadab Khan and Shri Apoorva Tewari, Advocate.

2. This is an application for review filed by the applicants-petitioners seeking a review of the judgment passed by the Writ Court on 27.04.2010 in Writ Petition No. 349(M/S) of 2007 by which the writ petition under Article 226 of the Constitution of India challenging the judgment dated 15.11.2006 passed by the Board of Revenue arising out of the proceedings in two Suits under Section 229-B and 176 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'Land Reforms Act, 1950'), respectively.

3. First and foremost a preliminary objection was raised by the Senior Counsel appearing for the opposite parties no. 4 and 5 on the ground that there was no provision for reviewing the judgment passed under Article 226 of the Constitution of India, secondly, the review application had been filed on 11.08.2010 i.e. after almost three months of passing of the judgment dated 27.04.2010, therefore, it was beyond the period of 130 days prescribed under Section 124 of the Limitation Act, 1963, that too, unaccompanied by any application under Section 5 for extension of limitation/condonation of delay in filing the same, therefore, not only interim order could not have been passed therein, but, in fact the review application itself was not maintainable and was liable to be dismissed.

4. Shri Prashant Chandra, learned Senior Advocate appearing for the applicants submitted that power was exercised by this Court by virtue of it being a Court of record having plenary powers to do complete justice between the parties and not under any provision such as Order XLVII C.P.C. etc. thus, the contention that there was no such power of review was misconceived. There is no question of application of the Limitation Act, 1963 to a review application arising out of writ proceeding under Article 226 of the Constitution of India.

5. The writ jurisdiction exercised under Article 226 of the Constitution of India is an extraordinary discretionary jurisdiction bestowed on the High Courts. By virtue of Section 141 C.P.C. the provisions of Code of Civil Procedure do not apply to such proceeding, therefore, the provision for review as prescribed under Order XLVII Rule 1 of the said Code, stricto sensu, does not apply to writ proceedings. There is no dearth of decisions to the effect that such powers of review are exercised by this Court in exercise of its inherent plenary powers to do complete justice for which no specific provision is required. It is also very well settled that in view of explanation to Section 141 C.P.C. the Code does not apply to writ proceedings. Nevertheless the exercise of such power can be guided by the Principles contained therein. Reference may be made in this regard to the constitution Bench judgment of the Supreme Court in the case of ***Shivdeo Singh Vs. State of Punjab*** reported in ***AIR 1963 SC 1909*** wherein it was held that "it is sufficient to say that there is nothing under Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it".

6. Reference may also be made in this regard to the decision of the Supreme Court reported in ***(2005) 13 SCC 289; Rajender Singh Vs. Lt. Governor, Andman and Nicobar Islands and others*** wherein it was held that "the power of judicial review of its own order by the High Court

inheres in every court of plenary jurisdiction to prevent miscarriage of justice." It was also a case of review arising out of proceedings under Article 226 of the Constitution of India.

7. Reference may also be made to a recent decision of the Supreme Court reported in ***(2014) 14 SCC 77; State of Rajasthan and another Vs. Surendra Mohnot and others*** which is on the same lines.

8. As far as the prescription of limitation of 30 days for an application for review of a judgment by a Court other than the Supreme Court under Section 124 of the Scheduled to the Limitation Act, 1963 and its application to the case at hand is concerned, this is an application seeking review of a judgment passed under Article 226 of the Constitution of India. Reference may be made in this regard to the decision of the Supreme Court reported in ***(1983) 2 SCC 1; Smt. Sudama Devi Vs. Commissioner and others*** wherein their Lordships observed that "there is no period of limitation prescribed by any law for filing a writ petition under Article 226 of the Constitution. It is in fact doubtful whether any such period of limitation can be prescribed by law. In any event one thing is clear and beyond doubt that no such period of limitation can be laid down either under rules made by the High Court or by practice. In every case it would have to be decided on the facts and circumstances whether the petitioner is guilty of laches and that would have to be done without taking into account any specific period as a period of limitation." The Supreme Court disapproved the order of the High Court dismissing the writ petition on the ground that it was beyond by time 136 days and that no explanation had been offered in this regard. On similar lines is the decision of the Supreme Court in the case reported in ***(1998) 8 SCC 685; State of U.P. and Others Vs. Raj Bahadur Singh and Another.***

9. It is also well settled that no limitation is prescribed under the Limitation Act, 1963 or otherwise for exercise of inherent powers, whether it be under Section 151 C.P.C. or the power of review as in this case which arises out of proceedings under Article 226 of the Constitution of India. A reference may be made in this regard to a Division Bench Judgment of this Court reported in ***Allahabad Rent Cases, 1990 (2) 444; Iqbal Siddiqui Vs. Smt. Kishwar Jahan (paragraph 19)*** wherein a plea based on the bar of the limitation prescribed under Section 124 of the Limitation Act was raised in respect of an application for review under Section 151 C.P.C. and not Order XLVII, Rule 1 of C.P.C. The Court was of the view that the prescription of Limitation Act under Article 124 was for a review application which was referable to Order XLVII, Rule 1 C.P.C. but not to an application under Section 151 C.P.C. invoking the inherent powers of the Court. Accordingly, it held that Article 124 of the Schedule contained in the Limitation Act was not involved.

10. Similar view was taken in a case reported in ***AIR 1929 Oudh 385; Mohammad Raza Vs. Ram Saroop and Others*** wherein by majority the Full Bench answered that "it is open to a party in a suit to invoke the inherent power of the Court to get the judgment and the decree amended under the provisions of Sections 151, 152 and 153 of the Code quite apart from the limitation applicable to the institution of an appeal or a review whether interference would be justified under such proceeding was a different matter to be considered on merits.

11. The Allahabad High Court Rules, 1952 do not contain any substantive provision for review of a judgment passed under Article 226 of the Constitution of India nor do they prescribe any limitation for exercise of the inherent power of review, nay, it could not have. The only provision is contained in Chapter V of Part 1 which is titled "JURISDICTION OF JUDGES SITTING ALONE OR IN DIVISION COURTS" and Rule 12 thereto merely prescribes the procedure as to how an application for review of a judgment shall be presented before the Registrar, who after doing the needful as per the said Rule. On bare perusal of the said Rule the Court finds that it is not a substantive provision prescribing for a review of judgment as aforesaid. Though it states that the Registrar shall present the same before the judge by whom such judgment was delivered along with an office report as to the limitation and sufficiency of Court fees it does not mean that a limitation has been prescribed for review of a judgment rendered under Article 226 of the Constitution of India. Chapters XXI and XXII of Part IV of the Rules of the High Court relate to enforcement of fundamental rights (writ in the nature of Habeas Corpus and direction or writ under Article 226 of the Constitution of India other than a writ in the nature of Habeas Corpus). None of the Rules therein contain a substantive provision for reviewing a judgment passed under Article 226 of the Constitution of India or a limitation for the same.

12. As has already been stated herein above, the power to review its judgment inheres in this Court as it exercises plenary jurisdiction to do complete justice and prevent its miscarriage. As there is no limitation prescribed for exercise of inherent power, therefore, it would be wrong to hold that limitation prescribed under Article 124 of the Schedule to the Limitation Act would govern the proceedings in question. Thus Article 124 of Limitation Act, 1963 is not attracted to a Review Petition seeking review of a judgment rendered under Article 226 of the Constitution of India. Having said so, the Court can not be unmindful of the legal position that whenever no such limitation is prescribed the action should be taken within a reasonable period. The reasonableness of a period would depend upon the facts and circumstances of each case and no hard and fast Rule can be laid down in this regard.

13. In this case the office/registry though it appears to have calculated the limitation, based on the provision contained under Article 124 of the Limitation Act, which was not applicable, made an endorsement that the Review Petition was within time.

14. In view of the above, the preliminary objection raised by the learned Senior Counsel appearing for the opposite parties that there is no power of review vested in the Court for review of the judgment in question or that it was barred by limitation is hereby rejected. In view of the aforesaid, the requirement of filing of an application under Section 5 of the Limitation Act, 1963 also does not arise though this Court must hasten to add that an explanation for a delay specially when it is inordinate and prejudicial to other side ought to be offered and can be called for by the Court. In the present case, the judgment was delivered on 27.04.2010. The certified copy of the corrected judgment was issued on 10.08.2010 after correction having been made on 17.05.2000. The review application was filed on 11.08.2010 in the Court. Thus, the review application was not filed with inordinate delay. In fact in para 34 a specific plea was raised that there is no limitation for the filing of a writ petition and there is also no limitation for the filing of a review application.

Thus, even on the basis of reasonableness of period, considering the facts of the case, the application for review is not liable to be thrown out, as, it was filed within a reasonable period of judgment passed by the Writ Court.

15. On the merits of the review application Shri Prashant Chandra, learned Senior Advocate contended that purport and effect of the bar under Section 49 of the U.P. Consolidation of Holdings Act, 1953 (For short 'Holdings Act, 1953), Section 34 of the United Provinces Tenancy Act, 1939 (For short 'the Tenancy Act, 1939), as also, the bar imposed by Section 6 of the Limitation Act, 1963 were not considered and appreciated by the Writ Court while passing the judgment under review. The Court failed to appreciate that by virtue of Section 34 of the Tenancy Act, 1939 the property, consequent to the death of her husband in the year 1950, devolved upon her by application of Muslim Personal Law as mentioned therein and not by Section 35 of the said Act. He contended that Shafiqur Rahman was duly represented through his Aunt in the proceeding before the consolidation authorities and after attaining majority he did not initiate any legal proceedings assailing the validity of the said orders passed by the consolidation authorities. In fact it was Atiqur Rahman, who in fact was a major at the relevant time and had contested the case, who filed the suit under Section 229-B of the U.P.Z.A.L.R. Act, 1950, that too, after the filing of a suit by the petitioners under Section 176 of the U.P.Z.A.L.R. Act, 1950 for demarcation/ partition of their share as already determined in the consolidation proceeding which had attained finality. He also contended that in the suit filed by the Atiqur Rahman the factum of the earlier consolidation proceedings and orders passed therein, which had attained finality up to the Deputy Director of Consolidation Level, were not disclosed and thus, a fraud was committed which vitiates the entire proceedings, but, this aspect of the matter has not been considered by the Writ Court while deciding the writ petition. It was contended that the initial suit filed by Atiqur Rahman in the year 1985 was based on adverse possession which presumed acceptance of the title of the petitioner and there was no claim based on Section 172 of the Land Reforms Act, 1950 on account of the subsequent marriage of the petitioners, therefore, without thereby being any pleading and any such ground in the suit the Board of Revenue had erred in allowing the claim of the respondents on the said count.

16. Per-contra learned Senior Counsel appearing for the respondents contended firstly that whatever has been argued was neither pleaded in the writ petition nor has it been pleaded in the review application, therefore, the same can not be considered. The pleas based on Section 35 of the Tenancy Act, 1939 and the bar of Section 49 of the Holdings Act, 1953, as also, the question of minority of the Shafiqur Rahman at the time of consolidation proceedings had been considered by the Writ Court while passing the judgment, therefore, the said issues are not open for re-consideration in proceedings for review. When the consolidation proceedings took place Shafiqur Rahman was admittedly minor and the Consolidation Court did not appoint any guardian in terms of Rule 14 of the U.P. Consolidation of Holdings Rules, 1954 (For short 'Consolidation Rules, 1954') under which only a male could have been appointed. It is alleged by the petitioners that his Aunt who had been appointed in some other proceedings by the Civil Court had represented his interest which was clearly in-violation of Rule 14 of the Consolidation Rules, 1954. These aspects have been considered by the Board of Revenue and the Writ Court. Moreover, after the death of Fazlur Rahman, the petitioner his wife remarried in the year 1952, similarly petitioner no. 2 who

was the daughter also got married, therefore, by virtue of provisions contained in Section 172 of the Land Reforms Act, assuming that any share in the estate of Fazlur Rahman (¼ share) devolved upon them, the same stood devolved back upon Shafiqur Rahman who was the nearest surviving male heir of Fazlur Rahman. Section 172 (2) would apply even to the case of petitioners who had allegedly inherited an interest in the holdings before the date of vesting. In the case of petitioner no. 2 Section 172(1) was applicable.

17. Further more, the plea based on Section 34 of the Tenancy Act, 1939 was absolutely misconceived and misleading, as, by the Muslim Personal Law (Shariat) Act 1937, Section 2 thereof, an exception was carved out by the words 'save questions relating to agricultural land' meaning thereby such Muslim Personal Law was not applicable to questions relating to agriculture land, therefore, the petitioners could not have inherited any interest/share in the agricultural holding of Fazlur Rahman which had to devolve on the male heir i.e. Shafiqur Rahman, who was a minor at that time. These aspects have been considered by the Board of Revenue.

18. Further more, it was contended that the reliance placed on Section 6 of the Limitation Act was also misconceived, as, for a suit under Section 229-B of the Land Reforms Act, no limitation was prescribed. He referred to the said provision, as also, opening line of Section 342 read with Rule 338 of the U.P. Zamindari Abolition & Land Reforms Rules, 1952 and Appendix III referred therein, a conjoint reading of which makes its ample clear that no such limitation is prescribed for initiating proceedings under Section 229-B. It being so the application of Section 6 of Limitation Act was misconceived.

19. Section 49 of the Holdings Act, 1953 would not be a bar in case where the party concerned was a minor and there was no compliance of Rule 14 of the Holdings Act, 1953, specially, when Section 172 of the Land Reforms Act, 1952 was applicable and in view of the Shariat Act 1937 the petitioners could not have inherited the property of Fazlur Rahman as Muslim Personal Law was not applicable in such matters. The ¼ share allegedly granted by the Consolidation Authorities was patently erroneous and was not saved by Section 49 of the Act, 1953.

20. It was further contended that in the garb of a review application the matter could not be reheard. Distinction between a review proceeding and appellate proceeding was also highlighted.

21. While it is true that there is nothing in Article 226 of the Constitution of India to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it but it is also equally true that there are limits to the exercise of such power of review. Such power may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the persons seeking review or could not be produced by him at the time when the order was made, which is not the case here; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any other sufficient reason. The words "any other sufficient reason"

means "a reason sufficient on grounds at least analogous to those referred hereinabove. ***(AIR 1954 SC 526; Moran Mar Basselios Catholicos and Anr. Vs. The Most Rev. Mar Poulose Athanasius and Ors.).***

22. As far as the term 'error or mistake apparent on the face of the record' is concerned, by its very connotation it signifies an error which is evident per-se from the records of the case and does not require any detailed examination, scrutiny and illustration either on facts or legal position. If an error is not evident and detection thereof requires long debate and process of reasoning it can not be treated as an error apparent on the face of the record for the purpose of order XLVII Rule 1 C.P.C. or review proceeding based on the principals contained therein. An order or decision merely because it is erroneous can not be reviewed on the ground that a different view could have been taken on a point of fact or law, as, the Court would not sit in appeal over its judgment. The decision being erroneous in law, is no ground for ordering review, unless of course the error in law is so palpable that there could be no other view in the sense that the matter had already been set at rest by any previous judgment of the Court or a higher Court from which there was no escape. Reference may be made in this regard to the Judgment of the Supreme Court dated 13.12.2012 rendered in Review Petition (C) No. 272 of 2007 arising out of Writ Petition (C) No. 633 of 2005.

23. The Court has carefully perused the pleadings of the original writ proceeding as also the review proceeding. The Court finds that various pleas which have been raised by Shri Prashant Chandra, learned Senior Counsel, no foundation for the same was/has been laid either in the pleadings of the writ petition or in the review application. It has not been said in the review application and the affidavit in its support that pleas based on fraud in not disclosing the earlier consolidation proceeding and provisions of Section 34 of the Tenancy Act, 1939 etc., were argued before the Writ Court but had not been taken into consideration.

24. In the review application it has been, inter alia, stated that the Writ Court committed a manifest error of law in not recording any finding in the light of the bar of Section 49 of the Consolidation of Holdings Act, 1953 specially as the consolidation proceedings which were hotly contested had attained finality up to the level of the Deputy Director of Consolidation. On a perusal of the judgment of the Writ Court, it is found that the bar of Section 49 of the Holdings Act, 1953 has been specifically considered and it was held that the same was not applicable. The Court has also taken into consideration the consolidation proceedings which have been referred by the petitioners, therefore, this ground is not available for seeking a review.

25. The other ground raised is that Writ Court erred in holding that the interests of the minor were not properly watched during the consolidation of holdings proceeding, as, no prejudice was caused, the petitioners having been held entitled to only ¼ share in the holdings of Fazlur Rahman, the rest having been made available to the opposite parties and that the Writ Court ignored the provisions of Section 6 of the Limitation Act. In this regard the Court is of the view that once the issue of minority of Shafiqur Rahman being barred by Section 49 of the Holdings Act, 1953 was considered by the Writ Court, then, to say that conclusions drawn were without any basis or justification may be a ground for appeal against the said judgment, but, not for seeking review.

26. As far as Section 6 of the Limitation Act is concerned, certainly this plea was raised by way of an amendment. The Writ Court while passing the judgment has categorically referred that it has gone through the contents of the writ petition including paragraphs 30-A, 30-B and 30-C which have been brought on record by application dated 23.04.2010 and the grounds A to H made in the writ petition as well as the counter and rejoinder affidavits filed by the contesting parties. It is also mentioned that it has perused various orders passed by the Revenue Authorities which are available on record. Now, ground-G is based on Section 6 of the Limitation Act. After the death of Fazlur Rahman in the year 1950 but before the date of vesting, the petitioner no. 1 is alleged to have inherited 1/4th share in his property, the petitioner no. 2 did so subsequently. It is also not out of place to mention that the land in question was agricultural land and this fact is not in dispute. The consolidation proceedings are said to have been completed sometimes in the year 1964. Under the orders of the Consolidation Authorities it is said that petitioners were held entitled to ¼ share in the holdings of Fazlur Rahman on the basis of Muslim Personal Law. Shri Prashant Chandra, learned Senior Advocate referred to Section 34 of the Tenancy Act, 1939 which according to him permitted devolution of holdings in accordance with the Personal Law to which the deceased was subject, in case a permanent tenure holder, a fix rate tenant, an occupancy or an ex-proprietary tenant in Oudh or a tenant holding on special terms in Oudh, dies. Assuming for a moment that Fazlur Rahman belonged to one of the category of tenants referred in Section 34 of the Tenancy Act, 1939, the application of Personal Law referred therein did not by itself make Muslim Personal Law applicable in view of the bar contained in Section 2 of the Shariat Act, 1937. When confronted Shri Chandra could not give any satisfactory reply on this issue. In Section 35 of the Tenancy Act, 1939 the holding of Fazlur Rahman was to devolve on a male lineal descendant in the male line of descent. The petitioners did not fall in this category. The order of the Consolidation Officer is not on record. It is not clear as to whether the petitioners had disclosed the factum of remarriage in those proceedings, as, under Section 172, even assuming that any interest had devolved upon them, the same would devolve back on the nearest surviving male heir.

27. Further more the writ proceeding arose out of a suit filed by the petitioners under Section 176 for division of their holdings based on the orders of the Consolidation Courts passed earlier and a suit under Section 229-B filed by Atiqur Rahman claiming that even after earlier consolidation proceeding he and others remained in possession and also on the basis of the factum of remarriage of the petitioners (Section 172 of the Land Reforms Act), therefore, it can not be said that the consolidation proceedings were not disclosed, may be, not in so many words, but, they were certainly referred in the plaint by way of an amendment. Both the suits were decided together. The proceedings ultimately went up to the Board of Revenue wherein it was held that the minor's interest was not represented properly. No guardian was appointed in terms of the Rule 14 of the Consolidation Rules, 1954. The petitioners had remarried thereby attracting the provisions of Section 172. The Board of Revenue decided the matter against the petitioners whereupon they filed the writ petition which was also decided against them.

28. It is not out of place to mention that for initiating a proceeding under Section 229-B of the Land Reforms Act, 1950 no limitation is prescribed under the Land Reforms Act. The application of the Limitation Act, 1963 to the proceeding under the said Act is qualified by the

opening words 'unless otherwise expressly provided for by or under this act'. Section 229-B does not prescribe any limitation. The U.P. Consolidation Holdings Rules, 1954 have been made under the Consolidation of Holdings Act 1953. Rule 338 provides that the suit, applications and other proceedings specified in the Appendix III shall be instituted within the time specified therein for them, respectively. This provision was inserted vide notification dated 27.04.1963. A perusal of Appendix III referred therein, specially the entry at Serial No. 39-B which was inserted by notification dated 16.11.1954 and relates to a suit under Section 229-B and the entry in Column No. 4 and 5 corresponding to the same, show that the word 'none' is mentioned therein. The heading of the said column is 'Period of Limitation' and 'Time from which period begins to run' which makes it amply clear that no such limitation is prescribed for such proceedings under Section 229-B.

29. For the reasons aforesaid, the pleas raised by the petitioners seeking review including the plea based on Section 6 of the Limitation Act, 1963 is misconceived. This Court while hearing a review application can not sit in appeal over the judgment passed in the writ proceeding nor can it review the judgment based on a rehearing of the matter.

30. In view of the law laid down in various judgments already referred herein above, the Court does not find any valid ground for reviewing the judgment dated 27.04.2010 passed in Writ Petition No. 349(M/S) of 2007.

31. The review application is, accordingly, dismissed. There shall be no orders as to costs.

(2016) 9 ILRA 148
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2016

BEFORE

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

Special Appeal Defective No.- 413 Of 2016

C/M Madarsa Ehl-E-Sunnat Noor-Ul-Uloom Atiqya & Anr. ...Appellants
Versus
Sri Prakash Singh, Secy., Minority Welfare & Ors. ...Respondents

Counsel for Appellants:
Laltaprasad Misra, Sharad Pathak

Counsel for Respondents:
G.A.

Held

The Division Bench disposed of the special appeal and upheld the order of the learned Single Judge closing the contempt proceedings on the ground of substantial compliance of the writ court's directions. The Court held that in civil contempt, the test is whether there exists a positive command and its wilful or deliberate disobedience. Since compliance by the State was not disputed and only the degree of compliance was questioned, no interference was warranted. However, the Court clarified that the State authorities remain duty-bound to ensure full and effective compliance of the earlier judgment, and the appellants are free to seek any other remedy available in law.

CASE LAW CITED

Midnapore Peoples Cooperative Bank Ltd. v. Chunilal Nanda
Special Deputy Collector (LA) v. N. Vasudeva Rao
S.M.A. Abdi v. Private Secretaries Brotherhood

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

1. This appeal has been filed under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 as an intra-Court Appeal in a matter arising out of a Civil Contempt Application No.2171 of 2014 that had been filed alleging disobedience of the judgment dated 8.1.2014 in Writ Petition No.2071 (MS) of 2011. A dispute had arisen in relation to extending the benefit of grant-in-aid to the petitioner-Madarsa which was brought to this Court assailing the Government Order dated 13.12.2006 and an order dated 29.9.2006 in Writ Petition No.78 (MS) of 2007. The orders were

quashed and a direction was given to the State Government to re-consider the case of the petitioners for extension of such benefits. The writ petition had been allowed on 23.7.2008 only on the issue of violation of principles of natural justice.

2. The State Government passed an order dated 17.2.2010 denying the benefit of grant-in-aid to the petitioner on the ground that there is a dispute about the Management of the Committee of the institution. The order was challenged that merely because there was a dispute, the same cannot result in denial of the benefit of grant-in-aid. The said order was quashed on 3.12.2010 and it was held that the grant-in-aid cannot be denied or withdrawn on account of such a dispute.

3. An order thereafter came to be passed by the State Government on 14.1.2011 whereby the inclusion of the name of the petitioner-Madarsa in the grant-in-aid list initially was cancelled. This writ petition No.2071 (MS) of 2011 was allowed vide judgment dated 8.1.2014.

4. Owing to non-compliance of the aforesaid judgment dated 8.1.2014, contempt application No.2171 of 2014 was filed.

5. It appears that an affidavit was filed on behalf of the State bringing on record the order dated 19.11.2014 indicating compliance of the judgment and extension of the benefit to the petitioner-institution. The learned Judge dealing with contempt matters, on such an affidavit being filed, has treated the same to be a substantial compliance of the directions of the Writ Court and has accordingly terminated the contempt proceedings.

6. Dr. L.P. Misra has raised a grievance that since the learned Single Judge has failed to exercise his jurisdiction, then keeping in view the judgment in the case of ***Midnapore Peoples' Cooperative Bank Ltd. v. Chunilal Nanda [(2006) 5 SCC 399]*** as also the judgment of the Apex Court in ***Special Deputy Collector (LA) v. N. Vasudeva Rao and others [(2007) 14 SCC 165]***, a Special Appeal is maintainable for the redressal of the grievances of the appellants.

7. He further submits that on account of the termination of the proceedings, an appeal under the Contempt of Courts Act, 1971 cannot be preferred under Section 19 thereof and consequently, the present appeal would be maintainable. For this, he has placed reliance on the Division Bench Judgment in the case of ***S.M.A. Abdi, the Principal Secretary (Law), Government of U.P., U.P. Secretariat, Lucknow and another v. Private Secretaries Brotherhood, Office of the U.P. State Law Officers and others [2010 (81) ALR 351].***

8. We have considered the aforesaid submissions raised and what we find is that the Division Bench judgment in the case of ***S.M.A. Abdi (supra)***, in paragraph - 2 thereof, has clearly indicated that the compliance of the judgment in that case was in relation to protection and bifurcation of a cadre of Private Secretaries in the Office of U.P. State Law Officers that had been interpreted by the learned Judge dealing with a contempt application in a manner which was found to be travelling beyond the directions that had already been issued by the Writ Court on the merits of the matter. The judgments cited by the learned Counsel for the appellants in the other two

decisions referred to here-in-above also relate to directions being issued by the Contempt Court which can be termed to be beyond the directions of the Writ Court. Here, the contention is that the learned Judge has failed to exercise jurisdiction.

9. We have examined the same and we find that the learned Single Judge has clearly recorded that the compliance indicates *'a substantial compliance'*. The learned Judge dealing with the contempt matter has not overstepped his authority in issuing any directions which may run counter to the directions of the Writ Court.

10. The grievance of the appellants is to the effect that the authority by not complying with the directions in it's entirety is not respecting the Majesty of this Court and therefore, the Court itself should take action as the matter of contempt is between the Court and the contemnor. It is urged that since there is a failure on this count, an appeal would be maintainable under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against a failure to exercise jurisdiction.

11. The issue which appears to be is of whether there is a substantial compliance or only a minuscule compliance of the directions of the Writ Court. In our opinion, the fact that there is a compliance has not been disputed. It is the degree of compliance which is being stated to be deficient and on that count, the enforcement has been prayed for by taking action.

12. A civil contempt has to be tested on the anvil of the existence of a positive command and it's wilful or deliberate disobedience by the contemnor.

13. An avoidance to comply by a ploy of mist or a pretence of obedience must be investigated before arriving at any conclusion of substantial compliance.

14. A compliance should not be a mere device to avoid punishment. The genuineness of the attempt and desire to obey the command should not be doubtful or deceitful.

15. The weapon of contempt is to ensure the existence of rule of law and this is achieved by instilling a fear of punishment on wilful disobedience.

16. The very purpose of contempt would be frustrated if disobedience is not suitably dealt with and is allowed to be perpetuated with impunity by observing abstinence.

17. The majesty of law, and the institution of Courts created to protect and enforce laws, would be at peril if situations of contempt are not dealt with deftly and promptly.

18. Compliance of a command has to be complete and effective so as to execute it in pith and substance. Any superficial handling or an intentional avoidance or a careless and casual approach would be skipping over the tolerant limits of judicial commands.

19. We find that the learned Single Judge has not committed any error in arriving at the conclusion of a substantial compliance, but at the same time, we may observe that the State Authorities are duty bound to ensure compliance effectively. We therefore do not find any ground to interfere with the order impugned, but keeping in view the nature of the relief that has been claimed by the appellants, we deem it fit and proper in the peculiar facts of this case to enable the authorities to proceed for compliance of the judgment dated 8.1.2014 in it's entirety that may be necessary keeping in view the contents of paragraph - 10 of the order of the State Government dated 19.11.2014. The disposal of this appeal or the termination of the contempt proceedings will not be an impediment in the passage of the appellants to seek any further remedy in law before this Court.

20. The Special Appeal stands ***disposed off*** accordingly.

(2016) 9 ILRA 152
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Writ A No.- 5337 Of 2016

Rais Ahmad **...Petitioner**
Versus
Smt. Kusum Sharma **...Respondent**

Counsel for Petitioner:
Ramendra Asthana, Rahul Saxena

Counsel for Respondent:
Salil Kumar Rai

Held

The High Court held that a release application under Section 21(1)(a) of the U.P. Act No. 13 of 1972 is maintainable for the bona fide need of the landlady's daughter-in-law, even though a daughter-in-law is not expressly included in the definition of "family" under Section 3(g). The Court observed that the term "family" has a wide and flexible meaning and must be interpreted in the factual context. Since the landlady's son is unquestionably a member of her family, his wife cannot be treated as belonging to a separate family, especially when there was no pleading or evidence showing that she lived separately. The Court emphasized that husband and wife must ordinarily be treated as part of the same family unit. Therefore, the need of the daughter-in-law to establish a P.C.O. business was accepted as the need of a family member, and the concurrent findings of bona fide need and comparative hardship recorded by the courts below were upheld. Accordingly, the writ petition was dismissed.

CASE LAW CITED

Sardar Ishwar Singh v. Smt. Kamta Devi, 1980 ARC 291
Thakurdeen v. Smt. Hero Devi, 1984 (2) ARC 117
Jagdish Singh v. ADJ, Dehradun, 1978 ARC 330
Keshav Narain Sharma v. Ist ADJ, Lucknow, 1981 ARC 627
Shyam Sunder Misra v. VIIth ADJ, 1989 (2) ARC 122
Smt. Kanti Devi v. Ist ADJ, Bahraich, 1998 (1) ARC 288
K. V. Muthu v. A. Ammal

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

1. The tenant Rais Ahmad has preferred this petition aggrieved by the judgement and order of release of the shop occupied by him by the courts below.

2. The release application was filed by Smt. Kusum Sharma, the respondent landlord under Section 21(1)(a) of the U.P. Act No.13 of 1972 (hereinafter referred to as the Act) alleging that the shop in dispute is required by her genuinely for establishing her daughter-in-law Smt. Jyoti Sharma, the wife of younger son Pankaj Sharma to run a P.C.O. to augment the income of the family.

3. The release application P.A. Case No.35 of 2012 was allowed by the judgement and order dated 12.03.2014 and the appeal preferred by the tenant was dismissed on 21.12.2015.

4. I have heard Sri Ramendra Asthana, learned counsel for the petitioner and Sri Salil Kumar Rai, learned counsel for the respondent. Both of them agreed for the final disposal of the petition.

5. Sri Asthana, has argued that the release application under Section 21(1) of the Act can be filed by the landlord for occupation by himself or any member of his family. The daughter-in-law of the landlady is not a member of her family. Therefore, she is not entitle to the release of the shop for the need of her daughter-in-law.

6. Sri Salil Kumar Rai, learned counsel for the respondent on the other hand contends that no such plea was raised by the petitioner in the courts below. The release application has been filed by the landlady for establishing her daughter-in-law, who is part and parcel of her family being the wife of the son of the landlady.

7. Section 21(1)(a) of the Act provides that landlord may apply to the prescribed authority for the release of the tenanted accommodation, if it is bonafidely required by him for occupation by himself or any member of his family. Thus, the need for the building has to be that of landlord or any member of his family.

8. The word 'landlord' has been defined in Section 3(j) of the Act to mean a person to whom the rent is or would be payable. In view of the aforesaid definition of the landlord, even a person authorised to collect rent on behalf of the owner would be a landlord but it is settled that for the purposes of Section 21 of the Act, the mere collector of rent cannot be recognised as the landlord and that a person having some better rights than mere collecting of rent in the shape of ownership would be the landlord.

9. The word 'family' has been defined in Section 3(g) of the Act to mean a spouse, male lineal descendants such parents, grand-parents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her and includes, in relation to a landlord any female having a legal right of resident in the building.

10. In short, the family of the landlord comprises of himself his spouse male lineal descendants, grand-parents and unmarried, widowed, divorced, judicially separated daughter or daughter of the male lineal descendants normally residing with him including any other family having a right of resident in the building.

11. The above definition of the family does not cover the wife of the male lineal descendant.

12. It is only for the above reason that Sri Asthana, emphasis that the daughter-in-law is not part of the family of the landlord and the release application for her need is not maintainable.

13. It may not be out of context to mention here that the last clause of Section 3(g) of the Act which defines family to include any female having a legal right of residence in the building cannot be applied to cases where the release is sought of a commercial building or shop and not of residential building.

14. In **Sardar Ishwar Singh Vs. Smt. Kamta Devi and others 1980 ARC 291** it has been held that the last clause of the definition of the family contain in Section 3(g) of the Act "including, in relation to a landlord, any female having a legal right of residence in that building" is not applicable in respect of non-residential building. Therefore, the daughter-in-law of the landlord even if having a legal right of resident with her would not be part of the family of the landlord for the purposes of the release of the shop in dispute under Section 21 of the Act.

15. Another decision of this court in **Thakurdeen Vs. Smt. Hero Devi and others 1984 (2) ARC 117** holds that ordinarily daughter-in-law of the landlord is beyond the ambit Section 3(g) of the Act and would not be included in the family of the landlord.

16. The aforesaid decision however further lays down that the use of the words "occupation by the landlord or member of his family" in Section 21 of the Act means not strictly the landlord or the members of his family but also those persons who normally reside with him. Thus, the need of landlord's daughter-in-law, who normally lives with him can also be considered for the release of accommodation.

17. In other words, the daughter-in-law of the landlord though not expressly included within the definition of the family of the landlord but would be deemed to be part of his family if she is normally residing with him. Thus, daughter-in-law of the landlord in certain circumstances can be part of the family of the landlord for whose need an application under Section 21 of the Act can be filed by the landlord.

18. In **Jagdish Singh Vs. Additional District & Sessions Judge, Dehradun and others 1978 ARC 330** while considering the provisions of Section 21 and Section 3(g) of the Act, the court held that a conjoint reading of the above provisions show that a person liable to be maintained by the landlord is a member of his family. A daughter-in-law is liable to be maintained by the father-in-law after the death of her husband and as such is very much part of the family of the father-in-law for whose need the release application is maintainable.

19. Even close relatives of the landlord like his nephew, nephew's wife and children living with him have been treated to be part of his family within the meaning of Section 3(g) of the Act in order to maintain a release application vide **Keshav Narain Sharma Vs. Ist A.D.J. Lucknow and others 1981**

ARC 627. In one another case **Shayam Sunder Misra Vs. Vith A.D.J. and others 1989 (2) ARC 122** this court held that the need of the persons, who do not come within the definition of the family of the landlord can also be considered if it is found that they are living with the landlord for assisting him.

20. In **Smt. Kanti Devi and others Vs. Ist A.D.J., Bahraich and others 1998 (1) ARC 288** it has been held that even a son of a married widowed daughter of the landlord living with him and supporting him is part of the family for whose need an application for release under Section 21 of the Act can be filed even though technically she may not fall within the definition of the family as per Section 3(g) of the Act.

21. The Apex Court in **K.V. Muthu Vs. A. Ammal AIR 1997 S.C. 628** observed that the word 'family' is of great flexibility and is capable of different meanings. Even if a particular person is not strictly included in the definition of the family of the landlord as given under Section 3(g) of the Act still a release application for the need of such a person is maintainable in certain circumstances. In the said case the need for nephew of the landlord, who was brought by him as his son was held to be a need of the family member of the landlord and the release application in that regard was entertained.

22. The crux of the above decisions vis-a-vis the definition of family contained in Section 3(g) of the Act is that the word family is of very wide connotation and even if any person may not strictly fall within its ambit but still may be treated to be part of the family of the landlord in certain circumstances for the purposes of maintaining a release application under Section 21(1) of the Act.

23. In the instant case, the landlady has two sons Manoj Sharma and Pankaj Sharma both married. The landlady has set up the need for her daughter-in-law that is the wife of his younger son. The two sons are very much the family members of the landlady. Since her sons are members of her family it obviously includes their wives also with them. The wives of the sons cannot be separated from the said family. It is beyond imagination to conceive of an idea that the husband would be part of one family and his wife would be part of another family. They both have to go together to be included in one family and if the son is the family member of the landlady, his wife also acquires the same status.

24. In addition to the above, in the absence of any pleadings and evidence that the daughter-in-law of the landlady is living separately and not as part of her family or that the landlady is not enjoying the company of her daughter-in-law, it is but natural to treat her as a person of the family of the landlady.

25. Accordingly, an application for release for the need of the daughter-in-law of the landlady is held to be maintainable.

26. In view of the aforesaid facts and circumstances, as no other point was raised and the matter stands concluded by the findings of fact on bona fide need and comparative hardship as are recorded concurrently by the courts below, I find no merit in the petition and the same is dismissed with no order as to costs.

(2016) 9 ILRA 156
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ A No.- 18457 Of 2013
&
Writ A No.- 35663 Of 2015

Mahendra Nath Pandey **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Swarn Kumar Srivastava, Anil Kumar Srivastava

Counsel for Respondents:
C.S.C.

Held

The High Court held that the fresh disciplinary proceedings initiated against the retired employee under Regulation 351-A of the Civil Services Regulations were barred by limitation and therefore illegal. It was ruled that once the earlier charge-sheet and inquiry report were set aside and a de novo inquiry with a fresh charge-sheet was directed after the petitioner's retirement, the proceedings would be deemed to have been instituted only from the date of the fresh charge-sheet, not the original 2005 charge-sheet. Since the alleged misconduct related to the period May 1998 to June 2000, and the fresh charge-sheet was issued only after retirement in 2011, it related to events more than four years old, violating the mandatory bar under Regulation 351-A proviso (a)(ii). Accordingly, the order directing fresh inquiry was quashed. Consequently, the order denying the petitioner's second promotional pay scale solely on the ground of pending disciplinary proceedings was also set aside, and the respondents were directed to reconsider his claim along with retiral and pensionary benefits in accordance with law.

CASE LAW CITED

None

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. These two petitions filed by a retired Assistant Engineer of the Public Works Department seek to challenge (i) the order dated 2 September 2009 by which the State Government has disapproved the report dated 27 January 2007 submitted by the Inquiry Officer in course of disciplinary proceedings held against the petitioner and considering the fact that the petitioner had

retired on 31 July 2009 has directed for issuing fresh charge-sheet and for continuing the disciplinary proceedings in accordance with Regulation 351-A of the Civil Services Regulations1 and (ii) the order dated 15 April 2015 negating the claim of the petitioner for grant of second promotional pay scale on account of pendency of the disciplinary proceedings.

2. The main submission of learned counsel for the petitioner is that the charges relate to the alleged irregularities committed by the petitioner during the period May 1998 to June 2000 whereas he retired on 31 July 2009 on attaining the age of superannuation. Thus, the charge against the petitioner relates to an event which took place more than four years before the institution of the fresh proceedings against him. It is urged that under Regulation 351-A, the Governor is competent to grant sanction for instituting proceedings only in respect of an event which took place not more than four years. However, in the instant case, the petitioner having retired on 31 July 2009 and the charges being in respect of an event which took place more than four years thus, could not form subject matter of disciplinary proceedings instituted at this stage.

3. On the other hand, learned Standing Counsel contended that the proceedings were initiated against the petitioner with the appointment of the Inquiry Officer by order dated 18 October 2005. Since the petitioner did not submit any reply to the charge-sheet issued to him by the Inquiry Officer, the enquiry was concluded exparte. The State Government finding that the enquiry was conducted without following the procedure prescribed under the Uttar Pradesh Government Servant (Discipline & Appeal) Rules, 19992, directed for continuing the enquiry proceedings as per the Regulation 351-A. In other words, the submission of learned Standing Counsel is that the enquiry against the petitioner having commenced prior to retirement, the bar contained under Regulation 351-A would not be attracted.

4. Before coming to the submission advanced by learned counsel for the parties, certain background facts deserve to be noted. The charge against the petitioner was in relation to alleged irregularities committed by him while he was posted as Assistant Engineer, Provincial Division, Public Works Department, Bansi, District Siddharth Nagar during the period May 1998 to June 2000. By an order dated 18 October 2005, a charge-sheet was issued to the petitioner and the Chief Engineer, Public Works Department, Gorakhpur was nominated as the Inquiry Officer. The petitioner did not submit his reply and consequently the Inquiry Officer concluded the enquiry exparte and submitted an enquiry report dated 27 January 2007. After considering the enquiry report, the proposal for imposing punishment upon the petitioner was sent to Uttar Pradesh Public Service Commission3 on 4 February 2008. The Commission by letter dated 9 July 2009 raised various objections in regard to the manner in which the enquiry was conducted. The State Government revisited the matter and found various deficiencies in the disciplinary proceedings. The Inquiry Officer had not conducted oral enquiry to bring home the charges levelled against the petitioner. The State Government, therefore, did not approve the report of the Inquiry Officer dated 27 January 2007 and it was accordingly, set aside with further direction for holding a de novo enquiry by issuing a fresh charge-sheet to the petitioner. It was further provided, having regard to the fact that the petitioner had retired on 31 July 2009, that the disciplinary proceedings shall be continued in accordance with the provisions of Regulation 351-A.

5. Regulation 351-A of the Civil Service Regulations is extracted below for convenience of reference :-

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused Government, if the pensioner is found in departmental or Judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during reemployment-

i. shall not be instituted save with the sanction of the Governor.

ii. shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

iii. shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P. shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission].

Explanation - For the purposes of this article-

(a) Departmental proceeding shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from and earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to a Civil court.

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

6. Regulation 351-A empowers the Governor to withhold or withdraw the pension or any part of it, permanently or for a specified period and to order recovery from a pension whole or part of any pecuniary loss caused to the Government if the pensioner is found in the departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to the Government by misconduct or negligence during his service. The said power is hedged with various safeguards in favour of the pensioner. The departmental proceedings could not be instituted after retirement (i) without the sanction of the Governor; (ii) shall not be instituted in respect of an event which took place more than four years before the institution of the proceedings; and (iii) shall be conducted by such authority or in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

7. The main issue before the Court is the date on which the departmental proceedings would be deemed to have been instituted against the petitioner as that would determine whether Regulation 351-A is attracted or not. According to the petitioner, the date of institution of the departmental proceedings shall be the date when fresh charge-sheet is served upon the petitioner in pursuance of the impugned order. It is submitted that any charge-sheet which would now be issued would attract the rigour of Regulation 351-A as it would be after the petitioner has retired. On the other hand, according to the respondents, the departmental proceedings shall be deemed to have commenced on 18 October 2005 when the charge-sheet was initially issued culminating in passing of the impugned order.

8. The Explanation to Regulation 351-A specifically provides that the departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him and if the officer has been placed under suspension from the earlier date on such date. Concededly, in the instant case, the petitioner was never placed under suspension. Thus the proceedings would be deemed to have been instituted on the date when the charges framed against the petitioner were issued to him.

9. Undoubtedly, the respondents had earlier issued a charge-sheet dated 18 October 2005 to the petitioner. An enquiry was also held on the basis of that charge-sheet but ultimately by the impugned order, the enquiry report was not approved and the charge-sheet issued to the petitioner was set aside. The State Government directed for a de novo enquiry being held against the petitioner after

issuing a fresh charge-sheet to him. The said order itself was passed on 2 September 2009 after the petitioner has retired on attaining the age of superannuation. Since the charge-sheet issued to the petitioner on 18 October 2005 itself has been set aside with a further direction to hold a de novo enquiry by issuing a fresh charge-sheet, it is not possible for this Court to accept the submission of learned Standing Counsel that the disciplinary proceedings shall be deemed to have commenced on the date when the earlier charge-sheet was issued. It was always open to the State Government while passing the impugned order dated 2 September 2009 to have directed for the disciplinary proceedings being held from the stage of issuance of the charges but such course was not adopted. It is clear from the impugned order that the State Government preferred not to adopt such a course as it was conscious of the fact that the petitioner had retired in the meantime. It is for the said reason that the order further provided that the disciplinary proceedings in pursuance of the impugned order shall be continued against the petitioner after ensuring compliance of Regulation 351-A. We are thus, of the view that Regulation 351-A will fully apply to the facts of the case at hand.

10. According to the case set up in the counter affidavit, a fresh charge-sheet dated 7 June 2011 was prepared in pursuance of the impugned order dated 2 September 2009. It was served on the petitioner by affixation on 18 February 2012. Though the service of fresh charge-sheet has been denied by the petitioner, but in any event, the same was after the petitioner had superannuated. Thus, there is no escape from the rigour of Regulation 351-A.

11. Undoubtedly, the permission of the Governor to hold enquiry against the petitioner after his retirement is contained in the impugned order itself, but the charges against the petitioner are in relation to the alleged misconduct on his part while he was posted as Assistant Engineer, Provincial Division, Public Works Department, Bansi during the period May 1998 to June 2000. The charge-sheet dated 7 June 2011 brought on record alongwith the counter affidavit proves the same. Thus, the fresh departmental enquiry is in relation to an event which took place more than four year. It is contrary to the safeguard provided in favour of pensioner under clause (a)(ii) of the proviso to Regulation 351-A. In such view of the matter, the direction contained in the impugned order dated 2 September 2009 for holding a de novo enquiry by issuing a fresh charge-sheet cannot be sustained and is hereby quashed.

12. The claim for grant of second promotional pay scale to the petitioner has been negatived only on the ground of pendency of the disciplinary proceedings in pursuance of the order dated 2 September 2009. In view of the findings recorded above that the disciplinary proceedings cannot be initiated against the petitioner at this stage, the order dated 15 April 2015 also cannot be sustained. Resultantly, the respondents shall now consider the claim of the petitioner for grant of second promotional pay scale, in accordance with law, preferably within a period of three months from the date of filing of a certified copy of this order before the concerned respondent. The petitioner shall also become entitled to his post retiral dues and other pensionary benefits, in accordance with law.

13. Writ Petition No.18457 of 2013 stands allowed with cost while writ petition 35663 of 2015 stands disposed of with the directions given above.

(2016) 9 ILRA 161
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE AMAR SINGH CHAUHAN, J.

Writ C No.- 15804 Of 2016

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

Counsel for Petitioners:
Kshitij Shailendra,Sumit Daga

Counsel for Respondents:
C.S.C.

Held

The Court held that since no award under Section 11 of the Land Acquisition Act, 1894 had been made, the petitioners' case was governed by Section 24(1)(a) of the RFCTLARR Act, 2013, and compensation must therefore be determined under the 2013 Act. It found the Collector's direction to assess compensation on the basis of the 1981 market value arbitrary and modified the order by directing that the market value be taken as on 01.01.2014, i.e., the date of commencement of the 2013 Act, in accordance with the Central Government's D.O. dated 26.10.2015 issued under Section 113. The Court further held that mere deposit of compensation in revenue deposit/government treasury does not amount to valid payment to landowners. Accordingly, the writ petition was allowed and fresh determination and payment of compensation was directed within the prescribed time.

CASE LAW CITED

Pune Municipal Corporation v. Harakchand Misirimal Solanki
Section 24(1)(a), RFCTLARR Act, 2013
Section 113, RFCTLARR Act, 2013

(Delivered by Hon'ble Tarun Agarwala, J.
&
Hon'ble Amar Singh Chauhan, J.)

1. In spite of a stop order, no counter affidavit has been filed. As oral request was made by learned Standing Counsel to grant further time to file the counter affidavit. Such request is rejected since there was a stop order by an earlier order of the Court dated 26.9.2016 granting the respondents three week's and no more time to file a counter affidavit.

2. The petitioners' father Kashmira Singh was the original tenure holder of the land in question being Khasra No. 311-M measuring 0.8350 hectares in village Lohari Khurd, Pargana Charthawal, Tehsil Sadar, District Muzaffarnagar. The name of Kashmira Singh was recorded in the revenue record. Upon his death, petitioners' name was recorded in the Khatauni of 1420 Fasli to 1425 Fasli. The petitioners' land was acquired sometimes in the year 1974-75. Pursuant to Notification issued under Sections 4 and 6 of the Land Acquisition Act, objections were filed by the petitioners which was rejected. For reasons best known to the respondents the award insofar as the petitioners are concerned, was not made under Section 11 of the Land Acquisition Act. The award of the co-sharers was however made. The petitioners were forcibly dispossessed from the land in the year 2014. Being aggrieved by this forceful dispossession, the petitioners filed Civil Misc. Writ Petition No. 52791 of 2014 which was disposed of by an order dated 07.10.2014 directing the petitioners to make a representation before the Collector, Muzaffarnagar who would decide the same by a reasoned and speaking order. The petitioners made a representation which was disposed of by an order dated 18.2.2016. The Collector, in its order, admitted that the land of the petitioners has been acquired and that neither the award has been made nor compensation has been paid. It has also been indicated that compensation was kept in the revenue deposit. The Collector has further directed the Special Land Acquisition Officer, Muzaffarnagar to determine the compensation by taking the market value of the land as existed in the year 1981 which was the date when the respondents deposited the amount in respect of other land holders in the revenue deposit.

3. The petitioners being aggrieved by the said order has filed the present writ petition.

4. Having heard the learned counsel for the parties, we find that the Land Acquisition Act has been repealed with effect from 01.01.2014 in view of Section 114 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the Act of 2013). With effect from 01.01.2014, the new Act of 2013 has come in force. Section 24(1)(a) of the Act provides that where no award under Section 11 of the Land Acquisition Act has been made, then compensation has to be determined under the Act of 2013. Section 26 of the Act 2013 provides the criteria for determining the market value of the land by the Collector. Proviso to Section 26 of the Act states that the date for determination of market value shall be the date on which the notification has been issued under Section 11 of the Act of 2013.

5. In the instant case, the notification was issued under the Act of 1894 which has now been repealed. The question that arises for consideration as to what would the appropriate date for determination of the market value of the land in question. As per impugned order, the Collector has directed the Special Land Acquisition Officer to determine the market value of the land on the date when the compensation was deposited in the revenue deposit. Prima facie this direction appears to be arbitrary. We find that under Section 113 of the Act, the Central Government has the power to make such provision or give such direction in case any difficulty arises for implementation of the Act.

6. For facility, Section 113 of the Act of 2013 is extracted hereunder:

*"**113 Power to remove difficulties**. - (1) If any difficulty arises in giving effect to the provisions of this part, the Central Government may, by order, make such provisions or give such directions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for the removal of the difficulty:*

Provided that no such power shall be exercised after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament."

7. In pursuance of the aforesaid provision, the Central Government has issued a D.O. No. 13013/01/2014-LRD(Pt.) dated 26.10.2015. In the said D.O., an issue was raised by Government of Maharashtra at Item No. 3 which is extracted hereunder:

"For calculation of market value, under section 24(1)(a), reference date should be 01.01.2014 (commencement of RFCTLARR Act, 2013) or date of issuing preliminary notification under Land Acquisition Act, 1894."

8. The opinion given by the Government of India is extracted hereunder:

"The reference date for calculation of market value, under section 24(1)(a) should be 01.01.2014 (commencement of RFCTLARR Act, 2013), as the Section reads "in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply. Under section 26 reference date is date of preliminary notification, but section 24 is a special case of application of the Act in retrospective cases, and a later date of determination of market value is suggested (i.e. 01.01.2014) with a view to ensure that the land owners/farmers/affected families get enhanced compensation under the provisions of the RFCTLARR Act, 2013 (as also recommended by Standing Committee in its 31st report)."

9. The Government of India has forwarded the aforesaid direction to all the Principal Secretaries of States/Union Territories for information and necessary action.

10. In our opinion the order issued by the Central Government is required to be implemented uniformly by all the State Governments and Union Territories including the State of U.P. There is no reason why the Collector should not apply the market value as existing as on 01.01.2014 on the land in question.

11. In the light of the aforesaid, the impugned order passed by the Collector, Muzaffarnagar dated 18.2.2016 is modified to the extent that compensation is required to be determined under Section 24 of the Act of 2013. The market rate of land would be such as applicable as on

01.01.2014 as per the D.O. of the Central Government dated 26th October, 2015. Such determination shall be made by the Collector/Special Land Acquisition Officer within six weeks from the date of production of a certified copy of this order and payment would be released accordingly within two weeks thereafter.

12. We also find from the impugned order that the compensation was kept in the revenue deposit. The Supreme Court in the case of **Pune Municipal Corporation and another vs. Harakchand Misirimal Solanki and others, 2014 (3) Supreme Court Cases 183** held that compensation is required to be deposited in the court and deposit of compensation amount in the Government treasury was of no avail and cannot be held to be equivalent to compensation paid to the land owners. The issue involved in this case is squarely covered by the said decision of the Supreme Court.

13. The writ petition is allowed.

(2016) 9 ILRA 165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2016

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No.- 45902 Of 2016

Lakshmi Prashad ...Petitioner

Versus

Commissioner (Judicial) Varanasi Region & Ors. ...Respondents

Counsel for Petitioner:
Purushottam Mani Tripathi

Counsel for Respondents:
C.S.C.

Held

The High Court held that the revision was maintainable against the mutation order passed under Section 34 of the U.P. Land Revenue Act, even after the enforcement of the U.P. Revenue Code, 2006. Relying on Section 231(1) of the Revenue Code, the Court clarified that all proceedings pending at the time of commencement of the Code are to be decided according to the law applicable before the Code came into force. Therefore, the revision could validly proceed under Section 219 of the U.P. Land Revenue Act. The Court further observed that where no appeal has actually been filed, revisional jurisdiction under Section 219 is akin to appellate jurisdiction and is a continuation of the original proceedings. It also held that amendment of the provision in the cause title from Section 210 of the Code to Section 219 of the old Act was a formal amendment, which could be allowed even ex parte, as no substantive right of the opposite party was affected. Accordingly, the writ petition was dismissed.

CASE LAW CITED

Section 231, U.P. Revenue Code, 2006
Section 219, U.P. Land Revenue Act

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. By means of this writ petition, the petitioner has sought a writ of certiorari for quashing the order dated 15.09.2016, passed by the respondent no. 1. By this order, a revision has been held to be maintainable and the objection of the petitioner that it was not maintainable has been repelled. Hence this writ petition.

3. The contention of learned counsel for the petitioner is that proceedings under Section 34 of the U.P. Land Revenue Act were instituted, whereupon an order was passed against which, the said revision was filed. The revision was filed invoking Section 210 of the U.P. Revenue Code, 2006.

4. On an earlier occasion, the petitioner had come up before this Court by means of writ petition no. 34423 of 2016 contending that against an order passed in a mutation case, an appeal would lie and that no revision against such an order was maintainable in view of the amendment that has been incorporated in Section 210 of the Revenue Code, 2006 itself. This Court vide order dated 22.08.2016 disposed of the writ petition directing the revisional Court to consider the application filed by the petitioner-opposite party, in the revision, regarding its maintainability.

5. The order impugned has been passed in pursuance of the earlier order of this Court dated 22.08.2016.

6. From a perusal of the record, it transpires that initially the revision had been filed invoking Section 210 of the U.P. Revenue Code, 2006. Subsequently on an amendment application, this provision was amended to read as Section 219 of the U.P. Land Revenue Act.

7. The contention of learned counsel for the petitioner is that this amendment was wrongly allowed.

8. The question therefore, which arises for consideration is as to the provision whereunder, an order passed in proceedings under Section 34 of the U.P. Land Revenue Act can be challenged once the Revenue Code, 2006 has been enforced.

9. The contention of learned counsel for the petitioner is that after the repeal of the U.P. Land Revenue Act, by enforcement of the U.P. Revenue Code, 2006, any appeal or revision, necessarily lies in accordance with the provision contained in the Revenue Code, 2006, and not in accordance with the provisions of the repealed Act.

10. From deciding this issue, Section 231 of the U.P. Revenue Code, 2006 is relevant and the same is extracted below:-

*"**Section 231:-Applicability of the Code to pending proceedings.**-(1) Save as otherwise expressly provided in this Code, all cases pending before the State Government or any revenue court immediately before the commencement of this Code, whether in appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had this Code not been passed.*

(2) All cases pending in any civil court immediately before the commencement of this Code which would under this Code be exclusively triable by a revenue court, shall be disposed of by such civil court according to the law in force prior to the date of such commencement."

11. Sub-section 1 of Section 231 quoted above, is in my considered opinion absolutely categorical. Therefore, an order on an application under Section 34 of the U.P. Land Revenue Act, is appealable and revisable in accordance with the provisions of the U.P. Land Revenue Act, itself and, therefore, the provision of Section 210 as also Section 219 of the U.P. Revenue Act are attracted and can be invoked even after the enforcement of the U.P. Revenue Code, 2006.

12. Under the circumstances, therefore, there is no illegality in the order, whereby the amendment application was allowed and the revision was stated to be one under the Section 219 of the U.P. Land Revenue Act.

13. It is settled law than an appeal is continuation of the proceedings or a suit.

14. It is contended that an appeal is continuation of the proceedings but a revision is not so. In the instant case, a revision has been preferred and therefore Section 231 of the Revenue Code shall not come into play.

15. A mutation order under Section 34 of the U.P. Land Revenue Act is amenable to an appeal under Section 210 of the said Act. Section 219 which provides for a revision states that a revision lies against orders which are not appealable or against orders which are appealable but no appeal has actually been filed.

16. These revisional jurisdiction can be invoked in place of appellate jurisdiction and therefore, in cases where a revision is filed instead of an appeal, in view of the provisions contained in the second part of Section 219, the same is akin to an appeal and must be held to be continuation of the proceedings.

17. For the reasons given above, this revision has rightly been held to be maintainable and I do not find any illegality in the said order. The writ petition is therefore, liable to be dismissed.

18. At this stage, learned counsel for the petitioner submits that the amendment application was allowed ex parte. Copy of the same have not been served upon him.

19. Although, in my considered opinion, nothing much turns upon this submission, however in case the petitioner considers it appropriate, he may file a recall application before the court concerned.

20. At the same time, it would be relevant to note that an amendment in the cause title of proceedings, which merely amends the section whereunder the said proceedings have been initiated, is an amendment which can be allowed at any stage, even without hearing, because no manifest right can be said to have accrued in favour of opposite party, which would necessarily require his being heard.

21. Subject to the above observation, this writ petition is dismissed.

(2016) 9 ILRA 168
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 10821 Of 2015

Naresh Kumar **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for Applicant:
Salman Ahmad

Counsel for Opposite Party:
Govt. Advocate

The applicant is the husband of the deceased and as the deceased did not have any issue, she developed mental frustration and used to remain in mental depression as a result of which she committed suicide.

Counsel for the applicant submitted that after the occurrence she was rushed to the hospital to give her medical succour but by that time, she had already died. It has further been submitted that thereafter inquest proceedings took place and the parents of the deceased were duly informed about the incident, who arrived on the information. Attention of the Court was drawn to the inquest report in which the first informant Jai Ram himself is one of the witnesses of the inquest and the applicant is also one of the witnesses of the inquest. Submission is that the applicant never ill-treated his wife nor ever demanded any dowry and, therefore, the complainant had not made any complaint against the applicant and his family members.

After considering the facts hon'ble court had granted the bail to the applicant with certain conditions

The applicant- Naresh Kumar, involved in Case Crime No. 411 of 2014, S.T. No. 111 of 2014, u/s 498A, 304B I.P.C. and 3/4 D.P. Act, P.S.- Kotwali Kalpi, District- Jalaun, be released on bail

(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 as the deceased did not have any issue, she developed mental frustration and used to remain in mental depression as a result of which she committed suicide. Further submission is that even after the occurrence she was rushed to the hospital to give her medical succour but by that time, she had already died. It has further been submitted that thereafter inquest proceedings took

place and the parents of the deceased were duly informed about the incident, who arrived on the information. Attention of the Court was drawn to the inquest report in which the first informant Jai Ram himself is one of the witnesses of the inquest and the applicant is also one of the witnesses of the inquest. Submission is that the applicant never ill-treated his wife nor ever demanded any dowry and, therefore, the complainant had not made any complaint against the applicant and his family members. Further submission is that though the police officers were very much present at the time of inquest but the first informant never made any complaint against the applicant though he was present all along. Subsequently, an application under Section 156(3) of Cr.P.C. in this regard was moved on 9.12.2013 while the incident in question is said to have taken place on 24.10.2013. Argument is that had there been any truth in the allegations made against the applicant about demanding of dowry and committing cruelty upon the deceased, then there is absolutely no explanation as to why and under what circumstances the first informant could not lodge the F.I.R. against the applicant for such a long period of time. Contention is that actually it appears on the face of the record that the F.I.R. is the result of confabulation and afterthought and only to blackmail the applicant. The bonafide post incident conduct of applicant in informing the parents, taking the wife to hospital, remaining present all throughout and not absconding from the scene of occurrence are some of the significant circumstances which are pointing towards his innocence. Such bonafide conduct when juxta-posed with the post incident conduct of the first informant inasmuch as he simply did not make even a whisper of grievance or complaint against accused, when looked and taken together become conclusive circumstances which run counter to the insinuating charge that has been flung against applicant. Much emphasis was also laid by the counsel on the period of detention and it has been pointed out that the applicant has spent more than two years in jail and he is behind the bars since 3.6.2014 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- Naresh Kumar, involved in Case Crime No. 411 of 2014, S.T. No. 111 of 2014, u/s 498A, 304B I.P.C. and 3/4 D.P. Act, P.S.- Kotwali Kalpi, District- Jalaun, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

(2) The applicant will personally appear on each and every date 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.

(2016) 9 ILRA 171
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 29808 Of 2016

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

Counsel for Applicant:
Sanjive Kumar Gupta

Counsel for Opposite Party:
G.A.

The present prosecution of the applicant is an out-come of malicious vengeance that has been firing upon the applicant because of the conspicuous background that much before the said incident the mother of the applicant (Smt. Ram Lali) had lodged a case under Sections 379, 323,504 IPC and Section 4/10 of the Forest Act, against the husband of the victim

Submissions made by the applicant counsel the present incident is said to have taken place on 16.8.2013 but no FIR was lodged with regard to the same and it was only after taking legal advice that an application under Section 156(3) Cr.P.C. was moved. Further submission is that even this application under Section 156(3) Cr.P.C. was moved on 25.8.2015, that is to say, after about more than 10 days of the said occurrence. Further submission is that if actually the rape had been committed upon the victim, there is no explanation as to how and why the FIR was not lodged by the police and as to why she (first informant) took so much time to move an application under Section 156(3) Cr.P.C.

The applicant- Hariom, involved in Case Crime No. 172 of 2016, u/ss 376 and 506 IPC P.S.-Dataganj, District-Budaun be released on bail

(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 learned counsel for the applicant is that the present prosecution of the applicant is an out-come of malicious vengeance that has been firing upon the applicant because of the conspicuous background that much before the said incident the mother of the applicant (Smt. Ram Lali) had lodged a case under Sections 379, 323,504 IPC and Section 4/10 of the Forest Act, against the husband of the victim, namely, Anand Pal and some others. This case was registered as

Case Crime No. 527 of 2013 at P.S. Dataganj, District Badaun. In this connection the victim husband, namely, Anand Pal, had been sent to jail and could be released on bail on 31.7.2015. Further submission is that being indignated by the same after he came out he has manipulated the present FIR against the applicant through his wife. Further submission is that though the present incident is said to have taken place on 16.8.2013 but no FIR was lodged with regard to the same and it was only after taking legal advice that an application under Section 156(3) Cr.P.C. was moved. Further submission is that even this application under Section 156(3) Cr.P.C. was moved on 25.8.2015, that is to say, after about more than 10 days of the said occurrence. Further submission is that if actually the rape had been committed upon the victim, there is no explanation as to how and why the FIR was not lodged by the police and as to why she (first informant) took so much time to move an application under Section 156(3) Cr.P.C. Further submission is that the medical evidence lends no corroboration to the alleged allegation made against the applicant. It is argued that even according to the version of the FIR, no hue and cry was raised by her at the time of incident, while normally in a place where the incident is said to have been committed several villagers are supposed to remain present and actually if such type of incident would have happened, there must be some witnesses of the occurrence and the incident of rape could not have gone so completely unnoticed. Further submission is that the conspicuous background of enmity with the victim's husband and the fact of his coming out of jail soon before lodging of the present FIR are strong circumstances to indicate the malafide nature of the prosecution and indicates false implication of the applicant in the case. 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 16.6.2016 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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- Hariom, involved in Case Crime No. 172 of 2016, u/ss 376 and 506 IPC P.S.-Dataganj, District- Budaun 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.

(2016) 9 ILRA 174
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No.- 14003 Of 2016

Sudhir **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Ram Raj Pandey

Counsel for Respondents:
G.A.

The petitioner has filed this writ petition with the prayer to issue a writ of certiorari quashing the impugned order dated 19.5.2016 passed by the Commissioner, Meerut Region, Meerut, in Appeal No. 36 of 2015-16 whereby confirming the order dated 7.12.2015 passed by the District Magistrate, Baghpat, in Computer Case No. D2015110800401, State Vs. Sudhir, arising out of the report under section 3/4 of the U.P. Control of Gundas Act, (herein after referred to as the 'Act') P.S. Chhaprauli, District Baghpat.

The contention of learned counsel for the petitioner is that the petitioner is innocent, he is not a habitual offender and he has no criminal history. However, due to dirty village politics a false and frivolous story was cooked up against him. Learned counsel has contended that the provisions of U.P. Control of Gundas Act, 1970 are not attracted, if there is only a solitary case against the accused. The learned counsel has placed reliance on the law laid down by the Hon'ble Apex Court in the case of ***Vijay Narain Singh v. State of Bihar and others, 1984 (3) SCC 40.***

Court observed that the impugned order dated 7.12.2015 passed by the Additional District Magistrate shows that the learned Magistrate has passed the order of externment of the petitioner on the basis of police report and also that the petitioner failed to adduce any evidence in his defence.

Considering the facts and circumstances of the case in the wake of the law laid down by Hon'ble Apex Court in ***Vijay Narain Singh***, this writ petition deserves to be allowed and the impugned orders dated 19.5.2016 and 7.12.2015 are liable to be quashed.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The petitioner has filed this writ petition with the prayer to issue a writ of certiorari quashing the impugned order dated 19.5.2016 passed by the Commissioner, Meerut Region, Meerut, in Appeal No. 36 of 2015-16 whereby confirming the order dated 7.12.2015 passed by the District Magistrate, Baghpat, in Computer Case No. D2015110800401, State Vs. Sudhir, arising out

of the report under section 3/4 of the U.P. Control of Gundas Act, (herein after referred to as the 'Act') P.S. Chhaprauli, District Baghpat.

2. Heard Sri Ram Raj Pandey, learned counsel for the petitioner and learned AGA for the State, which is the only opposite party. Perused the record.

3. Learned AGA has submitted that since only a legal question is involved in the present writ petition, there is no need to file counter affidavit on the part of State and the matter be decided in the wake of the settled legal position.

4. The contention of learned counsel for the petitioner is that the petitioner is innocent, he is not a habitual offender and he has no criminal history. However, due to dirty village politics a false and frivolous story was cooked up and he was involved in Case Crime No. 139 of 2015, under sections 323, 352, 427, 504, 506 I.P.C., P.S. Chhprauli, District Baghpat. It is further contended that in the aforesaid case the petitioner has already been acquitted by judgment and order dated 31.5.2016 passed by the A.C.J.M./ F.T.C., Baghpat, copy whereof has been filed as Annexure no. 4 to the writ petition. It is next submitted that apart from the aforesaid case, no other case has ever been registered against the petitioner. Learned counsel has contended that the provisions of U.P. Control of Gundas Act, 1970 are not attracted, if there is only a solitary case against the accused. The learned counsel has placed reliance on the law laid down by the Hon'ble Apex Court in the case of ***Vijay Narain Singh v. State of Bihar and others, 1984 (3) SCC 40*** and the judgment of coordinate Bench of this court, rendered in ***Criminal Misc. Writ Petition No. 6198 of 2015, Binni @ Vijan Vs. State of U.P. and others,*** decided on 7.4.2015 in which this court has relied upon its earlier judgment rendered in the case of ***Imran @ Abdul Qudus Khan v. State of U.P. And others, 2000 Cr. L.J. 1328.***

5. Considered the submissions.

6. The definition of the word "goonda" as defined under Section 2(b) of the Act, is reproduced as under:-

7. Section 2(b) defines a "goonda" as a person who:

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout; or

(vii) is a house-grabber.

8. The Apex Court in the case of ***Vijay Narain Singh*** (supra) while dealing with the provisions of the Bihar Control of Crimes Act, 1981, a law relating to preventive detention, wherein the word "anti-social elements" as defined in Section 2(d) of the Act, was para materia with the definition of the word "goonda" as defined under this Act, held in paragraph-31 as under:-

The expression 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. If connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. This appears to be clear from the use of the word 'habitually' separately in sub-clause (i), sub-clause (ii) and sub-clause (iv) of section 2 (b) and not in sub-clauses (iii) and(v) of section 2 (d). If the State Legislature had intended that a commission of two or more acts or omissions referred to in any of the subclauses (i) to (v) of section 2 (d) was sufficient to make a person an 'anti-social element', the definition would have run as 'Anti-Social Element' means 'a person who habitually is .....' As section 2 (d) of the Act now stands, whereas under sub-clause (iii) or sub-clause (v) of section 2 (d) a single act or omission referred to in them may be enough to treat the person concerned as an 'anti-social element', in the case of sub-clause (i), sub-clause (ii) or sub-clause (iv), there should be a repetition of acts or omissions of the same kind referred to in sub-clause (i), sub-clause (ii) or in sub-clause (iv) by the person concerned to treat him as an 'anti-social element'. Commission of an act or omission referred to in one of the sub-clauses (i). (ii) and (iv) and of another act or omission referred to in any other of the said sub-clauses would not be sufficient to treat a person as an 'anti-social element'. A single act or omission falling under sub-clause (i) and a single act or omission falling under sub-clause (iv) of section 2 (d) cannot, therefore, be characterised is a habitual act or omission referred to in either of them. Because the idea of 'habit' involves an element of persistence and a tendency to repeat the acts or omissions of the same class or kind, if the acts or omission in question are not of the same kind or even if they are of the same kind when they are committed with a long interval of time between the they cannot be treated as habitual ones.

9. The Apex Court in the case of ***State of Maharashtra and others v. Mehmud, 2007(12) SCC 358,*** once again had an occasion to deal with the provisions of Section 2(b)(i) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981, wherein the term "dangerous person" was defined, which is para materia with the word "goonda" under the Act and in that context, approved the view taken in ***Vijay Narain Singh*** (supra).

10. Thus what flows from the aforesaid discussion is that for a person to be a "goonda" under sub-clause (i) (b) of Section 2 of the Act, he is to be a person who has to his credit repeated/ persistent overt acts and not only an isolated/ individual act.

11. It is not disputed that there was only one case against the petitioner being Case Crime No. 139 of 2015, under sections 323, 352, 427, 504, 506 I.P.C., P.S. Chhprauli, District Baghpat, which has already been decided vide judgment and order dated 31.5.2016 passed by the A.C.J.M./ F.T.C., Baghpat, resulting in the acquittal of the petitioner.

12. The impugned order dated 7.12.2015 passed by the Additional District Magistrate shows that the learned Magistrate has passed the order of externment of the petitioner on the basis of police report and also that the petitioner failed to adduce any evidence in his defence.

13. Considering the facts and circumstances of the case in the wake of the law laid down by Hon'ble Apex Court in ***Vijay Narain Singh*** (supra), this writ petition deserves to be allowed and the impugned orders dated 19.5.2016 and 7.12.2015 are liable to be quashed.

14. Accordingly, the writ petition is allowed and the impugned order dated 19.5.2016 passed by the commissioner, Meerut Region, Meerut, in Appeal No. 36 of 2015-16 and order dated 7.12.2015 passed by the District Magistrate, Baghpat, in Computer Case No. D2015110800401, State Vs. Sudhir, arising out of the report under section 3/4 of the U.P. Control of Gundas Act, P.S. Chhaprauli, District Baghpat, are hereby quashed.

(2016) 9 ILRA 178
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2016

BEFORE

THE HON'BLE PANKAJ NAQVI, J.

Contempt Application (Civil) No.- 3761 Of 2016

Mangal Das ...Applicant

Versus

Sri Akhand Pratap Singh, D.M., Kaushambi & Ors. ...Opposite Parties

Counsel for Applicant:
Bhupendra Nath Singh, Devendra Pratap Singh

This contempt under Section 10 of The Contempt of Courts Act, 1971 has been filed for punishing the opposite parties for committing wilful/ deliberate disobedience of the judgment / decree dated 26.8.2008/ 10.9.2008 in Suit no.67 of 2007.

At the very threshold, the Court confronted the learned counsel for the applicant on the maintainability of contempt in view of the provisions of Order XXI Rule 32 CPC. Learned counsel for the applicant submitted that notwithstanding the availability of the remedy under Order XXI Rule 32 CPC, the application under Section 10 of the Act is maintainable.

The language of Order XXI Rule 32 CPC, it does not transpire that proceedings under Order XXI Rule 32 CPC cannot be invoked, once a decree of permanent injunction is satisfied. On the contrary, language is explicit, as it provides that as and when there is a wilful disobedience of a decree, it may be enforced by detention/ attachment or by both as against the party in default. The rationale is that in the event a decree-holder complains of wilful disobedience on the part of a judgment debtor, then the proceedings under Order XXI Rule 32, would involve investigation of facts and leading of evidence, as to whether there is any wilful disobedience or not and only thereafter, a finding can be arrived at as to the wilful disobedience. If so, then penal consequences of civil detention/ attachment of property or both would follow.

The Hon'ble Court has no hesitation in holding that the remedy, if any, for the applicant is to invoke the forum under Order XXI Rule 32 CPC, the instant contempt is not maintainable and is liable to be dismissed.

The contempt is dismissed *in limine*.

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

1. Heard Sri Bhupendra Nath Singh, learned counsel for the applicant.

2. This contempt under Section 10 of The Contempt of Courts Act, 1971 has been filed for punishing the opposite parties for committing wilful/ deliberate disobedience of the judgment / decree dated 26.8.2008/ 10.9.2008 in Suit no.67 of 2007.

3. The applicant claiming himself to be a tenure holder in possession of Arazi no. 633/01 (Area 0.160 hectare) filed a suit for permanent prohibitory injunction i.e, O.S. no.67/2007 against the opposite parties, which upon contest was decreed in his favour on 26.8.2008, but as the decree was sought to be disobeyed, he filed Execution Case no. 3/08, which was dismissed on 28.8.2012 on the ground that the decree is being obeyed. It appears subsequently a dispute arose afresh when the opposite parties were compelling the applicant to remove the boundary wall from Arazi No. 633/01, else the same would be removed by O.P.'s no. 3 to 6, which was protested by the applicant on 25.7.2016 before the Collector/ the Superintendent of Police concerned in view of the judgement/ decree dated 26.8.2008, but as the same was not responded, on the contrary, the opposite parties threatened to demolish the boundary wall involving the use of a JCB Machine, the applicant has rushed to this Court under Section 10 of the Act.

4. At the very threshold, the Court confronted the learned counsel for the applicant on the maintainability of contempt in view of the provisions of Order XXI Rule 32 CPC. Learned counsel for the applicant submitted that notwithstanding the availability of the remedy under Order XXI Rule 32 CPC, the application under Section 10 of the Act is maintainable. He also submitted that once a decree has been satisfied, subsequent disobedience could only be adjudicated through an application under Section 10 of the Act. He relied upon three judgments, i.e, ***S.K. Sarkar, Member, Board of Revenue Vs. Vinay Chandra Mishra, AIR 1981 SC 723, Pallav Sheth Vs. Custodian and others, (2001) 7 SCC 549*** and that of this Court in ***Vijay Pratap Singh Vs. Ajit Prasad, AIR 1966 Allahabad 305.*** On a pointed query, to which paragraph of the cited judgments does he rely, Sri Singh submitted that the Court may find out the same.

5. The approach of Sri Singh cannot be countenanced. Learned counsels are expected to assist the court without which the system of administration of justice cannot work. Learned counsel cannot take the liberty to cite authorities even without referring to the relevant paragraph of the cited judgment at a threshhold stage when the court has to formulate a prima facie view, as to the applicability of the cited authority on the facts of a particular case. This Court is reeling under huge arrears, wherein the system has evolved certain mechanism, to curtail the duration of arguments, but without sacrificing the cause of justice. A well established practice over the years has developed, where learned counsels either mark the relevant paragraph of the judgment or even orally refer to the relevant paragraph before it is cited as an authority. This necessarily facilitates the task of the judge as to the applicability/ relevance of a citation on the facts of the case, especially at the stage of cognizance. This assistance was lacking in the instant case, despite a request made by the Court.

Now a reference to the cited authorities.

6. The case of ***Pallav Sheth*** *(supra)* related to the period of limitation prescribed for initiating contempt under Section 20 of the Contempt of Courts Act, 1971 and power of this Court under Article 215 of the Constitution of India and nowhere in the said judgment the issue in hand was even remotely discussed.

7. The factual scenario in ***Vijay Pratap Singh*** *(supra)* is as under: -

Vijay Pratap Singh, an Advocate, filed a suit against the President, General Secretary of the U.P. Congress Committee and the General Secretary of the District Congress Committee, Azamgarh alleging that the election so held on 10.4.1964 for which the plaintiff and one Badri Singh were the only two candidates, the latter was declared elected despite illegalities/ irregularities in the conduct of the election, the election be declared as void/ inoperative. An ad interim order dated 18.4.1964 was passed restraining the District Election Officer and the Polling Officer concerned from holding elections of the DCC, PCC etc. It appears that the Congress Committee of the Indian National Congress, resolved that the election dispute be decided by a Tribunal constituted and not by recourse to judicial intervention and in furtherance thereof, letters were issued by the defendants of the suit to the Returning Officer expelling the plaintiff/ the contempt applicant from the Membership of the Congress. The learned Munsif vacated the ad interim injunction on the ground that the plaintff/ the contempt applicant is no longer a member of the Congress, which prompted him to file a contempt before this Court for punishing the defendants for committing contempt of the order of learned Munsif. An issue arose as to whether O.P. no.1 of the contempt upon having been appointed as a Governor of a State would still face contempt in view of the immunity granted to the office of Governor under Article 361(2) of the Constitution of India. In so far the other opposite parties were concerned, as they had issued letters to the plaintiff/ contempt applicant for approaching the Court of law as an anti-social/ reprehensible and a wilful misbehaviour without a word of regret/ apology, they were held guilty of contempt.

8. The third decision in the case of ***S.K. Sarkar*** *(supra)*, related to the jurisdiction/ power of the High Court to take suo motu action under Section 15 of the Contempt of Courts Act, 1971.

9. Beyond aforesaid, nothing less nothing more, was held, yet learned counsel for the applicant cited the said authorities in support of his contention.

10. The applicant has a decree of permanent prohibitory injunction in his favour. Order XXI Rule 32 provides the mode of execution of such a decree, which is extracted hereunder:

"32. **Decree for specific performance for restitution of conjugal rights, or for an injunction. -- (1)** ***Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both."***

11. A perusal of the aforesaid would manifest that a decree for an injunction can be enforced either by detention in prison or by attachment of the property or by both against the party, against whom a decree for injunction has been obtained, provided such a party has wilfully failed to obey it.

12. Ordinarily, contempt is not a mode of execution of a decree, when other modes have been provided. The Apex Court in ***Kanwar Singh Saini Vs. High Court of Delhi, (2012) 4 SCC 307***, had an occasion to examine the enforcement of interim/ final orders/ decree of the Court including undertakings given to the Court vis-a-vis contempt.

13. Paragraph 21 of the said judgment is quoted hereunder:

"The provision of Order 21 Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of Order 21 Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible."

14. Thus from the language of Order XXI Rule 32 CPC, it does not transpire that proceedings under Order XXI Rule 32 CPC cannot be invoked, once a decree of permanent injunction is satisfied. On the contrary, language is explicit, as it provides that as and when there is a wilful disobedience of a decree, it may be enforced by detention/ attachment or by both as against the party in default. The rationale is that in the event a decree-holder complains of wilful disobedience on the part of a judgment debtor, then the proceedings under Order XXI Rule 32, would involve investigation of facts and leading of evidence, as to whether there is any wilful disobedience or not and only thereafter, a finding can be arrived at as to the wilful disobedience. If so, then penal consequences of civil detention/ attachment of property or both would follow.

15. Thus, this Court has no hesitation in holding that the remedy, if any, for the applicant is to invoke the forum under Order XXI Rule 32 CPC, the instant contempt is not maintainable and is liable to be dismissed.

16. The contempt is dismissed in limine.

(2016) 9 ILRA 182
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Appeal No.- 1426 Of 2006
&
Criminal Revision No.- 2218 Of 2006

Ram Dularey Yadav **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
M.P. Yadav, D.C. Mishra, S.N. Yadav

Counsel for Respondent:
Govt. Advocate, Awadhesh Rai

The present criminal appeal has been filed by accused/ appellant, the sole convict against the judgment and order dated 10.03.2006 passed by Additional Sessions Judge, Court No.1, Mau in Sessions Trial No.111 of 2003 (State Vs. Ram Dularey and others), arising out of case crime no.179 of 2002, under Sections 363 & 366 read with Section 34 of the Indian Penal Code, P.S. Dohari Ghat, District Mau. By the impugned judgment and order in trial against the appellant and three others, the learned lower court did held only appellant Ram Dularey Yadav to be guilty of the offence and acquitted the three others and after hearing the convict on the point of sentence, sentenced him for the offence under Section 363 IPC for seven years' rigorous imprisonment with Rs.2000/- and under Section 366 IPC for ten years' rigorous imprisonment with fine of Rs.3000/- and in case of default in payment of fine to further undergo six months' imprisonment. By the present appeal the appellant has prayed that his conviction is liable to be set aside and allowing the appeal he may be acquitted of the charges.

Court finds that there are material contradictions in their statements as to the narration of the incident allegedly seen by them. While PW-1 has sated to have seen the appellant and victim talking with each other from a distance of 20 steps, the PW-2 has stated that after taking tea, at the tea stall of Sintu at a distance of 30-35 steps, when they left after 15-20 minutes, they saw the appellant and victim talking with each other. PW-1 has stated at page 6 of his cross-examination that first informant Virendra Kumar Yadav belongs to his family (*Khaandan*) and father of the victim lives in Jaunpur and similarly PW-2 at Page 3 of his cross-examination has stated that first informant Virendra Kumar Yadav happens to be his nephew as both of them belongs to the same village, but later on he has admitted that father of victim as well as father of first informant Virendra Kumar are his cousin brothers. Both the above witnesses have admitted that there is enmity between the prosecution party and the accused/ appellant over alleged forcible construction of gate by father of victim after encroaching upon the land of co-accused Ramgyan, the real brother of accused/ appellant Ram Dularey.

It is settled principle of law that the evidence of interested or related witnesses should be considered with caution and until and unless it is found to be trustworthy the conviction of accused on the basis of evidence of related or interested witness is not justified. After considering the fact and the unnatural conduct of PW-1 and PW-2, court considered view that they are not proved to be eye witnesses of the incident of enticing away victim by accused/ appellant in presence of co-accused persons or otherwise and their testimony is neither reliable nor trustworthy.

In the present case there is sufficient reason for drawing adverse inference against the prosecution for not producing the parents of victim to the witness box before the trial court. The evidence on record shows that PW-1 and PW-2 were not the eye witnesses of alleged incident of fetching the victim by accused/ appellant in broad day light at 10.00 a.m. instead of choosing sometime of loneliness in the late evening or early morning, and they have been set up subsequently in order to improve the case against the accused persons. The above witnesses are interested witnesses and their unnatural conduct and contradictory testimony is not reliable for holding the accused/ appellant guilty and the learned trial court has misread the evidence on record. I am of the considered view that the prosecution has failed to prove its case to the hilt beyond any shadow of reasonable doubt and has failed to bring home the charges against any of the accused by any cogent, reliable, independent and trustworthy evidence. Considering the totality of facts and circumstances, it is a fit case where the accused/ appellant is entitled to be given the benefit of doubt and the prosecution case is liable to be rejected. The accused/ appellant is also entitled for an order of acquittal.

The appeal is allowed accordingly and the impugned judgment and order of conviction and sentence of appellant Ram Dularey Yadav is set aside and he is held not guilty of the offences under Sections 363 & 366 IPC. Dismissing the criminal revision no.2218 of 2006 impugned judgment and order of acquittal of opposite party nos.2 to 4 Ramgyan, Surendra Nath Yadav and Smt. Subhawati is confirmed.

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

1. The present criminal appeal has been filed by accused/ appellant, the sole convict against the judgment and order dated 10.03.2006 passed by Additional Sessions Judge, Court No.1, Mau in Sessions Trial No.111 of 2003 (State Vs. Ram Dularey and others), arising out of case crime no.179 of 2002, under Sections 363 & 366 read with Section 34 of the Indian Penal Code, P.S. Dohari Ghat, District Mau. By the impugned judgment and order in trial against the appellant and three others, the learned lower court did held only appellant Ram Dularey Yadav to be guilty of the offence and acquitted the three others and after hearing the convict on the point of sentence, sentenced him for the offence under Section 363 IPC for seven years' rigorous imprisonment with Rs.2000/- and under Section 366 IPC for ten years' rigorous imprisonment with fine of Rs.3000/- and in case of default in payment of fine to further undergo six months' imprisonment. By the present appeal the appellant has prayed that his conviction is liable to be set aside and allowing the appeal he may be acquitted of the charges.

2. Against the impugned judgment and order with respect to the acquittal of co-accused Ram Gyan Yadav, Surendra Yadav and Smt. Subhawati Devi, criminal revision no.2218 of 2006 has also been filed by first informant Virendra Kumar Yadav seeking relief of setting aside their acquittal order and convicting them along with Ram Dularey for the offences under Sections 363 & 366 read with Section 34 IPC as well as for enhancement of sentence imposed on appellant Ram Dularey.

3. The FIR of this case was lodged by Virendra Kumar Yadav on 18.05.2002 at 00.10 a.m. against four persons named therein at Police Station Dohari Ghat, District Mau at case crime no.179 of 2002, under Sections 363 & 366 IPC. The averments of FIR in brief are as under:-

"That the victim, sister of the first informant, student of Class 9 aged about 13 years 3 months (D.O.B. 15.02.1989) proceeded to meet to her friend from the house of first informant; that there is a P.C.O. of Ram Dularey Yadav, who has enticed away the first informant's sister at about 10.00 a.m. on 14.05.2002 when she was going to meet her friend and had taken her somewhere else from Rasoolpur Market; that the first informant made search of his sister for several days, but could not know her whereabouts and when he asked the accused persons, instead of making any help in search of his sister, they threatened him."

4. After lodging of FIR, investigation was completed by the Investigating Officer and charge sheet was submitted against four accused named in the FIR and after taking cognizance, the case was committed to the court of Sessions. After committal of case, in Sessions Trial No.111 of 2003, charges were framed against all the four accused for committing the incident in question under Sections 363/ 34 and 366/34 IPC. The accused denied from the charges and claimed trial.

5. In order to prove its case and charges against the accused persons, the prosecution produced Laxmi Yadav and Kripa Yadav as eye witnesses as PW-1 and PW-2, Virendra Kumar Yadav being first informant as PW-3, Shiv Kumar Singh, Sub-Inspector, Investigating Officer of the case as PW-4, Jagdish Yadav, Head Constable to prove the Chik FIR as PW-5 and Satya Ram, Assistant Teacher, to prove the age of the victim according to School Register as PW-6.

6. After completion of prosecution evidence, statements of the accused persons were recorded under Section 313 Cr.P.C., who did not produce any witness in defence evidence. The learned Additional Sessions Judge after hearing the parties' counsel and perusal of record, by the impugned judgment and order acquitted the three persons named in the FIR and convicted the appellant Ram Dularey Yadav for the offence under Section 363 & 366 read with Section 34 IPC and sentenced him as mentioned above.

7. Heard Shri Jitendra Kumar Yadav, Advocate holding brief of Shri S.N. Yadav, learned counsel for the appellant in criminal appeal no.1426 of 2006 and counsel for the opposite parties in criminal revision no.2218 of 2006 and learned A.G.A. for the State. No one appeared for the first informant in criminal appeal no.1426 of 2006 or for revisionist in criminal revision no.2218 of 2006.

8. Learned counsel for the appellant assailed the impugned judgment and order on various points, which will be discussed hereinafter while the learned A.G.A. supported the impugned judgment and order and submitted that the appeal has been filed with false and baseless allegations and is liable to be dismissed.

9. None appeared to argue the revision filed by the first informant against the acquittal of three accused and the learned counsel for the opposite parties submitted that the acquittal of opposite parties does not suffer from any illegality, irregularity or incorrectness and so the revision is liable to be dismissed. It is pertinent to mention that in the above revision, the convict accused/ appellant Ram Dularey Yadav has not been arrayed as opposite party, but in the prayer clause of revision the prayer for enhancement of sentence of Ram Dularey Yadav has also been sought, which is legally not maintainable. It is also pertinent to mention that the trial court has sentenced the appellant Ram Dularey Yadav with maximum sentence provided under Sections 363 & 366 IPC and the sentence so imposed may not be enhanced to any extent beyond provisions of Sections 363 & 366 IPC.

10. The point-wise discussions of the arguments raised on behalf of the appellant are being made as under:

11. The incident in question is alleged to have been taken place on 14.05.2002 at about 10.00 a.m., of which FIR has been lodged on 18.05.2002 at 00.10 a.m., which has been assailed by appellant on following points:

(a) FIR has been lodged with inordinate delay of 4 days, at 00.10 hours in the midnight.

(b) The first informant is cousin brother of the victim and is an Advocate, but the FIR has been got scribed by Harish Chandra Yadav, who has not been produced by the prosecution.

(c) As per FIR the first informant was not the eye witness of the incident and there is no mention of any eye witness in the FIR.

(d) The parents of the victim have neither been shown as witnesses in the charge sheet nor were produced before the court nor their statements under Section 161 Cr.P.C. were recorded.

(e) PW-1 and PW-2, the alleged eye witnesses of the incident, who allegedly seen the victim at the time when she was being carried out by the appellant through Jeep, are closely related with the first informant as well as father of the victim and belong to the same village and not making of any disclosure by any of them to the first informant or father of the victim is quite unnatural and makes the prosecution story false and highly improbable.

(f) There is property dispute between the father of the victim and the accused/ appellant and the first informant Virendra Kumar Yadav, uncle of victim is an Advocate and has fabricated the false prosecution story in the FIR, for falsely implicating the appellant and others due to above property dispute.

(g) The nature of offence requires its committal in the darkness in hiding manner in absence of general public and allegations of its committal in broad day light at about 10.00 a.m. is absolutely wrong and highly improbable.

(h) The appellant is a handicapped person with 60% disability in his right leg and the victim may not have eloped with a disable person, under any imagination, particularly when there is no whisper of any love affair between the two.

(i) The learned trial court acted wrongly and illegally in convicting the appellant while acquitted the three others on same set of evidence.

(j) The victim was major at the time of alleged incident and appears to be living somewhere else under the knowledge of her parents.

(k) For not producing the parents of victim before the trial court, adverse inference ought to have been drawn against the prosecution and accused/ appellant should have been acquitted by giving benefit of doubt.

(l) The conviction of appellant is based on misreading of the evidence, and surmises and conjectures and is liable to be set aside.

12. The first informant- PW-3 and parents of victim are not alleged to be the eye witness as of the incident of enticing away the victim by Ram Dularey Yadav or other accused. The prosecution has produced Laxmi Yadav and Kripa Yadav as PW-1 and PW-2, who have stated that on 14.05.2010 at about 10.00 a.m. when they were coming back after distributing the milk, they saw that accused/ appellant Ram Dularey Yadav and the victim girl, who were talking each other at the temple of Shiv Ji at Parikhapur and at some distance co-accused Ramgyan, Surendra Nath Yadav and Smt. Subhawati were standing and in the meantime a Jeep came from west, in which Ram Dularey made to sit the victim by catching hold of her arm. PW-1 at Page 3 has stated that after distributing the milk in the Market at about 9.00 a.m., he remained in the Market upto 10.00 a.m. and before leaving for home, PW-2 Kripa Yadav met him in the Market and asked him to have a cup of tea, which took sometime, while victim and accused/ appellant were talking at the door of temple and thereafter on road, but he did not go there and kept watching from a distance of about 20 steps. He has further stated that next day at about 4.00 p.m. he told the police, that he had seen the accused persons enticing away the victim. On this point PW-2 Kripa Yadav has made a different statement that he was returning to home after distributing milk in the Market along-with Laxmi Yadav and when they reached near the temple of Shiv Ji on roadside, the appellant and victim were laughing and talking with each other while co-accused Ramgyan, Surendra Nath and Subhawati were standing near the temple and when Jeep came from western side, the appellant and victim left by the Jeep and co-accused also left to their homes after a while. He has also stated that, they asked co-accused Ramgyan as to where Ram Dularey and victim had gone, but he did not reply and next day on i.e. 15th May he had told the entire story to first informant Virendra Kumar

Yadav, about seeing the victim and appellant Ram Dularey talking each other and of his leaving with victim by Jeep.

13. Upon going through the statements of the above witnesses, I find that there are material contradictions in their statements as to the narration of the incident allegedly seen by them. While PW-1 has sated to have seen the appellant and victim talking with each other from a distance of 20 steps, the PW-2 has stated that after taking tea, at the tea stall of Sintu at a distance of 30-35 steps, when they left after 15-20 minutes, they saw the appellant and victim talking with each other. PW-1 has stated at page 6 of his cross-examination that first informant Virendra Kumar Yadav belongs to his family (Khaandan) and father of the victim lives in Jaunpur and similarly PW-2 at Page 3 of his cross-examination has stated that first informant Virendra Kumar Yadav happens to be his nephew as both of them belongs to the same village, but later on he has admitted that father of victim as well as father of first informant Virendra Kumar are his cousin brothers. Both the above witnesses have admitted that there is enmity between the prosecution party and the accused/ appellant over alleged forcible construction of gate by father of victim after encroaching upon the land of co-accused Ramgyan, the real brother of accused/ appellant Ram Dularey.

14. It is also pertinent to mention that in the nature of offence of enticing away of a minor or major girl, the natural conduct of any person is of having sympathy and of extending a helping hand towards the victim and her family. Sometimes a stranger may avoid poking his nose in such matters under apprehension that the family of victim may feel bad of interference in private matters for making girl or her family defamed, but when the family members of the victim themselves came into contact with such persons like PW-1 and PW-2 during search operations, it is quite improbable and highly unnatural conduct of such persons (howsoever distant relative he may be) not to tell him the whereabouts or facts known to them. In the facts and circumstances of the case the PW-1 being relative of the victim, as well as first informant and PW-2 being Chacha (close relative of victim and PW-3) would certainly have told him the entire story whatever had they seen with names of culprits, the very next day when they admittedly met the first informant, and not disclosing of these facts by them to the first informant or father of the victim (who is also alleged to have come from Jaunpur on the next day of incident) is quite unnatural and unbelievable. There is no whisper in the FIR lodged in the midnight, after about more than four days of the incident that the alleged eye witnesses PW-1 and PW-2 were the eye witnesses of the incident and ever told the first informant of the occurrence having been seen by them. The FIR is not alleged to have been lodged on the information received from PW-1 and PW-2.

15. In the case of **Gopal, Krishnaji Ketkar vs Mahomed Haji Latif & Ors, 1968 AIR 1413**, a Three Judges Bench of Apex Court has held that:

"Where a party in possession of the best evidence which would throw light on the issue in controversy withholds it - Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him."

16. Undisputedly the parents of the victim were living at Jaunpur and as first informant PW-3, they are also not alleged to be eye witnesses of the incident. However, they were the best witnesses to depose before the trial court that their daughter is missing since 14.10.2002 and is alleged to have been enticed away by the accused/ appellant or his associates. They could also have deposed the fact of victim having been fetched by accused/ appellant by Jeep at 10.00 a.m. on the basis of hear-say as their position would have been similar to that of first informant/ PW-3, who is also not eye witness of enticing away. For not producing the best evidence by the prosecution before the trial court about missing of the minor girl without assigning any reason, adverse inference ought to have been drawn by the trial court against the prosecution to the effect that had they been produced as witnesses, they would not have been able to support the prosecution case and conceal the truth of having knowledge of the whereabouts of victim or her being a major girl. In view of adverse inference so drawn against the prosecution for suppressing the truth, it is a fit case where accused/ appellant becomes entitled to a benefit of doubt and consequentially acquittal.

17. It is not disputed that the accused/ appellant Ram Dularey is a handicapped person, who has filed his disability certificate issued by Medical Board of Chief Medical Officer, Mau certifying 60% disability in his right leg and it has been admitted by PW-2 and PW-3 that accused/ appellant is a handicapped person disabled with one leg and cannot walk properly because of problem with one leg. It is not the case of the prosecution that the accused/ appellant was having love affair with the victim, the minor girl and enticed her away on account of the love affair. It is also pertinent to mention that since the accused/ appellant is a handicapped person until and otherwise proved, no girl is supposed to fall in love with such a disabled person and so even in case of any one side liking of victim by accused/ appellant, there can be no reason for the victim to go with the accused/ appellant at her own. There is no whisper of any force having been used by the accused/ appellant or other accused persons in forcibly sitting the victim in Jeep with the accused/ appellant. However, in case of use of forcible kidnapping, the victim would have raised alarm and the persons inside and outside the Jeep (by which she was allegedly taken away) including the alleged eye witnesses PW-1 & PW-2 (who being relatives, were her well wishers, would have come rushed for her rescue and would have immediately informed the parents as well as Vakil, Chacha of the victim, PW-3. In absence of any evidence to above effect, the prosecution has also failed to prove any motive of accused/ appellant behind the crime.

18. It has been contended by the accused/ appellant that the victim was major and was living with her parents in Jaunpur and the police have not made any efforts to trace out the victim at Jaunpur or anywhere else or either in or towards the Police Station Madhuban, where the appellant allegedly taken her away. It is pertinent to mention that the first informant is a law graduate and it is expected from him as a prudent man, to inform the police immediately after the incident, so that there could have been better possibility of tracing out the victim. The prosecution has also not made any efforts of tracing the victim by taking the accused/ appellant on police remand. The prosecution has failed to explain the inordinate delay of around 4 days in lodging FIR (from 10 a.m. on 14.05.2002 to 00.10 a.m. on 18.05.2002) and for lodging it urgently at midnight at 00.10 a.m. It has also been contended that as per entries in the family register, the victim was major at the time of incident. The possibility of eloping of victim in the darkness of night without knowledge of anybody, may not be ruled out.

19. Admittedly the first informant/ PW-3 is highly educated person and postgraduate as has been admitted by him in his cross-examination at Page 8 of his cross-examination that he is M.A., LL.B. He has stated that he lives at home and does agricultural work and since the matter was related to his prestige he was very much nervous and so instead of writing the written report himself, got it written by Harishchandra Yadav on his dictation and in dictating there was no problem. It is pertinent to mention that the father of the victim had come the very next day, but no reason has been assigned as to why the FIR (which was lodged after around 4 days at midnight) was not lodged by father himself.

20. PW-1 and PW-2 are only chance witnesses and have also stated to have enquired into with co-accused Ramgyan, Subhawati and Surendra Nath as to where the victim and accused/ appellant have gone, but even when no reply was given by them, they did not inform the first informant or father of the victim, which is also quite unnatural and their conduct in not doing so despite being related, makes their contention of being eye witnesses doubtful and untrustworthy. Similarly on alleged asking by PW-1 and PW-2 from Ramgyan and others, not giving any threat by them is quite unnatural, while on mere enquiry by the first informant, they allegedly threatened him. The first informant has not assigned any reason when neither he was eye witness of the occurrence nor got any information from alleged eye witnesses then why and on what ground he approached the family members of accused/ appellant i.e. co-accused persons for enquiring about the victim.

21. It is settled principle of law that the evidence of interested or related witnesses should be considered with caution and until and unless it is found to be trustworthy the conviction of accused on the basis of evidence of related or interested witness is not justified. In view of the discussions made above and considering the unnatural conduct of PW-1 and PW-2, I am of the considered view that they are not proved to be eye witnesses of the incident of enticing away victim by accused/ appellant in presence of co-accused persons or otherwise and their testimony is neither reliable nor trustworthy.

22. In the present case the only eye witnesses of the incident, PW-1 and PW-2, are admittedly related/ closely related witnesses and their conduct has been found unnatural in not disclosing and not helping the first informant. The conduct of father of the victim in not lodging the FIR and not appearing before the trial court for stating on oath that his daughter is missing and has been enticed away by the accused/ appellant with the help of other co-accused or otherwise and the conduct of PW-3/ first informant, who himself is a law graduate and is also alleged to be an Advocate in not mentioning the names of alleged eye witnesses in the FIR and lodging of FIR with inordinate delay of 4 days at midnight without any whisper about the love affair if any, between the victim and the accused/ appellant and further the undisputed disability of accused/ appellant makes the entire prosecution story highly improbable and doubtful and gives strength to the arguments that the father of victim and his family members including first informant, on account of property dispute have falsely implicated the accused/ appellant and his family members, due to suspicion.

23. In view of the facts and circumstances of the case, there is sufficient reason for drawing adverse inference against the prosecution for not producing the parents of victim to the witness box before the trial court. The evidence on record shows that PW-1 and PW-2 were not the eye witnesses of alleged incident of fetching the victim by accused/ appellant in broad day light at 10.00 a.m. instead of

choosing sometime of loneliness in the late evening or early morning, and they have been set up subsequently in order to improve the case against the accused persons. The above witnesses are interested witnesses and their unnatural conduct and contradictory testimony is not reliable for holding the accused/ appellant guilty and the learned trial court has misread the evidence on record. I am of the considered view that the prosecution has failed to prove its case to the hilt beyond any shadow of reasonable doubt and has failed to bring home the charges against any of the accused by any cogent, reliable, independent and trustworthy evidence. Considering the totality of facts and circumstances, it is a fit case where the accused/ appellant is entitled to be given the benefit of doubt and the prosecution case is liable to be rejected. The accused/ appellant is also entitled for an order of acquittal.

24. It is settled principle of law as has been held by the Apex Court in the case of **K. Prakashan Vs. P.K. Sunderan (2008) 1 SCC 258** that -

"When two views are possible, appellate court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial court was neither perverse nor suffered from any legal infirmity or non-consideration/ misappropriation of evidence on record, reversal thereof by High Court is not justified."

25. In view of the discussions made above, the appeal is liable to be allowed. Since in the order of acquittal of opposite party nos.2 to 4 Ramgyan, Surendra Nath Yadav and Smt. Subhawati, against whom there is virtually no evidence at all, there is no illegality, irregularity, impropriety, incorrectness or perversity, there is no sufficient ground for interfering with or setting it aside order of their acquittal. The criminal revision has no force and is liable to be dismissed.

26. The appeal is allowed accordingly and the impugned judgment and order of conviction and sentence of appellant Ram Dularey Yadav is set aside and he is held not guilty of the offences under Sections 363 & 366 IPC. Dismissing the criminal revision no.2218 of 2006 impugned judgment and order of acquittal of opposite party nos.2 to 4 Ramgyan, Surendra Nath Yadav and Smt. Subhawati is confirmed.

27. The prosecution case stands failed and the accused/ appellant Ram Dularey Yadav is acquitted of the charges under Sections 363 & 366 read with Section 34 IPC. He will be released, if in custody, forthwith unless wanted in some other case.

28. Let a copy of this order be immediately sent to the Sessions Judge, Mau through e-mail, fax and ordinary post for ascertaining immediate release of accused/ appellant Ram Dularey Yadav unless wanted in some other case.

29. Let the lower court record be sent to the court below along with copy of this judgment and order without any delay.

(2016) 9 ILRA 191
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE MUKHTAR AHMAD, J.

Criminal Appeal No.- 3175 Of 1983
&
Connected With Other Cases

Ram Pal & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
K.N. Dwivedi

Counsel for Respondent:
D.G.A.

The present criminal appeal and connected appeals no. 3176 of 1983 and 3177 of 1983 have been preferred against the judgement and order of conviction and sentence dated 17.12.1983 passed by IIIrd Additional Session Judge, Farrukhabad in S.T. No. 319 of 1980 (State Vs. Jagdeo and 3 Others) arising out of Case Crime No. 529 of 1978, under Section 396 I.P.C., hence all the appeals are being considered jointly.

The First Information Report was lodged by Shiv Lal s/o Sita Ram Kishaan, R/o Machha, P.S. Kannauj, District Farrukhabad. According to the version of F.I.R., informant Shiv Lal s/o Sita Ram Kishaan was the resident of Village Machha. Amber and Ladaite were step brothers and Amber had died. Grand mother of Ladaite Smt. Jasoda was kept of Tijja, uncle of Jagdeo. After the death of Tijja, Smt. Jasoda before her death executed sale deed of the land in favour of Amber and Ladaite regarding land measuring 14 *Bigha*, there was dispute in between Ladaite and Jagdeo in Tehsil and after that at Fatehgarh. On 26.12.1978 the date was fixed for the case due to that reason Jagdeo has grudge against them and Jagdeo on last Tuesday, threatened him and Ladaite, before the next date i.e. 26.12.1978 he would cause damage to them since the case was initiated in between the parties.

Court observed that as per the the F.I.R. the enmity was because 20 *bigha* land was transferred by Smt. Jasoda Devi, through registered sale deed in favour of Ladaite and Amber, step-brothers of informant Shiv Lal. Smt. Jasoda Devi was kept of one Tijja, uncle of accused-appellant Jagdeo, hence, he was annoyed and had grudge against Ladaite and other family members. He threatened to informant and Ladaite to ruing them. In the night 12-13 miscreants entered into the house, armed with gun, country-made pistol and looted house hold articles, jewelries, thereafter they left the house, Jagdeo exhorted to snatch the house hold articles of Manna, neighbour of the informant also because he was also doing pairvi. According to the statement of Shiv Lal PW1, 10-12 miscreants were involved in the dacoity which took place in his house, they identified them in the light of *diya* which was kept in lighted in the house and he identified Ram Pal, Jagdeo, Moti, Nand Ram, Ram Bhajan. Subsequently, he stated that out of 12-13 miscreants who entered into the house, 6-7

miscreants went to the house of Manna for committing dacoity which is against version of the F.I.R. and this was improvement. Further from perusal of F.I.R. and statements it is clear that when Madan Lal challenged the dacoits who were going with the booty then they shot fire and when Nokhey started pelting brickbat from the roof of the house of Manna then Ram Pal shot fire which shows the intention was only for committing dacoity and not to commit murder. The enmity from Jagdeo was shown with the informant and his brother Ladaite but they were not assaulted by them. Further they have not concealed their faces, though they were well know to the informant and family members. Ladaite was not examined. Even injured witnesses Madan Lal and Rajendra Singh were also not examined in support of the prosecution case.

Court observed that the appellant Ram Bhajan is the only surviving and is entitled for benefit of doubt.

Hence, the impugned judgement and order of conviction and sentence dated 17.12.1983 passed in S.T. No. 319 of 1980, District Farrukhabad, is hereby set aside. The bail bond and sureties are discharged.

Accordingly the appeal of Ram Bhajan is hereby allowed

(Delivered by Hon'ble Arvind Kumar Tripathi, J.)

1. The present criminal appeal and connected appeals no. 3176 of 1983 and 3177 of 1983 have been preferred against the judgement and order of conviction and sentence dated 17.12.1983 passed by IIIrd Additional Session Judge, Farrukhabad in S.T. No. 319 of 1980 (State Vs. Jagdeo and 3 Others) arising out of Case Crime No. 529 of 1978, under Section 396 I.P.C., hence all the appeals are being considered jointly.

2. However, since appellant no. 1 Ram Pal in the present appeal and appellants Jegdeo and Nand Ram in the connected appeals died hence appeal in respect of them stood abated vide order dated 09.08.2016. The present appeal survives only on behalf of sole appellant no. 2 Ram Bhajan. Appellant Jagdeo, Ram Bhajan and Nandram were convicted and sentenced under Section 396 I.P.C. for 5 years rigorous imprisonment with fine of sum of Rs. 2,000/- and in-default 6 months further rigorous imprisonment, accused-appellant Ram Pal was convicted under Section 396 I.P.C. for life imprisonment.

3. Mr. Sanjeev Kumar Trivedi, learned Advocate appeared on behalf of appellant and Mr. Virendra Singh Yadav, learned A.G.A. appeared on behalf of State.

4. The brief facts of the case is that First Information Report was lodged by Shiv Lal s/o Sita Ram Kishaan, R/o Machha, P.S. Kannauj, District Farrukhabad. According to the version of F.I.R., informant Shiv Lal s/o Sita Ram Kishaan was the resident of Village Machha. Amber and Ladaite were step brothers and Amber had died. Grand mother of Ladaite Smt. Jasoda was kept of Tijja, uncle of Jagdeo. After the death of Tijja, Smt. Jasoda before her death executed sale deed of the land in favour of Amber and Ladaite regarding land measuring 14 Bigha, there was dispute in between Ladaite and Jagdeo in Tehsil and after that at Fatehgarh. On 26.12.1978 the date was fixed for the case due to that reason Jagdeo has grudge against them and Jagdeo on last Tuesday, threatened him and Ladaite, before the next date i.e. 26.12.1978 he would cause damage to them since the case was initiated in between the parties. There was no talking terms in between the

parties. Due to that reason in the the night of 25.12.1978 at about 9:00 p.m when informant, his brother Ladaite, his wife Ganga Devi and mother Mahrana, after taking dinner just laid to sleep, dibbi was burning, 12-13 miscreants attacked with the gun, country-made pistol and lathi, they over powered to the informant and his brother Ladaite and looted all house hold articles from kotha, snatched one Kheduwa (Jewelry) from the leg of Ganga Devi and from the right leg they could not snatched, injury was also caused. Jagdeo was exhorted to teach them lesson for contesting case and snatched all the jewelry and house hold goods. They identified the miscreants in the light of diya as Ram Pal Kishaan, r/o Village Tikapurwa armed with gun, Ram Bhajan Kishaan armed with country-made pistol (katta), Moti Lal Kishaan armed with country-made Pistol (Katta) and Nand Ram Kishaan also armed with gun who residing Village Kacchiyapur. When miscreants left the house of the informant then accused-appellant Jagdeo, asked, other co-accused appellants to snatch the house holds articles of his neighbour Manna and his nephew who was doing pairvi on behalf of Ladaite. Thereafter they went to the house of Manna, entered into the house and started looting housing hold articles, they raised alarm, the number of villagers including Madan Lal Yadav, Ganga Charan Yadav, Munshi Lal Yadav, Banwari Yadav, Ram Kumar Yadav, Ram Lal Kishaan, Rajendra Singh and others came running towards the place of incident, flashing their torches. When they were going towards west from beneath the tree of Viriya, Madan Lal Pradhan moved forward and exhorted to catch the miscreants, then one of the miscreants shot fire by gun causing fire arm injuries to Madan Lal Pradhan and Rajendra Singh. In the meantime, Nokhe, neighbour of Manna started hurling brickbats from the roof of the house towards miscreants then Ram Pal shot fire with his gun causing fire arm injury on the face of Nokhey, who fell down on the roof and died on the spot. The family members of Manna in the light of diya and other villagers in the light of torch saw and identified the assailants and they could identify on seeing them. Some assailants were of young age, some were of middle age. They were wearing khaki cloths, big coats and some were wearing plain cloths. The language of some miscreants was of gangapar and some of miscreants was of nearly places, list of Jewelries were also mentioned. The F.I.R. was registered as Case Crime No. 529 of 1978 at P.S. Kannauj at 09:30 a.m. on 26.12.1978, the distance of Police Station, from the place of incident was about 7 k.m. north. In the F.I.R., Jagdeo, Ram Pal Kishaan, Ram Bhajan, Moti Kishaan and Nand Ram Kishaan were named and 7-8 assailants were unnamed. The investigation was taken over by Sub-inspector/Station Officer, Hausla Prasad Sharma. He went to inspect the place of the incident, the inquest report was prepared in the presence of the witnesses, their signatures were taken there, dead body was sealed and sent with necessary papers to mortuary, Sadar Hosptial, Fatehgarh for postmortem examination. He recorded the statement of informant Shiv Lal, Manna, Sitaram, Baladin and others. The torch of the witnesses were seen and handed over in their custody. Dibri was seen and handed over to them. Inspected the place of incident and prepare the site plan. Injured Gendan Lal and Rajendra Singh were sent along with Constable Raj Bahadur Singh for medical. He searched assailants and made search at the house of Ram Pal, Ram Bhajan. After completing the investigation and necessary formalities charge sheet was submitted. Thereafter the case was committed to the Court of Session.

5. Injured Rajendra was examined on 26.12.1978 at 11:45 a.m., three injuries were noted as below:-

1. One gunshot wound of entry 1/10" X 1/10" X muscle deep on the right side front of chest lower part. Margins are inverted and lacerated. No blackening and tattooing present.

2. One gunshot wound of entry 1/10" X 1/10" X muscle deep on the left side groin region. Margins are inverted and lacerated. No blackening and tattooing present.

3. One gunshot wound of entry 1/10" X 1/10" X muscle deep on the outer aspect of right elbow. Joint injuries are inverted and lacerated. No blackening and tattooing present.

All injuries are simple, caused by some fire arm.

6. Injured Gendan Lal was examined on 26.12.1978 at 11:30 a.m., three multiple gunshot wound were found on his person.

1. Multiple gunshot wounds of entry in an area at 7" X 5" on the left side abdomen front, each measuring 1/10" X 1/10" X muscle deep. Margins are inverted and lacerated. No blackening and tattooing present.

2. Multiple gunshot wounds of entry in an area at 10" X 2½" on the outer aspect of right forearm and hand (dorsum), each measuring 1/10" X 1/10" X muscle deep. Margins are inverted and lacerated. No blackening and tattooing presents.

3. Multiple gunshot wound of entry in an ear at 6" X3" on the inner aspect of the left forearm and hand (palmer sufeses), each measuring 1/10" X 1/10" X muscle deep. Margins are inverted and lacerated. No blackening and tattooing presents.

All injuries kept U.O. and advised X-ray, all are caused by some firearm, duration about ½ day.

7. Postmortem examination on body of Nokhe Lal was conduct on 27.12.1978 at 03:00 p.m. by Medical Officer in District Hospital, Fatehgarh. Following injuries were noted;-

1. Gunshot wound of entry 1/8" X 1/8" X bone deep present just below left eye brow on the right side. No blackening present, margin inverted.

2. Gunshot wound of exit 1/4" X 1/4" X communicated injury no. 1 present forehead right side. Margin everted. Direction - downward to upward.

Cause of death was due to shock and hemorrhage

8. The injury reports and postmortem report were admitted and as such no witnesses examined to prove the injury report and postmortem examination report.

9. The prosecution to prove its case, examined as many as 4 witnesses. PW1/informant Shiv Lal (eye witness), PW2 Baladin (eye witness). Two formal witnesses, S.I. Haushla Prasad Sharma, Investigating Officer was examined as PW3 and Constable Virbhan Singh who carried the dead body to District Hospital for postmortem examination, was examined as PW4. After evidence was closed by the prosecution statement of accused were recorded under Section 313 Cr.P.C. They denied the charges and stated that they were falsely implicated due to enmity as there was case pending in between the informant and Jagdeo and other accused were relative of accused Jagdeo or were assisting Jagdeo. In defence, neither any oral evidence nor documentary evidence was adduced on behalf of defence. After considering the evidence and hearing the parties, the trial Court held the accused-appellants guilty hence convicted and sentenced them under Section 396 I.P.C. The only surviving appellant Ram Bhajan was convicted and sentenced five years rigorous imprisonment with fine.

10. Learned counsel for the appellant challenged the impugned judgement and submitted that even if there was any dispute that was with Jagdeo with regard to the land of Smt. Jasoda Devi. Appellant Ram Bhajan and other accused were also implicated because he was the relative of Jagdeo and supporting him. According to prosecution case and statement of witnesses, 12 assailants entered into the house and looted jewelries as mentioned in the F.I.R. not only from the house of Shiv Lal and Ladaite but even from the house of other neighbour of Shiv Lal, namely Nanhe s/o Gajja Kishaan. It appears that dacoity was committed by unknown miscreants and due to suspicion and enmity with Jagdeo, as litigation was going on in between them. Hence, not only Jagdeo was implicated but even appellants were implicated being relative and close to Jagdeo. He has also contended that merely by committing dacoity, case could not be solved in respect of the land in dispute. The accused did not assault any member of family there was no attempt to assault with intention to kill them because the dispute regarding the land could be solved after the death of informant and step-brother Ladaite. Nothing was recovered from appellant Ram Bhajan though search was made by the Investigating Officer at the house of accused Ram Bhajan and other co-accused. Neither any looted article was recovered nor country-made pistol from the appellant Ram Bhajan. None of the injured witnesses were examined to support of the prosecution case. No injury was caused to PW1 and his brother Ladaite. Ladaite was also not examined. Since the prosecution story is doubtful, and prosecution failed to prove the case beyond doubt, hence, the impugned judgement of conviction and sentence is liable to be set aside.

11. Learned A.G.A. opposed the prayer and submitted that the statement of PW1 and PW2 are intact and there was no major contradiction or discrepancy. All the witnesses are not required to be examined. Since PW1 and PW2 who are eye witness are reliable and as such trial Court rightly held the appellants guilty and rightly convicted and awarded sentence and as such the appeal is liable to be dismissed.

12. Considered the submissions of the learned counsel for the parties. According to the F.I.R. the enmity was because 20 bigha land was transferred by Smt. Jasoda Devi, through registered sale deed in favour of Ladaite and Amber, step-brothers of informant Shiv Lal. Smt. Jasoda Devi was kept of one Tijja, uncle of accused-appellant Jagdeo, hence, he was annoyed and had grudge against Ladaite and other family members. He threatened to informant and Ladaite to ruing them. In the night 12-13 miscreants entered into the house, armed with gun, country-made pistol and looted house hold articles, jewelries,

thereafter they left the house, Jagdeo exhorted to snatch the house hold articles of Manna, neighbour of the informant also because he was also doing pairvi. According to the statement of Shiv Lal PW1, 10-12 miscreants were involved in the dacoity which took place in his house, they identified them in the light of diya which was kept in lighted in the house and he identified Ram Pal, Jagdeo, Moti, Nand Ram, Ram Bhajan. Subsequently, he stated that out of 12-13 miscreants who entered into the house, 6-7 miscreants went to the house of Manna for committing dacoity which is against version of the F.I.R. and this was improvement. Further from perusal of F.I.R. and statements it is clear that when Madan Lal challenged the dacoits who were going with the booty then they shot fire and when Nokhey started pelting brickbat from the roof of the house of Manna then Ram Pal shot fire which shows the intention was only for committing dacoity and not to commit murder. The enmity from Jagdeo was shown with the informant and his brother Ladaite but they were not assaulted by them. Further they have not concealed their faces, though they were well know to the informant and family members. Ladaite was not examined. Even injured witnesses Madan Lal and Rajendra Singh were also not examined in support of the prosecution case.

13. Shiv Lal was very close to Baladin. As per suggestion made to PW2 Baladin, in his cross-examination, he has stated that it was incorrect to say that since he was very close, hence, he was giving statement. When dacoity was committed in the house of Shiv Lal he was sleeping beneath a chhappar (thatched roof). After hearing alarm, he awoke and saw the dacoits in the light of torch. He saw the dacoits when they were coming from the house of Shiv Lal and Manna, who were 12-13 in number. Jagdeo, Ram Pal and Nand Ram were armed with weapon, gun, Ram Bhajan was armed with country-made pistol. In view of the statement it is clear that no injury was caused either to the informant or Ladaite with whom there was enmity, which shows that intention was to commit dacoity and when they were challenged and assaulted then they shot fire. The incident took place on 25.12.1978 at about 09:30 p.m. but the F.I.R. was lodged at 09:30 a.m. on 26.12.1978. There was no recovery of either any fire arm or any looted article, from the appellant Ram Bhajan. He is on bail during pendency of appeal.

14. Villagers who received injury, they were not produced before the trial Court in support of prosecution story. According to the statement of Baladin, he was sleeping beneath the chhappar, however, subsequently he stated that he was sleeping inside his kotha. The charge sheet was not submitted against Nand Ram. Subsequently he was summoned under Section 319 Cr.P.C. The dacoity was committed not only in the house of Ladaite and informant but also in the house of Manna. These circumstances shows that the dacoity was committed by unknown persons and due to enmity and suspicion accused-appellant was falsely implicated. Hence, in view of the facts and circumstances mentioned above, the prosecution story is found doubtful.

15. In view of the above noted discussion the only surviving appellant Ram Bhajan is entitled for benefit of doubt. Hence, the impugned judgement and order of conviction and sentence dated 17.12.1983 passed in S.T. No. 319 of 1980, District Farrukhabad, is hereby set aside. The bail bond and sureties are discharged.

16. Accordingly the appeal of Ram Bhajan is hereby allowed

(2016) 9 ILRA 197
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3152 Of 2014

Chhabila Singh Yadav & Ors. ...Revisionists
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Revisionists:
M.P. Yadav, U.S. Chauhan

Counsel for Opposite Parties:
Govt. Advocate, Awadhesh Tiwari, Jagdish Singh

This criminal revision has been preferred by the revisionists for setting aside the impugned judgment and order dated 06.11.2012 passed by the learned Chief Judicial Magistrate, Ballia in Complaint Case No. 70 of 2012, under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (Smt. Suman Devi Vs. Raju Singh Yadav and others) and impugned judgment and order dated 25.08.2014 passed by the learned Additional Sessions Judge (Ex Cadre), Ballia in Criminal Misc. Application No. 46 of 2013 (Raju Singh and others Vs. State of U.P. and others).

It is contended by learned counsel for the revisionists that the learned Chief Judicial Magistrate, Ballia had passed an ex-parte order dated 06.11.2012 without providing an opportunity of hearing to the revisionists, which is against the settled principles of law. It is further contended that the appellate court has also erred in dismissing the appeal filed by the revisionists on the ground of limitation without considering the merit of the case. It is also submitted that the revisionists are living separately and they have no concern either direct or indirect with the opposite party no. 2 and her husband.

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.

Court held that the impugned judgment and order dated 06.11.2012 passed by the learned Chief Judicial Magistrate, Ballia in Complaint Case No. 70 of 2012 (Smt. Suman Devi Vs. Raju Singh Yadav and others) under Section 12 of the Protection of Women from Domestic Violence Act, 2005, Police Station- Kotwali, District- Ballia and order dated dated 25.8.2014 passed by the learned Additional Sessions Judge (Ex Cadre), Ballia in Criminal Misc. Application No. 46 of 2013 (Raju Singh and others Vs. State of U.P. and others) are liable to be set aside for the reasons discussed as above.

Accordingly, this revision summarily allowed.

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

1. Heard Sri M.P. Yadav, learned counsel for the revisionists and Sri Manoj Yadav, Advocate, holding brief of Sri Awadhesh Tiwari, learned counsel for the opposite party nos. 2 and 3 and perused the record.

2. This criminal revision has been preferred by the revisionists for setting aside the impugned judgment and order dated 06.11.2012 passed by the learned Chief Judicial Magistrate, Ballia in Complaint Case No. 70 of 2012, under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (Smt. Suman Devi Vs. Raju Singh Yadav and others) and impugned judgment and order dated 25.08.2014 passed by the learned Additional Sessions Judge (Ex Cadre), Ballia in Criminal Misc. Application No. 46 of 2013 (Raju Singh and others Vs. State of U.P. and others).

3. It is contended by learned counsel for the revisionists that the learned Chief Judicial Magistrate, Ballia had passed an ex-parte order dated 06.11.2012 without providing an opportunity of hearing to the revisionists, which is against the settled principles of law. It is further contended that the appellate court has also erred in dismissing the appeal filed by the revisionists on the ground of limitation without considering the merit of the case. It is also submitted that the revisionists are living separately and they have no concern either direct or indirect with the opposite party no. 2 and her husband. It is next submitted that the revisionists had no knowledge about the ex-parte order and the said fact came into knowledge when the Police of Police Station Kasimabad, Ghazipur reached at the house of the revisionists to serve the copy of the order dated 06.11.2012 for making payment of monetary relief.

4. Learned counsel for the revisionists has relied upon the judgment of High Court of Uttrakhand in case of **S Vishwanathan s/o Shankaran vs. Pushpa and State of Uttarakhand, 2011 (74) AllCriC 43** and also the judgment of this Court in **Criminal Revision No. 864 of 2012** (Smt. Rani Devi vs. State of U.P. & others) decided on 13.7.2016.

5. 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.

6. Although, while deciding the Criminal Misc. Application No. 46 of 2013 (Raju Singh and others Vs. State of U.P. and others) vide order dated 25.08.2014, the learned Additional Sessions Judge (Ex Cadre), Ballia has mentioned that it came into knowledge of the appellant on 25.4.2013 when the Police of Police Station Kasimabad, Ghazipur went to serve the recovery warrant issued in Execution Case No.03 of 2013 of ex-parte judgment and order dated 06.11.2012 and, thereafter the learned Additional Sessions Judge (Ex Cadre), Ballia dismissed the application under Section 5 of Limitation Act preferred by the appellant/ opposite party no.3, Raju Singh. The order dated 25.4.2013 passed by the learned Sessions Judge (Ex Cadre) Ballia in Criminal Misc. Application No. 46 of 2013 (Raju Singh and others vs. State of U.P. and others) is a non-speaking order regarding the details of service upon the appellant/ opposite party, Raju Singh and others.

7. Resultantly, the impugned judgment and order dated 06.11.2012 passed by the learned Chief Judicial Magistrate, Ballia in Complaint Case No. 70 of 2012 (Smt. Suman Devi Vs. Raju Singh Yadav and others) under Section 12 of the Protection of Women from Domestic Violence Act, 2005, Police Station- Kotwali, District- Ballia and order dated dated 25.8.2014 passed by the learned Additional Sessions Judge (Ex Cadre), Ballia in Criminal Misc. Application No. 46 of 2013 (Raju Singh and others Vs. State of U.P. and others) are liable to be set aside for the reasons discussed as above.

8. Accordingly, this revision summarily allowed.

9. The impugned judgment and order dated 06.11.2012 passed by the learned Chief Judicial Magistrate, Ballia in Complaint Case No. 70 of 2012 (Smt. Suman Devi Vs. Raju Singh Yadav and others) under Section 12 of the Protection of Women from Domestic Violence Act, 2005, Police Station- Kotwali, District- Ballia and order dated dated 25.8.2014 passed by the learned Additional Sessions Judge (Ex Cadre), Ballia in Criminal Misc. Application No. 46 of 2013 (Raju Singh and others Vs. State of U.P. and others) are hereby set aside.

10. The revisionists, namely, Chhabila Singh Yadav, Dheeraj Singh Yadav, Smt. Muneshwari Devi, Rahul Kumar @ Mulayam, Prem Shankar @ Pappu, Ranju Devi, Km. Rinku Singh Yadav, Anil Kumar Yadav and Smt. Tara Devi, are directed to appear before the trial court on 16th September, 2016.

11. Learned trial court is directed to pass a fresh order after hearing the parties. In case, they fail to appear before the trial court personally or through counsel on the date fixed i.e. on 16th September, 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.

(2016) 9 ILRA 200
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Revision No.- 1924 Of 2016

Smt. Mamta Barnwal & Anr. ...Revisionists
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Revisionists:
Prakash Chandra Srivastav

Counsel for Opposite Parties:
G.A.

The revision has been filed against the impugned order dated 21.5.2015 passed by Additional Sessions Judge Court No.5, Azamgarh in Sessions Trial No.400 of 2013 (State vs. Pradeep Burnwal and others) under Sections 498A, 304B I.P.C. and 3/4 D.P. Act, P.S. Phoolpur, District Azamgarh allowing the application 28-B of prosecution u/s 319 Cr.P.C. and summoning Smt. Mamta Burnwal and Sunita Burnwal for trial together with the co-accused Pradeep Burnwal and others. Feeling aggrieved, summoned accused Mamta Burnwal and Sunita Burnwal have filed this revision with a prayer for setting aside the impugned order.

Court find that the revisionists were named in the promptly lodged F.I.R, regarding the dowry death of Smt. Varsha Burnawal whose death took place in other than natural manner within seven years of marriage and there are allegations of demand of dowry and treating the deceased with cruelty of non-fulfillment of such demand. Undisputedly, the revisionists were not charge-sheeted and during trial upon application under Section 319 Cr.P.C. they have been summoned for trial together with co-accused persons, their husbands, brothers-in-law (Dewar) and parents-in-law (S*as & Sasur*).

In the impugned order learned trial court has considered the statements of three prosecution witnesses wherein P.W.2, the brother of deceased, has made specific allegations against the revisionists. It is also pertinent to mention that in the statements of P.W.1, 2 and 3 it has been stated that all the family members (S*usural wale*) treated the deceased with cruelty for non-fulfillment of demand of Safari vehicle as dowry and the revisionists do not claim to be falling outside the category of *Sasural wale.*

Court find that the learned lower court has exercised the discretion rightly in view of the evidence on record in summoning the additional accused/revisionists, the *Jethanis* of deceased who were named in F.I.R. but not charge-sheeted by I.O. for trial together with co-accused for the offence of dowry death. The learned counsel for revisionists has failed to show any illegality, irregularity, impropriety or incorrectness in the impugned order and there is nothing to show that the discretion so exercised by the trial court in summoning the revisionists has been exercised arbitrarily, rather it has been exercised judicially and there is no reason to interfere with it. There is no sufficient ground for interfering with or setting it aside the impugned order, the revision has no merits and is liable to be dismissed.

The revision is dismissed accordingly.

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

1. The revision has been filed against the impugned order dated 21.5.2015 passed by Additional Sessions Judge Court No.5, Azamgarh in Sessions Trial No.400 of 2013 (State vs. Pradeep Burnwal and others) under Sections 498A, 304B I.P.C. and 3/4 D.P. Act, P.S. Phoolpur, District Azamgarh allowing the application 28-B of prosecution u/s 319 Cr.P.C. and summoning Smt. Mamta Burnwal and Sunita Burnwal for trial together with the co-accused Pradeep Burnwal and others. Feeling aggrieved, summoned accused Mamta Burnwal and Sunita Burnwal have filed this revision with a prayer for setting aside the impugned order.

2. At the stage of admission, learned counsel for opposite party no.2 filed Vakalatnama and put in appearance.

3. The learned counsel for revisionists contended that the impugned order is wrong on facts and law; that the F.I.R. was lodged with false and incorrect allegations falsely implicating as many as seven persons including the husband, father-in-law, mother-in-law, two brothers-in-law (Jeth), and two sisters-in-law (Jethani), all the family members of the husband of deceased excluding only one brother-in-law and sister-in-law (Jeth & Jethani) for the offence of dowry death of Smt. Varsha Burnawal; that the revisionists reside separately as has been admitted by P.W.-1 in his cross examination; that in the false F.I.R. revisionists were also named being Jethanis of the deceased without assigning any specific role to them; that upon investigation charge-sheet was filed against five out of the seven accused persons and no charge-sheet was filed against the revisionists as no cogent evidence was found against them; that the deceased was daughter-in-law of Subhash Chandra Burnawal and the revisionists are also daughters-in-law of accused Subhash Chandra Burnawal being wives of his sons Sandeep Burnawal and Vinay Burnawal respectively; that the position of revisionists is similar to that of deceased and there was no reason for making demand of dowry by them from the deceased, their sister-in-law or treating her with cruelty for non-fulfillment of alleged demand of dowry; that in the statements on oath of the PW-1, 2 and 3, copies filed at annexure-4, 5 and 6, it has been stated that Subhash Chandra, Pradeep, Vinay and Sandeep had made complaint of not giving Safari vehicle at the time of Bida of deceased, after marriage and the revisionists have not been named for making such complaint; that the I.O. had rightly not charge-sheeted the revisionists and there is no probability of revisionists being held guilty for dowry death of their younger sister-in-law; that the learned trial court has passed impugned order summoning the revisionists only on the basis of prima facie case which is wrong and illegal; that for the purposes of summoning any person for trial together with the co-accused under the provisions of Section 319 Cr.P.C. mere satisfaction of prima facie case is not enough and the degree of satisfaction that is required is much stricter; that the learned trial court ought to have dismissed application under Section 319 Cr.P.C; that by setting aside the impugned order, summoning the revisionists, the revision be allowed.

4. Per contra, learned AGA and learned counsel for first informant/opposite party no.2 supported the impugned order and contended that the daughter of opposite party no.2 was married to Pradeep Burnawal, son of Subhash Chandra Burnawal; that there was demand of Safari vehicle at the time of marriage which could not be given at the time of Bida after marriage and so complaint was made by father-in-law and brothers-in-law of deceased at the time of Bida; that thereafter the deceased was always treated with cruelty in connection with demand of dowry by all the accused including revisionists and on 27.10.2012, when wife of opposite party no.2 purchased a TATA Indigo vehicle, the husband and in-laws of deceased including the revisionists, became annoyed, hurled taunts for not providing the agreed Safari vehicle and treating the deceased with cruelty committed her dowry death; that it is wrong to say that the revisionists were falsely implicated and they are living separately; that the real fact is that the accused persons are living together in adjoining portions of the house, each one having access to the portion of other; that it is wrong to say that in F.I.R the revisionists were falsely implicated and had it been so, there would have been no reason to spare one brother-in-law & sister-in-law (Jeth & Jethani) of deceased who were neither named in F.I.R. nor sought to be summoned through application 28B under section 319 Cr.P.C; that in F.I.R specific role has been assigned to revisionists and if due to influence of accused persons or sympathy of I.O. towards revisionists or otherwise due to misappreciation of evidence by I.O. they were not charge-sheeted, it will not be correct to say that they may not be summoned or tried together with their husbands for the offence of dowry death; that prima facie there is very strong case against the revisionists with every possibility of their conviction for the offence of dowry death along with co-accused as well as their husbands who are already facing the trial; that the trial court has exercised the discretion rightly in favour of allowing the application and summoning the revisionists and neither there is any illegality, irregularity, impropriety or incorrectness in the impugned order nor there is any sufficient cause for interfering with the discretion so exercised by the trial court; that the revision has been filed with false and baseless allegations and is liable to be dismissed.

5. Upon hearing the learned counsel for the parties and perusal of record and the landmark case law laid down by the Constitution Bench of Apex Court in the case of **Hardeep Singh vs. State of Punjab and others,** (2014) 3 SCC 92, relied by both the sides, I find that the revisionists were named in the promptly lodged F.I.R, regarding the dowry death of Smt. Varsha Burnawal whose death took place in other than natural manner within seven years of marriage and there are allegations of demand of dowry and treating the deceased with cruelty of non-fulfillment of such demand. Undisputedly, the revisionists were not charge-sheeted and during trial upon application under Section 319 Cr.P.C. they have been summoned for trial together with co-accused persons, their husbands, brothers-in-law (Dewar) and parents-in-law (Sas & Sasur).

6. In the impugned order learned trial court has considered the statements of three prosecution witnesses wherein P.W.2, the brother of deceased, has made specific allegations against the revisionists. It is also pertinent to mention that in the statements of P.W.1, 2 and 3 it has been stated that all the family members (Susural wale) treated the deceased with cruelty for non-fulfillment of demand of Safari vehicle as dowry and the revisionists do not claim to be falling outside the category of Sasural wale.

7. The provisions of Section 319 (1) Cr.P.C. are being reproduced as under :-

"(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."

8. The above section provides that where it appears from evidence that any person not being accused has committed offence, the court may proceed against him.

9. In the case of **Pyarelal Bhargav vs. State of Rajasthan, AIR 1963 SC 1094**, the four Judges Bench of Apex Court held that the appropriate meaning of word "appears" is "seems". It imports a lesser degree of probability than proof. It has been held by the Apex Court at times that what is necessary for court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as the accused in the case.

10. In the case of **Rajendra Singh vs. State of U.P. (2007) 7 SCC 378** the Apex Court held that :

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

11. In paragraphs no.106 and 107 of the above judgement of Hardeep Singh (supra) relied by both the parties, the apex court has held as under :

"106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if it appears from the evidence that any person not being the accused has committed any offence is clear from the words "for which such person could be tried together with the accused." The words used are not for which such person could be convicted. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

107. In Joginder Singh v. State of Punjab, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319(1) Cr.P.C, clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression."

12. In view of law laid down by Apex Court, if at the time of exercising its jurisdiction in summoning or refusing to summon the additional accused, it appears to the trial court, i.e., it seems to the trial court from the evidence on record that any person not being the accused has committed any offence, whether he was named in F.I.R. or not and whether he was charge-sheeted or not, if the evidence remains unrebutted, he may be convicted for the offence it may pass order for summoning the additional accused. At the time of disposal of application under section 319 Cr.P.C. the trial court is not required to be satisfied that such additional accused has committed an offence, as this can only be decided at the time of final disposal of trial upon evidence of both parties.

13. Considering the evidence on record, I find that the learned lower court has exercised the discretion rightly in view of the evidence on record in summoning the additional accused/revisionists, the Jethanis of deceased who were named in F.I.R. but not charge- sheeted by I.O. for trial together with co-accused for the offence of dowry death. The learned counsel for revisionists has failed to show any illegality, irregularity, impropriety or incorrectness in the impugned order and there is nothing to show that the discretion so exercised by the trial court in summoning the revisionists has been exercised arbitrarily, rather it has been exercised judicially and there is no reason to interfere with it.

14. There is no sufficient ground for interfering with or setting it aside the impugned order, the revision has no merits and is liable to be dismissed.

15. The revision is dismissed accordingly.

16. However, if the revisionists move application for bail before the trial court, the same shall be disposed of expeditiously in accordance with law.

17. Any observation made in the body of the judgement on the merits of the evidence on record, shall not prejudice either party and shall have no binding effect at the time of final disposal of trial.

(2016) 9 ILRA 205
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 2917 Of 2015

Pankaj ...Revisionist
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Revisionist:
Dushyant Singh, M.C. Singh

Counsel for Opposite Parties:
Govt.Advocate, Chandra Prakash Srivastav

The present criminal revision has been preferred by the revisionist for setting aside the judgment and order dated 24.06.2015 passed by the Additional Sessions Judge, Court No. 2, Bulandshahr in Criminal Appeal No. 62 of 2015 (Pankaj Vs. State of U.P. and judgment and order dated 28.05.2015 passed by the Principal Magistrate, Juvenile Justice Board, Bulandshahr in Bail Application No. 52 of 2015-State Vs. Pankaj Kumar, and with further prayer to release the revisionist on bail in Case Crime No. 65 of 2015, under Section 376-D I.P.C. and Section 4 POCSO Act, Police Station Arnia, District Bulandshahr in Case No. 52 of 2015-State Vs. Pankaj Kumar.

Learned counsel for the revisionist submitted that the prosecutrix is major and as per medical report, she was pregnant of 18 weeks, which shows that the prosecutrix was already having illicit relation with someone else but the revisionist has been falsely implicated in the present case. It is further submitted that no mark of injury was found on any part of the body of the prosecutrix. It is next submitted that the F.I.R. is too much delayed and there is no explanation of this inordinate delay. It is also submitted that the findings of the courts below that the conduct of the revisionist is not good and he is having association with men of criminal nature, are based on surmises and conjectures, therefore, there was no such material to arrive at such conclusion. It is contended that both the courts below committed manifest error of law in rejecting the bail application of the revisionist who is juvenile aged about 16 years, 11 months and 14 days at the time of the alleged incident. It is further contended that under the provisions of Section 12 of the Juvenile Justice Act, as a general Rule, the juvenile has to be released on bail unless and until there is material on record to establish that the release will likely to bring juvenile into association with any known criminal or expose him to moral, physical or psychological danger. It is also contended that the report of the District Probation Officer is sketchy and without any basis.

In revision under Section 397 Cr.P.C., the revisional court cannot analyse 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. 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. There is no illegality, perversity or infirmity in the impugned orders. The revision lacks merits and is liable to be dismissed.

The revision is, accordingly, dismissed.

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

1. Heard Sri M.C. Singh, learned counsel for the revisionist, Sri Chandra Prakash Srivastava, learned counsel for the opposite party no. 2 and learned A.G.A. for the opposite party no. 1.

2. The present criminal revision has been preferred by the revisionist for setting aside the judgment and order dated 24.06.2015 passed by the Additional Sessions Judge, Court No. 2, Bulandshahr in Criminal Appeal No. 62 of 2015 (Pankaj Vs. State of U.P. and judgment and order dated 28.05.2015 passed by the Principal Magistrate, Juvenile Justice Board, Bulandshahr in Bail Application No. 52 of 2015-State Vs. Pankaj Kumar, and with further prayer to release the revisionist on bail in Case Crime No. 65 of 2015, under Section 376-D I.P.C. and Section 4 POCSO Act, Police Station Arnia, District Bulandshahr in Case No. 52 of 2015-State Vs. Pankaj Kumar.

3. The F.I.R. version in narrow compass is as follows:-

4. The informant Smt. Tarawati Devi wife of Shishram, resident of village Balrau Arnia, District Bulandshahr has presented a written application on 27.02.2015 before the Station Officer, Police Station Arnia, District Bulandshahr that on 22.2.2015 when her daughter Km. XYZ aged about 15 years went to attend the call of nature in the fields near engine situated at the field of Khan Chandra then Kapil son of Kisan, put country made pistol on the ear of her daughter dragged her alongwith his three friends into the wheat fields of Devendra and all four namely Kapil son of Kisan, Sandeep son of Tekchandra, Shiv Shanker son of Sukhai and Mukaddam alias Ajit son of Sukhpal and Pankaj son of Pappu committed rape upon her daughter Km. XYZ. Her daughter stated this fact to her when she returned back to home. Due to fear she could not make report till now.

5. Learned counsel for the revisionist submitted that the prosecutrix is major and as per medical report, she was pregnant of 18 weeks, which shows that the prosecutrix was already having illicit relation with someone else but the revisionist has been falsely implicated in the present case. It is further submitted that no mark of injury was found on any part of the body of the prosecutrix and hymen was found old torn and healed. She did not enjoy the good reputation and unnecessarily she is trying to defame the lads of her village. It is next submitted that the F.I.R. is too much delayed and there is no explanation of this inordinate delay. It is also submitted that the findings of the courts below that the conduct of the revisionist is not good and he is having association with men of criminal nature, are based on surmises and conjectures, therefore, there was no such material to arrive at such conclusion. It is contended that both the courts below committed manifest error of law in rejecting the bail application of the revisionist who is juvenile aged about 16 years, 11 months and 14 days at the time of the alleged incident. It is further contended that under the provisions of Section 12 of the Juvenile Justice Act, as a general Rule, the juvenile has to be released on bail unless and until there is material on record to establish that the release will likely to

bring juvenile into association with any known criminal or expose him to moral, physical or psychological danger. It is also contended that the report of the District Probation Officer is sketchy and without any basis.

6. Learned counsel for the revisionist placed reliance on the following decisions in support of his contentions:-

(1) Amit Yadav @ Monu @ Bebo (Minor) Vs. State of U.P. and another, 2016(4) ADJ 137.

(2) Criminal Revision No. 718 of 2016-Jitendra Kushwaha Vs. State of U.P. and another decided on 11.7.2016.

(3) Prakash v. State of Rajasthan, 2006 CRI. L.J. 1373.

(4) A Juvenile v. State of Orissa, 2009 CRI. L.J. 2002.

7. Learned A.G.A. as well as learned counsel for the opposite party no. 2 vehemently opposed the arguments advanced by learned counsel for the revisionist.

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

9. 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 Act 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 non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (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."

10. 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.

11. 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."*

12. As per certificate issued by office of the Chief Medical Officer, Bulandshahr, age of the victim girl XYZ has been mentioned as 16 years. As per report of OPD slip issued by X-Ray Department, B.B.D. Hospital, Bulandshahr of the victim Km. XYZ dated 2.3.2015, her pregnancy is about 18.2 weeks. As per statement of the victim girl XYZ recorded under Section 164 Cr.P.C. on 02.03.2015 she has clearly stated that five months ago from the date of recording of her statement under Section 164 Cr.P.C. she was gang raped by lads namely Kapil, Pankaj son of Pappu, Shiv Shanker son of Subai, Ajit son of Satpal, Sandeep son of Teck Chandra and on

22.02.2015 at about 6.30 P.M. again the aforementioned boys committed gang rape upon her in the wheat fields.

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 deserve-allocating 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 analyse 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.

(2016) 9 ILRA 211
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3874 Of 2011

Prabhu Dayal Alias Parsadi Lal ...Revisionist
Versus
State Of U.P. & Ors. ...Opposite Parties

Counsel for Revisionist:
Sunil Kumar Yadav

Counsel for Opposite Parties:
Govt. Advocate, Shashi Dhar Pandey

Present criminal revision has been filed against the judgment and order dated 20.8.2011 passed by the learned Special Judge (Dacoity Affected Area) Court No.4, Firozabad in Special Session Trial No. 184 of 2008 (State vs. Viresh Chandra and others) in Crime No. 252 of 2003, under Sections 307 and 504 I.P.C., Police Station- Eka, District- Firozabad, whereby the learned Additional Session Judge (Dacoity Affected Area), Court No.4, District- Firozabad has dismissed the application no. 93-A of the informant (revisionist).

The facts of the F.I.R. reveal that the casteist remarks were hurled by accused persons intentionally to insult and humiliate the informant and his family members. Learned Special Judge (Dacoity Affected Area), Court No.4, District- Firozabad has erroneously recorded the impugned findings dated 20.8.2011 which is liable to be set aside.

The criminal revision is, accordingly, allowed.

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

1. Counter affidavit filed today by learned A.G.A. on behalf of the State is taken on record.

2. Heard Sri Sunil Kumar Yadav, learned counsel for the revisionist along with Dr. C.P. Upadhyay, learned counsel for the opposite party nos. 2 to 5 and Ms. Anita Srivastava, learned A.G.A. for the State and perused the record.

3. This criminal revision has been filed against the judgment and order dated 20.8.2011 passed by the learned Special Judge (Dacoity Affected Area) Court No.4, Firozabad in Special Session Trial No. 184 of 2008 (State vs. Viresh Chandra and others) in Crime No. 252 of 2003, under Sections 307 and 504 I.P.C., Police Station- Eka, District- Firozabad, whereby the learned

Additional Session Judge (Dacoity Affected Area), Court No.4, District- Firozabad has dismissed the application no. 93-A of the informant (revisionist).

4. The facts of this case in narrow compass are that on 22.11.2003, one Prabhu Dayal @ Prasadi Lal has submitted a written application before the Station Officer, Police Station- Eka, District- Firozabad alleging therein that informant Prabhu Dayal s/o Ishwar Prasad Jatav, original resident of Qasba and Police Station- Eka, District Firozabad on 21.11.2003 at about 5:00 P.M. due to previous enmity of the land dispute; when the informant, his son Veenu, nephews Ratnesh Kumar, Jitendra Singh and Ramu, all sons of Kisan Lal and daughters Km. Neelam and Km. Neeraj and wife were working in the fields for extraction of mustard oil and threshing of wheat at that time accused persons (i) Viresh Chandra s/o Ramesh Mishra wielding DBBL gun 12 bore of his brother-in-law, (ii) Ved Prakash son of Ramesh Chandra wielding his licensed rifle (iii) Jai Jeevan Ram @ Santosh Kumar s/o Ram Chandra wielding knife (iv) Rakesh Kumar s/o Pachram Singh Vari wielding 12 bore SBBL licensed gun of Summer Singh s/o Baburam reached at the fields of the informant with common intention and abused the informant and his family members using casteist remarks and started indiscriminate firing with intention to kill the informant and his family members. The informant and his family members tried to flee away from the scene. Piyush s/o informant, Ratnesh Kumar and Jitendra Singh, nephews of the informant were apprehended and the accused persons inflicted injuries with the knives. Due to which Veenu s/o informant and his nephews received grievous injuries. The F.I.R. was lodged on 23.11.2003 at about 5:30 hours.

5. Learned counsel for the opposite party nos. 2 to 5 has vehemently argued that this case is at the stage of prosecution evidence and it would be too late to allow this revision. He has also pointed out that several technical difficulties may crop up if this revision is allowed.

6. The facts of the F.I.R. reveal that the casteist remarks were hurled by accused persons intentionally to insult and humiliate the informant and his family members. Learned Special Judge (Dacoity Affected Area), Court No.4, District- Firozabad has erroneously recorded the impugned findings dated 20.8.2011 which is liable to be set aside.

7. The criminal revision is, accordingly, allowed.

8. The impugned judgment and order dated 20.8.2011 passed by the learned Special Judge (Dacoity Affected Area) Court No.4, Firozabad in Special Session Trial No. 184 of 2008 (State vs. Viresh Chandra and others) in Crime No. 252 of 2003, under Sections 307 and 504 I.P.C., Police Station- Eka, District- Firozabad is hereby set aside.

9. Learned Special Judge (Dacoity Affected Area) Court No.4, Firozabad is directed to adjudicate the matter afresh, in accordance with law, after hearing both the parties within a month from the date of production of a certified copy of this order.

(2016) 9 ILRA 213
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.09.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

First Appeal No.- 79 Of 2016

Smt. Shobhawati ...Appellant
Versus
Sudhir & Ors. ...Respondents

Counsel for Appellant:
Virendra Kumar Shukla, Dr. L.P. Mishra, Meenakshi Singh Parihar

This application under Order XLI Rule 21 of Code of Civil Procedure read with Chapter IX Rule 17 (2) of Allahabad High Court Rules, has been filed for setting aside the order/judgement passed by this Court on 17.8.2016 in the present first appeal.

Submissions made by appellant counsel that the remedy for an election petition as well as for a petition of disqualification in respect of an Adhyaksha of Zila Panchayat is conceived under Section 27 (2) (c) in reference to Section 19 of the Act which clearly postulates two situations; one arising out of the invalidation of an election and the other a situation of disqualification incurred during currency of the term. When a disqualification is incurred as a result of invalidation of election, the proceedings of election petition are to be read in Section 27 (2) (c) which would follow in the manner of procedure prescribed under Chapter IV of the Rules. The distinguishing feature of such a proceeding lies in the fact that a contesting candidate to the office of Adhyaksha would alone file an election petition within the period of limitation as prescribed under Rule 33 and such a petition would be decided by following the procedure contained in Chapter IV of the rules. Any order passed on an election petition would be an order under Rule 40 and subject to the appellate jurisdiction of this Court vested by virtue of Rule 47. On the other hand, if a petition alleging disqualification against the Adhyaksha of Zila Panchayat is filed on any other ground except invalidation of election, the same would be filed under the same provision i.e. Section 27 (2) (c) of the Adhiniyam but the procedure that would be followed is contained under Chapter V of the rules as aforesaid.

Hon'ble Court observed that by means of the judgement dated 17.8.2016 has remitted the matter on the question of limitation and has not precluded the court below to consider any other issue as a preliminary issue if the same can otherwise be legally treated so and decided. Therefore, the alternative submission put forth by Sri H.G.S. Parihar, Senior Counsel that issue no. 3 may also be considered and decided as a preliminary issue does not seem to be unjust while pressing this application. Accordingly, Hon'ble Court having regard to submissions put forth, declines to entertain the application filed under Order XLI Rule 21 read with Chapter IX Rule 7 of the High Court Rules with the clarification that preliminary issue, apart from limitation, if any, may also be considered and decided by the court below in terms of the judgement passed on 17.8.2016. The application is disposed of in terms of the clarification made above, however, it is expected that the court below shall adhere to the direction already issued.

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. This application under Order XLI Rule 21 of Code of Civil Procedure read with Chapter IX Rule 17 (2) of Allahabad High Court Rules, has been filed for setting aside the order/judgement passed by this Court on 17.8.2016 in the present first appeal.

2. Having regard to the nature of dispute involved in the First Appeal being a pure question of law, the Court proceeded to decide the same by remitting the matter back to the court below for consideration of the issue of limitation afresh by putting the parties to a notice in the light of observations made. In effect, none of the parties was put to any prejudice insofar as the rule of opportunity is concerned. The application for setting aside the ex-parte judgement is also not questioned on any such prejudice being caused but a legal question as to the very maintainability of first appeal against an order passed under Section 27 of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, has been raised in the application seeking to recall/ set aside the order so passed.

3. Sri H.G.S. Parihar, learned Senior Counsel, assisted by Smt. Meenakshi Parihar Singh has put forth an interesting argument in the light of Section 27 of U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 and the Court hastens to reproduce the same as under:

"27. Disputes as to membership or disqualification--

(1) If any dispute arises as to whether a particular person is a member of the Zila Panchayat under clause a of Section 18, the dispute shall be referred in the manner prescribed to the State Government and the decision of the State Government shall be final and binding.

(2) If a dispute arises as to whether a person--

(a) has been lawfully chosen a member of a Zila Panchayat under Section 18; or

(b) has ceased to remain eligible for being chosen a member of of the Zila Panchayat for the purposes of Section 20; or

(c) has become disqualified to be Adhyaksha for the purposes of Section 19,

the dispute shall be referred in the manner prescribed to the Judge whose decision shall be final and binding."

4. On the premise of aforesaid provision, it is urged that the election petition was admittedly filed by the appellant under Section 27 but a proceeding contested under Section 27 on a decision being rendered, attains finality and such a decision is not amenable to appellate jurisdiction of this Court by virtue of Rule 47 of the U.P. Zila Panchayats (Election of Adhyaksha and Up-Adhyaksha and Settlement of Election Disputes) Rules, 1994, which conceives the appeals to be filed against the orders passed under Rule 40 of the said rules. In other words, the decision rendered under Section 27 (2)(c) by the competent judge is final.

5. It is alternatively urged that the election petition filed by the appellant even if maintainable under Rule 33 of the aforesaid rules but having been admittedly filed under Section 27 of the Adhiniyam, 1961, has led to framing of an issue to this effect i.e. issue no. 3 before the competent court which remains yet to be considered and once the issue of limitation raised in the First Appeal is remitted to be considered afresh, the issue no. 3 as to the maintainability of the election petition under Section 27 (2) (c) be also directed to be decided as a preliminary issue.

6. On a close scrutiny of the submission advanced before this Court, it is noticed that a rigid construction of Section 27 (2) (c) of the Adhiniyam, 19061 in a manner in which argument has been placed, there does not seem to be any scope for entertaining an election petition within the scope of Section 27 (2) (c) and consequently, the entire Chapter IV of the statutory rules becomes redundant for the simple reason that Chapter V of the statutory rules being relatable to Section 27 (2)(c) does not provide for an appeal against an order passed, rather it stipulates the decision under Section 27 (2) (c) to be final. Moreover, Rule 40 and Rule 47 contained in Chapter IV by virtue of Rule 50 do not apply to the disputes raised under Section 27 (2) (c) read with Rule 48.

7. Dr. L.P. Misra, learned counsel appearing for the appellant while placing the same provision of the Act, has argued that the remedy for an election petition as well as for a petition of disqualification in respect of an Adhyaksha of Zila Panchayat is conceived under Section 27 (2) (c) in reference to Section 19 of the Act which clearly postulates two situations; one arising out of the invalidation of an election and the other a situation of disqualification incurred during currency of the term. When a disqualification is incurred as a result of invalidation of election, the proceedings of election petition are to be read in Section 27 (2) (c) which would follow in the manner of procedure prescribed under Chapter IV of the Rules. The distinguishing feature of such a proceeding lies in the fact that a contesting candidate to the office of Adhyaksha would alone file an election petition within the period of limitation as prescribed under Rule 33 and such a petition would be decided by following the procedure contained in Chapter IV of the rules. Any order passed on an election petition would be an order under Rule 40 and subject to the appellate jurisdiction of this Court vested by virtue of Rule 47. On the other hand, if a petition alleging disqualification against the Adhyaksha of Zila Panchayat is filed on any other ground except invalidation of election, the same would be filed under the same provision i.e. Section 27 (2) (c) of the Adhiniyam but the procedure that would be followed is contained under Chapter V of the rules as aforesaid.

8. It is also pointed out that once a Division Bench of this Court had relegated the matter for being taken up in an election petition vide judgement 12.1.2016 passed in Writ Petition No. 74 (MB) of 2016, the appellant being entitled to avail the remedy of election petition before the competent court has rightly filed the election petition under Section 27 (2) (c), as such, the objections raised on this score before the competent court being still open to be considered does not cause any prejudice to the applicant on the basis of which the judgement rendered by this Court may be set aside or recalled.

9. The rival contentions made before this Court call for an interpretation of Section 27 (2) (c) of the Adhiniyam in relation to the remedy available to a contesting candidate for the office of Adhyaksh, Zila Panchayat in the event of being aggrieved and the availability of the remedy of appeal under Rule-47 of the Rules framed thereunder.

10. Before dealing with the statutory provisions, it is needful to refer to the constitutional provisions contained in Chapter IX of the Constitution of India. Article 243-B provides for constitution of the Panchayats which reads as under:

"243B. Constitution of Panchayats :

(1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part

(2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs."

11. Article 243-O further contemplates a bar to interfere by court in electoral matters and for ready reference the same is reproduced hereunder:

"Article-243-O. Bar to interference by courts in electoral matters. *Notwithstanding anything in this Constitution,--*

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243K, shall not be called in question in any court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

12. It is amply clear from the constitutional provisions extracted above that the State Government is under an obligation to constitute Panchayats and once the Panchayats are constituted, no court shall interfere in the constitution of Panchayat except by an election petition to such authority and in such manner as is provided for by or under any law made by the State legislature. The constitutional mandate to provide for an authority and manner by the State legislature is specific.

13. Article 243-N also provides that the existing laws insofar as they are inconsistent with Chapter IX shall continue to be in force until amended or repealed but not beyond a period of one year from the date of promulgation and enforcement of the seventy-third amendment in the Constitution. In pursuit of the constitutional scheme under Chapter IX, the State legislature insofar as the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 is concerned, some new

provisions were inserted in the year 1994 which include Section 264-B and being relevant, the same is extracted below:

*"**264-B. Manner and conduct of election.**-(1) The election to the office of an Adhyaksha or a member of a Zila Panchayat and a Pramukh, or a member of a Kshettra Panchayat shall be held by secret ballot in the manner provided by rules which shall also provide for resolution of doubts and disputes relating to the election of such Adhyaksha and Pramukh.*

(2) The superintendence, direction and control of the conduct of election of the office of an Adhyakasha or a member of a Zila Panchayat and of a Pramukh or a member of a Kshettra Panchayat shall vest in the State Election Commission.

(3) Except as provided in sub-section (4), the State Government shall, in consultation with the State Election Commission, by notification, appoint the date or dates for general election of the Adhyaksha or members of a Zila Panchayat or the Pramukh or members of a Kshettra Panchayat.

(4) The State Election Commission shall, in consultation with the State Government, by notification, appoint date or dates for bye election of the Adhyaksha, Upadhyaksha or members of a Zila Panchayat or Pramukh or members of a Kshettra Panchayat."

14. After promulgation of the above provision by U.P. Act No. 9 of 1994, the statutory rules with respect to the settlement of disputes in relation to members and Adhyaksha & Up-Adhiyakshas were framed under Section 237 of the Adhiniyam which requires the statutory rules to be laid before each House of the State Legislature before its publication.

15. The rules notified on 1.4.1995 relevant for the purpose as mentioned above, were framed under Section 237 read with Section 27 (2) (c) and Section 264-B of the Adhiniyam.

16. Once from the scheme of legislation, it is clear that rules were framed under Section 27 (2) (c) read with Section 264-B of the Adhiniyam, 1961, Chapter IV of the Rules becomes relatable to Section 27 (2) (c) read with Section 264-B, whereas Chapter V of the Rules remains relatable to Section 27 (2) (c) of the Act. Any order passed under Section 27 (2) (c) read with Chapter V of the Rules is final and would not be appealable, whereas once an election petition is filed under Section 27 (2) (c) read with Section 264-B, Chapter IV of the Rules would become applicable and the issues shall be decided accordingly. In the light of aforesaid discussion, I am of the considered opinion that insofar as a decision on a preliminary issue rendered in an election petition is concerned, an appeal is maintainable before this Court under Rule 47, as such, the order passed by this Court on 17.8.2016 does not suffer from lack of jurisdiction.

17. Having discussed the legal provision as above, it is apt to consider the arguments raised by the learned counsel for the parties in the context of judgement passed by the District Judge, which gave rise to the First Appeal. From the judgement passed by the District Judge, it is clear that

issues no. 3 and 4 are in the nature of preliminary issues. Issue no. 3 is curable whereas issue no. 4 once established would culminate into rejection of the plaint/petition.

18. This Court by means of the judgement dated 17.8.2016 has remitted the matter on the question of limitation and has not precluded the court below to consider any other issue as a preliminary issue if the same can otherwise be legally treated so and decided. Therefore, the alternative submission put forth by Sri H.G.S. Parihar, Senior Counsel that issue no. 3 may also be considered and decided as a preliminary issue does not seem to be unjust while pressing this application.

19. Accordingly, this Court having regard to submissions put forth, declines to entertain the application filed under Order XLI Rule 21 read with Chapter IX Rule 7 of the High Court Rules with the clarification that preliminary issue, apart from limitation, if any, may also be considered and decided by the court below in terms of the judgement passed on 17.8.2016. The application is disposed of in terms of the clarification made above, however, it is expected that the court below shall adhere to the direction already issued.

20. No order as to cost.

(2016) 9 ILRA 219
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal No.- 402 Of 2012
&
Connected With Other Cases

Tej Singh & Ors. **...Appellants**
Versus
State Of U.P. & Ors. **...Respondents**

Present first appeals have been filed by the claimants challenging the judgment and award dated 29.11.2003 passed by District Judge, Gautam Budh Nagar in various Land Acquisition References filed under Section 18 of the Land Acquisition Act, 1894 (for short the 'Act').

Land in dispute situated in village Illabas, Pargana, Tehsil & District Gautam Budh Nagar was subject matter of acquisition under the provisions of the Act for the benefit of New Okhla Industrial Development Authority for planned development. Notification under Section 4 of the Act was published on 06.01.1992. Declaration under Section 6 of the Act was issued on 18.04.1992. Possession of the land was taken on 09.07.1994 and award was declared by the Special Land Acquisition Officer on 06.01.1997 determining the market value of the land at the rate of Rs.50/- per square yard. Dissatisfied with the determination of the market rate of the land at the rate of Rs.50/- per square yard and the compensation awarded, the claimant-appellants moved references under Section 18 of the Act claiming compensation at the rate of Rs.1500/- per square yard. Similarly situated other tenure holders also moved references, which were clubbed together and decided by common judgment and order dated 29.11.2003 under challenge in these appeals. Reference court determined a sum of Rs.71/- per square yard as market value of the land.

The land in question is situate in NOIDA-Dadri highway at a very short distance from New Delhi and is similar in potentiality and in other factors with the land of the adjoining villages, namely, Bhangel Begumpur, Morana, Nagla Charan Das, is undisputed.

Ashrafi & Ors. Vs. State of Haryana & Ors., (2013) 5 SCC 527 the Hon'ble apex court held that while determining the market value of the acquired land, an increase of 12% shall be made applicable in the base year market value due to escalation of the price with cumulative/compound effect.

Court observed that after considering the apex court judgement, the market value of the land of the claimant-appellants, which has been acquired vide notification dated 06.01.1992, is liable to be determined by applying 12% increase annually with cumulative/compounding effect. In case, the base year market price of village Illabas is treated to be Rs.297/- per square yard with regard to the land, which was acquired on 06.08.1988, then market value of the land of the claimant-appellants, which has been acquired at least four years after the earlier acquisition, would come to more than Rs.340/- per square yard, but the appellants have confined their claim only to Rs.340/- per square yard. In the cases in hand, whose land was acquired on 06.01.1992,

are entitled to compensation at the market value of Rs.340/- per square yard along with all other statutory benefits admissible under the Act.

Court held that all the first appeals of the claimant-appellants are liable to be allowed by modifying the judgment and award dated 29.11.2003 passed by reference court and the consequential decree thereof by enhancing the market value as awarded by the reference court from Rs.71/- per square yard to Rs.340/- per square yard with all other statutory benefits payable under the provisions of the Act.

The appeals, accordingly, stands allowed to the extent directed above.

(Delivered by Hon'ble Krishna Murari, J.
&
Hon'ble Prashant Kumar, J.)

1. Aforesaid first appeals have been filed by the claimants challenging the judgment and award dated 29.11.2003 passed by District Judge, Gautam Budh Nagar in various Land Acquisition References filed under Section 18 of the Land Acquisition Act, 1894 (for short the 'Act'). All the appeals are based on same set of facts raising common question of law and, hence, have been clubbed together and are being decided by this common judgment.

2. We have heard Shri Madan Mohan, learned counsel for the appellants and Shri Amit Manohar for the NOIDA and learned Standing Counsel for the State respondents.

3. Land in dispute belonging to the claimant-appellants, situate in village Illabas, Pargana, Tehsil & District Gautam Budh Nagar was subject matter of acquisition under the provisions of the Act for the benefit of New Okhla Industrial Development Authority (hereinafter referred to as 'NOIDA') for planned development. Notification under Section 4 of the Act was published on 06.01.1992. Declaration under Section 6 of the Act was issued on 18.04.1992. Total area of 126-17-00 bighas of land, which includes the land of the claimant-appellants, was acquired. Possession of the land was taken on 09.07.1994 and award was declared by the Special Land Acquisition Officer on 06.01.1997 determining the market value of the land at the rate of Rs.50/- per square yard.

4. Dissatisfied with the determination of the market rate of the land at the rate of Rs.50/- per square yard and the compensation awarded, the claimant-appellants moved references under Section 18 of the Act claiming compensation at the rate of Rs.1500/- per square yard. Similarly situated other tenure holders also moved references, which were clubbed together and decided by common judgment and order dated 29.11.2003 under challenge in these appeals. Reference court determined a sum of Rs.71/- per square yard as market value of the land. Aggrieved by the same, the claimant-appellants have preferred the present appeals.

5. Learned counsel for the appellants contends that the land in question situate in village Illabas is on NOIDA-Dadri highway along the developed sectors in NOIDA. It is also submitted that land is having great potentiality for constructions and is situate at a very short distance from New Delhi. It has also been stated that land in question is similarly to land of adjoining villages,

namely, Bhangel Begumpur, Morana and Nagla Charan Das. It is also submitted that the market value of the land of the village in question, namely, Illabas, which was acquired vide notification dated 06.08.1988, this Court in First Appeal No. 417/1995, NOIDA & Ors. Vs. Jairam & Ors., vide judgment and order dated 25.02.2014, determined the compensation to Rs.297/- per square yard.

6. Learned counsel for the appellants vehemently contended that if Rs.297/- per square yard determined as fair market value of the land of the similar villages acquired in 1988, is taken to be the base year market value, the appellants are entitled to an increase of 12% per annum due to escalation in price during these years.

7. Reliance in support of the contention has been placed on the judgment of the Hon'ble Apex Court in the case of **Om Prakash (dead) by LRs & Ors. Vs. Union of India & Anr., (2004) 10 SCC 627** and **Ashrafi & Ors. Vs. State of Haryana & Ors., (2013) 5 SCC 527.**

8. In reply, learned counsel for the respondent-NOIDA submits that the determination of the market value of the land in question by the reference court is perfectly just and the impugned award does not call for any interference.

9. We have considered the arguments advanced by the learned counsel for the parties and perused the record.

10. The fact that the land in question is situate in NOIDA-Dadri highway at a very short distance from New Delhi and is similar in potentiality and in other factors with the land of the adjoining villages, namely, Bhangel Begumpur, Morana, Nagla Charan Das, is undisputed.

11. The reference court in the impugned judgment has recorded a finding that the village Illabas where the land in question situate, is adjacent to village Bhangel Begumpur and Morana. Certain area of the land of the village in question, namely, Illabas was subject matter of acquisition vide notification dated 06.08.1988. Special Land Acquisition Officer declared an award dated 26.09.1990 determining the market value of the land to be Rs.35.07/- per square yard. In reference made by the tenure holder, the compensation was enhanced to Rs.93.75/- per square yard by the reference court vide order dated 26.02.1993. The dispute travelled to this Court in the form of various first appeals, the leading being Appeal No. 417 of 1995, NOIDA & Ors. Vs. Jairam & Ors. A Division Bench of this Court vide order dated 25.02.2014 determined the market value of the said land at the rate of Rs.297/- per square yard. In determining the market value of Rs.297/- per square yard, the Division Bench relied upon the market value determined in respect of the land situate in adjoining villages, namely, Bhangel Begumpur. It has also been held that the village Illabas is situate at a distance of one Kilometer from village Bhangel Begumpur and is adjoining to Delhi-Dadri road and there is noting on record to demonstrate any dissimilarity in the nature and potentiality of the two villages, i.e., village Illabas and village Bhangel Begumpur.

12. Reference may also be made to another Division Bench judgment of this Court dated 09.05.2008 rendered in First Appeal No. 34 of 2007, Ganeshi Singh & Ors. Vs. NOIDA & Ors. in

respect of the land situate in village Chhalera. The acquisition was made for NOIDA vide notification dated 05.01.1991. Special Land Acquisition Officer determined market value to be Rs.110/- per square yard. However, on a reference filed by the tenure holder, the same was enhanced to Rs.222/- per square yard. In the appeal filed by the claimant-appellants, initially vide order dated 09.05.2008, the market value was determined at the rate of Rs.297/- per square yard, however, on an application made by the claimant-appellants, vide order dated 19.05.2010, the judgment dated 09.05.2008 was modified by applying the principles of annual increments in the prices of the land as evolved by the Hon'ble Apex Court in the case of **Om Prakash** (supra) and the market value of the land was determined at the rate of Rs.340/- per square yard.

13. The Hon'ble Apex Court in the case of **Om Prakash** (supra) has observed in paragraph 11 as under.

"In the circumstances, the High Court was justified in working out the fair market value of the lands in question on the basis of Rs.16,750/- per bigha as on 30-10-1963. The High Court noticed that in several judgments of this Court escalation at different and varying rates i.e. 6% per annum from 1959 to 1965, @10% per annum for every year from 1966 to 1973 and @12% per annum from 1975 had been considered to be reasonable increase to arrive at the fair market value, assuming that the pace of escalation during this period was normal for the entire period from 1959 onwards. Since no material was placed on record to show that there was any abnormality during the period, the High Court applied the same principle to the facts and circumstances before it, and accepted increase of 10% every year progressively from 1963 to 1973 and thereafter @12% every year progressively up to the date of acquisition. The High Court noticed in the judgment that if escalation is allowed on this basis, the fair market value would be Rs.1,28,889 per bigha. In case progressive increase is allowed @10% for the entire period, the amount will work out to Rs.1,08,397 per bigha. Allowing appreciation @12% for every year, not cumulatively, but at a flat rate of 12% per annum from 1963 to 1983, the amount would work out to Rs.56,112 per bigha. The High Court in its judgment under appeal pointed out that the market value of Rs.16,750 per bigha fixed in the case of Dharambir v. Union of India was not in respect of commercial land but only of agricultural land. That the market value of agricultural land is much lower than that of land suitable for commercial purposes, is trite. After having worked out the market value of the land on various bases and keeping in view the fact that between 8-12-1982 and 2-6-1983, the lands in question had at least some commercial potentiality, the High Court decided that the fair market value of all categories of lands situated in the villages in question as on the date of acquisition should be fixed at Rs.82,255 per bigha."

14. The issue was reiterated by the Hon'ble Apex Court in the case of **Ashrafi & Ors.** (supra) holding that while determining the market value of the acquired land, an increase of 12% shall be made applicable in the base year market value due to escalation of the price with cumulative/compound effect.

15. In the cases in hand, in respect of identically and similarly situated parcel of the land of the same village having the same potentiality and acquired for the same purpose by the same authority in the year 1988, fair market value was determined at the rate of Rs.297/- per square yard.

16. Keeping in view the principles evolved by the Hon'ble Apex Court in the case of **Om Prakash** (supra) and **Ashrafi & Ors.** (supra), the market value of the land of the claimant-appellants, which has been acquired vide notification dated 06.01.1992, is liable to be determined by applying 12% increase annually with cumulative/compounding effect. In case, the base year market price of village Illabas is treated to be Rs.297/- per square yard with regard to the land, which was acquired on 06.08.1988, then market value of the land of the claimant-appellants, which has been acquired at least four years after the earlier acquisition, would come to more than Rs.340/- per square yard, but the appellants have confined their claim only to Rs.340/- per square yard.

17. In view of the principles evolved by the Hon'ble Apex Court in the cases of **Om Prakash** (supra) and **Ashrafi & Ors.** (supra) as also various Division Benches judgment of this Court, the claimant-appellants, in the cases in hand, whose land was acquired on 06.01.1992, are entitled to compensation at the market value of Rs.340/- per square yard along with all other statutory benefits admissible under the Act.

18. In view of the aforesaid facts and circumstances, all the first appeals of the claimant-appellants are liable to be allowed by modifying the judgment and award dated 29.11.2003 passed by reference court and the consequential decree thereof by enhancing the market value as awarded by the reference court from Rs.71/- per square yard to Rs.340/- per square yard with all other statutory benefits payable under the provisions of the Act.

19. The appeals, accordingly, stands allowed to the extent directed above.

20. However, in the facts and circumstances, we do not make any order as to costs.

(2016) 9 ILRA 224
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL. J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 34 Of 2015
&
Connected With Other Cases

Commissioner Of Income Tax Kanpur ...Appellant
Versus
Mehtab Alam, Sultan Villa ...Respondent

Counsel for Appellant:
Ashok Kumar, Sr.S.C., Bharat Ji Agrawal

Counsel for Respondent:
Prateek Dawar

All appeals have been preferred under Section 260A of Income Tax Act, 1961 by Commissioner of Income Tax, Kanpur being aggrieved by judgment and order dated 18.11.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench, Lucknow.

In a search and seizure operation carried on 24.9.2010 at Chaudhary Charan Singh Airport, Amausi, Lucknow, Mehtab Alam and his wife Smt. Nausheen Farah Lari were found in possession of cash of Rs.1 crore, each, in two bags, containing total sum of Rs.2 crores. Warrants under Section 132 of Act, 1961 was issued by DIT (Investigation), Kanpur and served upon them. Punchnama was also drawn on 24.9.2010, on the spot, evidencing seizure of Rs.2 crores from assessee and his wife. Statement under Section 131 (1A) was recorded. He was asked to explain how purchases could be made in cash worth exceeding Rs.2,000/- in view of Section 40A, to which he replied that he was not aware of said provisions. He also stated that none of his concerns have ever made cash purchases exceeding Rs.20,000/-, in past.

Additional Director, Income Tax (Investigation), obtained print out of cash books of M/s Model Tanners (India) Pvt. Ltd., M/s Model Exims Pvt. Ltd. and M/s Model Echoes Pvt. Ltd. on same day i.e. 24.09.2010 at about 5.30 p.m. which showed no entry in cash books or drawl balance as on 24.09.2010, handing over cash to assessee or to any person whatsoever. In fact, no cash of the amount in question was available in books of said two concerns. The other two concerns namely New Universal Tanners and S.K. Enterprises were not found existing at the addresses given.

Commissioner, Income Tax (Central), Kanpur after issuing notice under Section 263 (1) and affording opportunity to assessee, passed an order dated 28.3.2014 holding that assessment orders made by Assessing Officer had caused prejudice to Revenue and after setting aside assessment orders, directed Assessing Officer to consider assessment afresh taking into account points raised and stated in CIT's order dated 28.3.2014.

Aggrieved by order of CIT passed under Section 263, assessee preferred appeals which have been allowed by Tribunal vide judgment and order dated 18.11.2014 giving rise to these appeals by Revenue. Tribunal has held that CIT recorded a finding that Assessing Officer has passed an erroneous order but cannot direct for further inquiry by Assessing Officer.

Court observed that Tribunal has misdirected itself and without appreciating scope of Section 263, has illegally set aside order of CIT. Our reasons are as under: In order to attract Section 263 of Act, 1961, Statute requires that there must exist an erroneous order of assessment of Assessing Officer, prejudicial to the interest of Revenue.

In the present case, Commissioner has found that recovery of Rs.2 crores in denomination of one thousand rupee notes remained unexplained through out. Assessee sought to explain receipt of Rs.2 crores from different business concerns but record of those did not reconcile. Still without inquiry and looking to money trail of cash, Assessing Officer passed assessment order under Section 153A read with Section 143 and has caused prejudice to Revenue.

Power under Section 263 can be exercised by Commissioner if order of assessment passed by Assessing Officer is an erroneous order and is prejudicial to interest of Revenue. If these twin conditions are satisfied, Commissioner would be justified in passing order, exercising power under Section 263.

Tribunal has got impressed with the reply of assessee that he has explained receipt of Rs.2 crores. Tribunal unfortunately failed to notice that said explanation did not reconcile with record of concerns/companies. The assessee claimed that money belong to and he had receipt there from but could not got it verified from record of such concerns, still Assessing Officer without making a detailed in-depth inquiry on this aspect, has proceeded to make assessment causing prejudice to interest of Revenue.

Court observed that the Tribunal has completely erred in law in setting aside order passed by CIT under Section 263 of Act, 1961. The judgment and order of Tribunal dated 18.11.2014 impugned in these appeals is hereby set aside. The order dated 28.3.2014 passed by CIT in exercise of Section 263 of Act, 1961, is hereby restored.

All these appeals are allowed.

(Delivered by Hon'ble Sudhir Agarwal. J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Ashok Kumar, Senior Standing Counsel, assisted by Sri Ashish Agrawal for appellant and Sri Prateek Dawar for respondents.

2. All these appeals have been preferred under Section 260A of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") by Commissioner of Income Tax, Kanpur (hereinafter referred to as "Revenue") being aggrieved by judgment and order dated 18.11.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench, Lucknow (hereinafter referred to as "Tribunal").

3. The appeal number, assessment year and dates of order are tabulated as below:-

S.No.	Appeal No.	A.Y.	Date of Judgment and appeal no. in Tribunal
1	34/2015	2005-06	18.11.2014 passed in ITA No.288/LKW/2014
2	35/2015	2005-06	18.11.2014 passed in ITA No.295/LKW/2014
3	42/2015	2006-07	18.11.2014 passed in ITA No.289/LKW/2014
4	43/2015	2007-08	18.11.2014 passed in ITA No.290/LKW/2014
5	44/2015	2008-09	18.11.2014 passed in ITA No.291/LKW/2014
6	45/2015	2009-10	18.11.2014 passed in ITA No.292/LKW/2014
7	46/2015	2010-11	18.11.2014 passed in ITA No.293/LKW/2014
8	47/2015	2011-12	18.11.2014 passed in ITA No.294/LKW/2014
9	48/2015	2006-07	18.11.2014 passed in ITA No.296/LKW/2014
10	49/2015	2007-08	18.11.2014 passed in ITA No.297/LKW/2014
11	50/2015	2008-09	18.11.2014 passed in ITA No.298/LKW/2014
12	51/2015	2009-10	18.11.2014 passed in ITA No.299/LKW/2014
13	52/2015	2010-11	18.11.2014 passed in ITA No.300/LKW/2014
14	53/2015	2011-12	18.11.2014 passed in ITA No.301/LKW/2014

4. Though appellant has formulated a large number of substantial questions of law but with consent of parties, we find that following substantial questions of law need be decided in these appeals:-

"(i) Whether Income Tax Appellate Tribunal has erred in law and on facts in misreading ratio of Apex Court decision in the case of Malabar Industrial Co. Ltd. Vs. CIT, 243 ITR 83 (SC), in coming to conclusion that even though order of Assessing Authority is erroneous as well as prejudicial to the interest of Revenue, still invocation of section 263 of Act, 1961 by Commissioner was not valid?

(ii) Whether Income Tax Appellate Tribunal has erred in law and on facts in passing an order in total disregard of law as contained in section 263 of Act, 1961 as well as the facts, brought on record, which clearly indicate that huge revenue was assessable under section 69A of Act, 1961, but Assessing Officer did not assess the same after considering entire set of facts, available on record and passed an erroneous order, prejudicial to the interest of Revenue.

5. With the consent of parties, we proceed to decide these appeals at this stage by a common judgment since the facts and issues as also substantial questions of law are common.

6. Brief facts necessary for adjudication of aforesaid questions may be stated as under.

7. In a search and seizure operation carried on 24.9.2010 at Chaudhary Charan Singh Airport, Amausi, Lucknow, Mehtab Alam (hereinafter referred to as "assessee") and his wife Smt. Nausheen Farah Lari were found in possession of cash of Rs.1 crore, each, in two bags, containing total sum of Rs.2 crores. Warrants under Section 132 of Act, 1961 was issued by DIT (Investigation), Kanpur and served upon them. Punchnama was also drawn on 24.9.2010, on the

spot, evidencing seizure of Rs.2 crores from assessee and his wife. Statement under Section 131 (1A) was recorded wherein assessee introduced himself as Director of M/s Model Tanners (India) Pvt. Ltd., Kanpur, Partner of M/s Model Exims, Jajmau, Kanpur, Director of M/s Model Echoes Pvt. Ltd. Jajmau, Kanpur, Prop. of M/s S.K. Enterprises, 95/26, Farrash Khana, Kanpur and Partner of M/s Al-Razeeq Traders, Jajmau, Kanpur. He was asked to explain how purchases could be made in cash worth exceeding Rs.2,000/- in view of Section 40A, to which he replied that he was not aware of said provisions. He also stated that none of his concerns have ever made cash purchases exceeding Rs.20,000/-, in past.

8. Additional Director, Income Tax (Investigation), obtained print out of cash books of M/s Model Tanners (India) Pvt. Ltd., M/s Model Exims Pvt. Ltd. and M/s Model Echoes Pvt. Ltd. on same day i.e. 24.09.2010 at about 5.30 p.m. which showed no entry in cash books or drawl balance as on 24.09.2010, handing over cash to assessee or to any person whatsoever. In fact, no cash of the amount in question was available in books of said two concerns. The other two concerns namely New Universal Tanners and S.K. Enterprises were not found existing at the addresses given.

9. Entire seized amount of Rs.2 crores was in denomination of rupee one thousand notes and as per claim of assessee, cash belongs to above named companies in the following manner:

(i) Model Exim Unit I	- Rs.21,00,000/-
(ii) Model Tanners (I) Pvt. Ltd.	- Rs.15,00,000/-
(iii) Model Tanner (I) Pvt. Ltd.	- Rs.35,00,000/-
(iv) Model Exhoes Pvt. Ltd. (Tannery Division)	- Rs.20,00,000/-
Total	= Rs.91,00,000/-

10. The opening cash balance on 06.09.2010 in the aforesaid concerns was found as under:

S. No.	Name of the concern	Opening cash balance	Maximum possible availability of Rs.1000/- notes.
1	Model Exims, Unit-II	Rs.4,16,408/-	416
2	Model Tanners (I) Pvt. Ltd., Unit-II	Rs.4,525/-	4
3	Model Tanners (I) Pvt. Ltd.	Rs.4,15,215/-	415
4	Model Echoes Pvt. Ltd., (Tannery Division)	Rs.9,19,060/-	919

11. The aforesaid companies also withdrew Rs.93 lacs on 06.09.2010, in following amounts:

(i) Model Exims, Unit-II	Rs.20,00,000/-

(ii) Model Tanners (I) Pvt. Ltd., Unit-II		Rs.40,00,000/-
(iii) Model Tanners (I) Pvt. Ltd.		Rs.13,00,000/-
(iv) Model Echoes Pvt. Ltd., (Tannery Division)		Rs.20,00,000/-
	Total =	Rs.93,00,000/-

12. Entire withdrawal was not in denomination of rupee one thousand notes but in different denomination as under:

1000 x 2100 = Rs.21,00,000/-
500 x 10000 = Rs.50,00,000/-
100 x 22000 = Rs.22,00,000/-
Total = Rs.93,00,000/-

13. Thereafter, till 24.9.2010, no cash withdrawal was noticed in the accounts of aforesaid concerns. The maximum availability as per record with aforesaid concerns of cash balance on 24.9.2010 in denomination of Rs.1,000/- was or could be Rs.38,54,000/- i.e. 3854 notes but they had given to assessee Rs.91/- lacs i.e. 9100 notes. The mismatch in cash found with assessee did not tally with aforesaid record and assessee and his wife must have obtained such cash from other sources.

14. Income Tax Team also visited places at the address of M/s S.K. Enterprises and M/s Al-Razeeq Traders on 25.9.2010 but did not find any such concern to exist at the addresses given.

15. Assessee claimed that he was given Rs.30 lacs by one Mohd. Khalid alleged Prop. of M/s S.K. Enterprises but Mohd. Khalid in his statement said that he has not entered into any business transaction etc. towards Sultan Tanners before 1.9.2010 and he did not verify claim of handing over of Rs.30 lacs to assessee.

16. Assessing Officer, however, completed assessment orders under Section 153A/143 (3) for Assessment Year 2005-06 to 2011-12 vide order dated 31.3.2013 in the following manner:-

A.Y	Date of filing return in response to notice u/s 153A/143(3)	Returned Income	Date of Asstt. Order u/s 153A/143(3)	Assessed Income
2005-06	27.08.2012	5,35,700/-	31.03.2013	5,83,700/-
2006-07	27.08.2012	3,32,390/-	31.03.2013	3,99,350/-
2007-08	27.08.2012	5,62,072/-	31.03.2013	6,21,757/-
2008-09	27.08.2012	6,98,647/-	31.03.2013	7,89,104/-
2009-10	27.08.2012	5,68,745/-	31.03.2013	6,33,510/-
2010-11	27.08.2012	13,75,603/-	31.03.2013	14,43,320/-
2011-12	31.07.2011	11,14,014/-	31.03.2013	11,92,973/-

17. Commissioner, Income Tax (Central), Kanpur (hereinafter referred to as "CIT"), after issuing notice under Section 263 (1) and affording opportunity to assessee, passed an order dated 28.3.2014 holding that assessment orders made by Assessing Officer had caused prejudice to Revenue and after setting aside assessment orders, directed Assessing Officer to consider assessment afresh taking into account points raised and stated in CIT's order dated 28.3.2014.

18. Aggrieved by order of CIT passed under Section 263, assessee preferred appeals which have been allowed by Tribunal vide judgment and order dated 18.11.2014 giving rise to these appeals by Revenue. Tribunal has held that CIT recorded a finding that Assessing Officer has passed an erroneous order but cannot direct for further inquiry by Assessing Officer. It has also observed that Assessing Officer has made assessment under Section 153A consequent to search operation and before doing that, it has issued a questionnaire to assessee and thereafter matter was examined hence CIT cannot pass an order under Section 263 observing that Assessing Officer has not applied his mind to the factum of seizure during search operation. Last reason given by Tribunal in passing impugned order and to set aside order passed by CIT is that at the best it was a case of "inadequate inquiry" and not "lack of inquiry", therefore, power under Section 263 by CIT was not justified.

19. In our view, Tribunal has misdirected itself and without appreciating scope of Section 263, has illegally set aside order of CIT. Our reasons are as under:

20. In order to attract Section 263 of Act, 1961, Statute requires that there must exist an erroneous order of assessment of Assessing Officer, prejudicial to the interest of Revenue.

21. In ***Malabar Industrial Company Ltd. Vs. CIT [2000 (243) ITR 83 (SC)],*** Court considered Section 263(1) of Act, 1961 and held that pre-requisite to exercise of jurisdiction by Commissioner, suo motu, under Section 263 is that order of Income Tax Officer is erroneous and prejudicial to the interest of Revenue. Commissioner has to be satisfied on existence of twin conditions i.e.

(i) Order of Assessing Officer sought to be revised is erroneous, and

(ii) It is prejudicial to the interest of Revenue.

22. If any one of them is absent, Section 263 of Act, 1961 would not be attracted. It was also held in ***Malabar Industrial Co. Ltd. (supra)*** that this power of revision cannot be invoked in respect to each and every mistake or error committed by Assessing Officer. It is only when an order is erroneous and prejudicial to the interest of Revenue,, then Section 263 of Act, 1961 will be attracted. An incorrect assumption of fact or an incorrect application of law will satisfy the requirement of order being 'erroneous'. Court further said that orders passed without applying principles of natural justice or without application of mind, would also come within the category of "erroneous orders".

23. Coming to the phrase "prejudicial to the interest of Revenue", Court said in ***Malabar Industrial Co. Ltd. (supra)*** that it is not an expression of art and not defined in Act, 1961. When considered with its ordinary meaning, it is of wide import and not confined to mere loss of tax. Court was of the view that scheme of Act was to levy and collect tax in accordance to the provisions of Act and this task is entrusted to Revenue. If, due to erroneous order of Income Tax Officer, Revenue is loosing tax, lawfully payable by a person, it will certainly be prejudicial to the interest of Revenue. However, every loss of revenue, as a consequence of an order of Assessing Officer, cannot be treated as prejudicial to the interest of Revenue. For example, when Income Tax Officer adopted one of the course permissible in law and it resulted in loss of revenue, or where two views are possible and Income Tax Officer has taken one view with which Commissioner does not agree, it cannot be treated erroneous order, prejudicial to the interest of Revenue, unless view taken by Income Tax Officer is unsustainable in law.

24. Aforesaid view taken in ***Malabar Industrial Company Ltd. (Supra)*** has been followed in ***CIT Vs. Max India Ltd. [2007 (295) ITR 282]***, where also Court has reiterated that expression 'erroneous' should be read in conjunction with phrase "prejudicial to the interest of Revenue".

25. Recently, it has also been considered by this Court in **CIT, Meerut Vs. Shri Anand Kumar Jain, ITA No.143 of 2014, decided on 3.11.2014,** and in the circumstances in which Commissioner can exercise powers under Section 263 has been explained as under:-

"Hence, it is well settled that every loss of revenue in consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Assessing Officer adopts one of the courses permissible in law or where two views are possible of which the Assessing Officer has taken one view, the Commissioner cannot exercise jurisdiction under Section 263 merely because he does not agree with the view of the Assessing Officer unless the view which is taken by the Assessing Officer is unsustainable in law. On the other hand, where an order has been passed by the Assessing Officer without application of mind or where the Assessing Officer has made an incorrect assessment of facts or an incorrect application of law, that would satisfy the requirement of the order being erroneous. As regards the words 'prejudicial to the interests of the revenue', the Supreme Court has held that if due to an erroneous order of the Assessing Officer the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue."

26. In the present case, Commissioner has found that recovery of Rs.2 crores in denomination of one thousand rupee notes remained unexplained through out. Assessee sought to explain receipt of Rs.2 crores from different business concerns but record of those did not reconcile. Still without inquiry and looking to money trail of cash, Assessing Officer passed assessment order under Section 153A read with Section 143 and has caused prejudice to Revenue.

27. Here is a case of no inquiry or no proper inquiry and not inadequate inquiry. Moreover, it is not relevant whether Assessing Officer conducted adequate or inadequate inquiry. Power under Section 263 can be exercised by Commissioner if order of assessment passed by Assessing Officer

is an erroneous order and is prejudicial to interest of Revenue. If these twin conditions are satisfied, Commissioner would be justified in passing order, exercising power under Section 263.

28. Tribunal has got impressed with the reply of assessee that he has explained receipt of Rs.2 crores. Tribunal unfortunately failed to notice that said explanation did not reconcile with record of concerns/companies. The assessee claimed that money belong to and he had receipt there from but could not got it verified from record of such concerns, still Assessing Officer without making a detailed in-depth inquiry on this aspect, has proceeded to make assessment causing prejudice to interest of Revenue.

29. We, therefore, answer the questions noted above in favour of Revenue and hold that Tribunal has completely erred in law in setting aside order passed by CIT under Section 263 of Act, 1961.

30. All these appeals are allowed. The judgment and order of Tribunal dated 18.11.2014 impugned in these appeals is hereby set aside. The order dated 28.3.2014 passed by CIT in exercise of Section 263 of Act, 1961, is hereby restored.

31. No costs.

(2016) 9 ILRA 232
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 270 Of 2014
&
Connected With Other Cases

Commissioner Of Income Tax Central Kanpur ...Appellant
Versus
Kesarwani Zarda Bhandar Sahson Alld. ...Respondent

Counsel for Appellant:
Ashok Kumar, S.C.,Bharat Ji Agrwal

Counsel for Respondent:
Krishna Agrawal

Present appeals have been filed by Income Tax Department under Section 260-A of arising from judgment and order dated 1st September 2014 deciding Income Tax Appeals No. 358 and 374 to 378/Alld./2013 and Income Tax Appeals No. 6 to 11/Alld./2014 relating to Assessment Years 2004-05 to 2009-10, by a common order.

The questions raised before us are confined to scope of Section 153A as to whether Assessing Officer has power to reassess return of Assessee not only for the undisclosed income found during search operation but also in regard to assessment order already finalized or stood processed under Sectin 143(1) of Act, 1961.

Section commenced with the words notwithstanding anything contained in Section 139, 147, 148, 149, 151 and 153, meaning thereby whatever has been provided in the aforesaid provisions that will not bar Assessing Officer in proceeding with the assessment or reassessment of total income for six assessment years, immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The word 'assess' or 'reassess' not only suggest but show that power under Section 153A includes reassessment and that would be done only when assessment has already been finalized. There is inherent hint in Section 153A and there is no reason to restrict its scope.

The issue has now been finalized by a Division Bench of this Court in Commissioner of Income Tax Vs. Raj Kumar Arora, (2014) 367 ITR 517 (All) Court observed that The judgment and order of Tribunal to this extent is hereby set aside and the additions made by Assessing Authority which were deleted by Tribunal by taking otherwise view with respect to the scope of Section 153A are restored.

Appeals are allowed.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.

1. Heard Sri Gaurav Mahajan, assisted by Sri Ashok Kumar, learned counsel for appellants and Sri Ravi Kant, Senior Advocate assisted by Sri Umesh Chandra Kesarwani and Sri Rakesh Ranjan Agarwal, Senior Advocate assisted by Sri Suyash Agarwal, counsel for respondents.

2. All these appeals have been filed by Income Tax Department (hereinafter refereed to as "Revenue") under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") arising from judgment and order dated 1st September 2014 deciding Income Tax Appeals No. 358 and 374 to 378/Alld./2013 and Income Tax Appeals No. 6 to 11/Alld./2014 relating to Assessment Years 2004-05 to 2009-10, by a common order.

3. The brief facts giving rise to these appeals may be narrated as under.

4. M/S Kesarwani Zarda Bhandar, Sahson, Allahabad a firm (hereinafter referred to as "Assessee") came into existence in 1967, for manufacturing branded chewing tobacco known as "Zarda' which is an excisable item.

5. For Assessment Years 2004-05 and 2007-08, Assessee already filed returns of income within time. Assessement Order in respect to Assessment Year 2004-05 was also passed by Assessing Officer (hereinafter referred to as "AO") on 19th December 2006. Remaining assessments for Assessment Years 2005-06 to 2007-08 were completed under Section 143(A). On 27th August 2009, search and seizure operation was carried out at Assessee's premises at Allahabad, Branch Office situated at Mumbai and Ahemdabad and the residential premises of partner's firm to Assessee, under Section 132(1) of the Act 1961.

6. A notice under Section 153A of Act, 1961 was issued on 7th July 2010 requiring Assessee to file return of income for Assessment Years 2004-2005 to 2009-2010. Assessing Officer made assessment for the aforesaid years making various additions.

7. Assessee preferred appeal which were decided by Commissioner of Income Tax (Appeals) [hereinafter referred to as "CIT (Appeals)"] vide separate order dated 30th September 2013. Thereafter, Assessee and Revenue, both preferred appeals before Tribunal who has allowed Assessee's appeal and dismissed Revenue's appeal. Hence this appeal by Revenue.

8. Appeal was admitted on following substantial questions of law:

(1) Whether the Hon'ble Income Tax Appellate Tribunal had erred in law and on facts in setting aside the assessment completed under Section 153A of the Income Tax Act, 1961 and not following the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Raj Kuamr in ITA No. 56 of 2011 wherein it is held that the Assessing Officer has the power to re-

assess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of original asseessment.

(2) Whether in view of the law laid down by this Hon'ble Court in the case of CIT Vs. Raj Kumar (supra), the Assessing Officer would be competent to re-open the assessment proceedings already made and determine the total income of the assessee ; the Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act ?

9. The questions raised before us are confined to scope of Section 153A as to whether Assessing Officer has power to reassess return of Assessee not only for the undisclosed income found during search operation but also in regard to assessment order already finalized or stood processed under Sectin 143(1) of Act, 1961. Section 153A was inserted by Finance Act, 2003, with effect from 1.6.2003 which reads as follows.

"(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall--

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

***Provided** that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:*

***Provided further** that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate:*

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the [Principal Commissioner or] Commissioner:

Provided *that such revival shall cease to have effect, if such order of annulment is set aside.]*

Explanation.--For the removal of doubts, it is hereby declared that,--

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

10. As is evident Section commenced with the words notwithstanding anything contained in Section 139, 147, 148, 149, 151 and 153, meaning thereby whatever has been provided in the aforesaid provisions that will not bar Assessing Officer in proceeding with the assessment or reassessment of total income for six assessment years, immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The word 'assess' or 'reassess' not only suggest but show that power under Section 153A includes reassessment and that would be done only when assessment has already been finalized. There is inherent hint in Section 153A and there is no reason to restrict its scope. Tribunal has relied on the decision of Special Bench of Mumbai Tribunal in **All Cargo Global Logistics Ltd. Vs. DCIT, 147 TTJ 513** wherein it was held that no addition can be made for any assessment year under Section 153A, the assessment which, is not pending on the date of search, unless any incriminating material is found in the course of search. Tribunal has decided the issue in favour of Assessee and deleted all the additions made in assessment orders up for consideration in various appeal for Assessment Years 2004-05 to Assessment Year 2007-08.

11. We find that this issue has now been finalized by a Division Bench of this Court in **Commissioner of Income Tax Vs. Raj Kumar Arora, (2014) 367 ITR 517 (All)** wherein it has been held as under :-

"Consequently, even though an assessment order has been passed under Section 143(1) (a) or under Section 143(3) of the Act, the Assessing Officer would be required to reopen these proceedings and reassess the total income taking notice of undisclosed income even found during the search and seizure operation. The fetter imposed upon the Assessing Officer under Sections 147 and 148 of the Act have been removed by the non obstante clause under Section 153A of the Act.

Consequently, we are of the opinion that in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.

In the light of the aforesaid, the reasons given by the Tribunal that no material was found during the search cannot be sustained, since we have held that the ***Assessing Officer has the power to reassess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment."***

12. In view of above decision which squarely clinches both the substantial questions of law pressed in these appeals, we find no reason to take a different view and hence answer the above questions in favour of Revenue and against Assessee.

13. The judgment and order of Tribunal to this extent is hereby set aside and the additions made by Assessing Authority which were deleted by Tribunal by taking otherwise view with respect to the scope of Section 153A are restored.

14. Appeals are allowed.

(2016) 9 ILRA 237
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.09.2016

BEFORE

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

Misc. Bench No.- 21150 Of 2016

Vinay Pratap Singh **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Vivek Raj Singh

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

Present writ petition questions the correctness of the Government order dated 01.04.2006 and the order issued by the respondent State on 02.06.2016 whereby the standard rate of Rs.65/- per quintal for inter-State transportation and handling of foodgrains have been fixed by the State Government. The contention of the learned counsel for the petitioner is that the same is based on a totally misinterpretation of Rule 7 of the Food Security (Assistance to the State Government) Rules, 2015.

Court observed that the State Government while proceeding to interpret Rule 7 of 2015 Rules may not have correctly arrived at the conclusion of the maximum permissible rate of Rs.65/- and to that extent the argument of the learned counsel for the petitioner may be correct but the petitioner cannot compel the State Government to trade or to fix the rate as had been done earlier. The State Government has now reduced and fixed the rate at Rs.65/-. It is open to the petitioner to enter into the trade on the said rates as prescribed in the Government orders. A writ therefore, cannot be issued to compel the State Government to proceed to fix the rates as earlier which cannot be a matter of adjudication for this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India.

The writ petition lacks merit and is accordingly rejected.

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

1. Heard Sri Vivek Raj Singh, learned counsel for the petitioner and the learned standing counsel for the respondents 1 to 4. Notices have been accepted on behalf of the respondent No.5 by Sri Ankit Pandey.

2. This writ petition questions the correctness of the Government order dated 01.04.2006 and the order issued by the respondent State on 02.06.2016 whereby the standard rate of Rs.65/- per quintal for inter-State transportation and handling of foodgrains have been fixed by the State Government. The contention of the learned counsel for the petitioner is that the same is based on a totally misinterpretation of Rule 7 of the Food Security (Assistance to the State Government) Rules, 2015. A copy of the said Rules has been placed on record. The said rule 7 is extracted hereinunder:-

"7. Norms and pattern of Central assistance.-- (1) The norms of Central assistance (in Rs. Per quintal) to the State Government and Union territory and share of the Central Government (in percentage) shall be limited as under:

Category of State and Union Territories	**Norms of expenditure** (Rate in Rs, per quintal)			**Central share** (in per cent)
	Intra-State movement and handling	**Fair Price Shop dealers margin**		
		Basic	**Additional margin for sale through point of sale device**	
General	65	70	17	50
Special	100	143	17	75

Explanation--For the purpose of this rule-

(1) "General Category States and Union territories" means the following:

(i) Andhra Pradesh;
(ii) Bihar;
(iii) Chhattisgarh;
(iv) Goa;
(v) Gujarat;
(vi) Haryana;
(vii) Jharkhand;
(viii) Karnataka;
(ix) Kerala;
(x) Madhya Pradesh;
(xi) Maharashtra;
(xii) Odisha;
(xiii) Punjab;
(xiv) Rajasthan;

(xv) Tamil Nadu;
(xvi) Telangana;
(xvii) Uttar Pradesh;
(xviii) West Bengal;
(xix) Chandigarh;
(xx) Dadra and Nagar Haveli;
(xxi) Daman and Diu;
(xxii) Delhi; and
(xxiii) Puducherry.

(2) "Special Category States and Union Territories" means the following:

(i) Arunachal pradesh;
(ii) Assam;
(iii) Himanchal Pradesh;
(iv) Jammu and Kashmir;
(v) Manipur;
(vi) Meghalaya;
(vii) Mizoram;
(viii) Nagaland;
(ix) Sikkim;
(x) Tripura;
(xi) Uttarakhand;
(xii) Andman and Nicobar Islands; and
(xiii) Lakshadweep.

(2) The additional margin provided in sub-rule (1) is towards the cost of purchase, operation and maintenance of the point of sale device, its running expenses and incentive for its use.

(3) The additional margin shall be payable for the fair price shop which has installed a point of sale device and shall be limited to the transactions made through it.

(4) The additional margin shall be released on the basis of a certificate from the State Government, supported by the documents, indicating the following, namely:-

(a) number of fair price shops at which the point of sale devices have been installed and are functional; and

(b) the details of all transactions using the point of sale devices.

(5) The State Government shall furnish the details of all transactions made through the point of sale devices in public domain.

(6) The State Government shall have the flexibility in choosing any of the following models for the installation of point of sale device, namely:-

(a) the State Government may purchase, install and maintain the point of sale device,

(b) the State Government may select a system integrator to purchase, install and maintain the point of sale device;

(c) the fair price shop dealer may purchase, install and maintain the point of sale device.

(7) The State Government shall determine the basis for apportioning the additional margin for sale through point of sale device among different stakeholders, depending upon the model chosen.

(8) The State Government shall have the flexibility to allow differential margins within the State taking into consideration the location of shops and number of ration cards attached to the shops.

Provided that the Central assistance shall be limited to the rates specified in sub-rule (1) of rule 7 or the actual average rates for the State as a whole, at which the expenditure was actually incurred by the State Government, whichever is lower.

(9) For the expenditure on intra-State movement and handling of foodgrains, Central assistance shall be limited to the rates specified in sub-rule (1) of rule 7 or the actual average rates for the State as a whole at which expenditure was incurred by the State Government, whichever is lower."

3. Learned counsel submits that the said Rule 7 only indicates the norms provided by the Central Government for central assistance which is Rs.65/- per quintal to the maximum and 50% thereof to be borne by the Central Government. Learned counsel submits that this was a restraint on the burden of share to be borne by the Central Government and was not a norm to fix the maximum rate to be offered by the State Government. The contention is that totally misinterpreting the said norms, the impugned Government order has been issued treating the same to be a direction to fix the maximum limit of rate of Rs.65/- per quintal to be compulsorily observed by the State Government. Learned counsel submits that the consequential order dated 02.06.2016 also suffers from the same infirmity and as such, both deserve to be quashed as they are based on a misinterpretation and misreading of the aforesaid Rules.

4. We have considered the aforesaid submissions raised and we find that the State Government while proceeding to interpret Rule 7 of 2015 Rules may not have correctly arrived at the conclusion of the maximum permissible rate of Rs.65/- and to that extent the argument of the

learned counsel for the petitioner may be correct but the petitioner cannot compel the State Government to trade or to fix the rate as had been done earlier. The State Government has now reduced and fixed the rate at Rs.65/-. It is open to the petitioner to enter into the trade on the said rates as prescribed in the Government orders. A writ therefore, cannot be issued to compel the State Government to proceed to fix the rates as earlier which cannot be a matter of adjudication for this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India.

5. The writ petition lacks merit and is accordingly rejected. However, if there is any dispute with regard to the agreement with the State Government vis-a-vis the rate, it will be open to the petitioner to approach any appropriate forum in accordance with law.

(2016) 9 ILRA 242
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 1581 Of 2013

Hirendra Nandi ...Revisionist
Versus
State Of U.P. & Ors. ...Opposite Parties

Counsel for Revisionist:
Kripa Shanker Singh, Pankaj Kumar

Counsel for Opposite Parties:
Govt. Advocate, Jainendra Kumar Mishra

Present criminal revision has been directed against the judgment and order dated 16.05.2013 passed by the learned Chief Judicial Magistrate, Allahabad on Misc. Application No.409/XII/13 (Hirendra Nandi vs. Vinod Kumar and others), whereby the application under Section 156(3) Cr.P.C. dated 01.04.2013 moved by the revisionist has been rejected.

Learned counsel for the revisionist has submitted that the Police of Police Station- Kydganj, Allahabad reached at the home of revisionist and informed him that non-bailable warrant has been issued against him. The Station Officer and other Police personnel of Police Station- Kydganj, has compelled the revisionist to sign on four cheques of total amount of Rs.10,00,000/- in favour of Ram Kumar Verma and also forced his mother to put her thumb impression upon one stamp paper and also registered one forged F.I.R. under Sections 386, 323, 504, 506 I.P.C. against the revisionist. On perusal of the impugned F.I.R. and order dated 16.05.2013 passed by the learned Chief Judicial Magistrate, Allahabad, it appears that it has been observed in the impugned order that civil litigation is pending between the parties in the court of learned Additional Civil Judge (Senior Division)/ A.C.J.M., Room No.6, Allahabad and also one order dated 31.1.2013 was also available on the file regarding contempt application Civil No. 529 of 2013 passed by this Court. This also reveals that there is dispute pending amongst the parties in this Court. This has been observed by the learned Chief Judicial Magistrate that the dispute is of the civil nature and as a counter blast, this application under Section 156(3) Cr.P.C. has been preferred which is liable to be rejected and it was rejected by the learned Chief Judicial Magistrate, Allahabad vide order dated 16.05.2013.

Court observed that it appears that there is a long drawn civil dispute between both the parties regarding above house No. 41/34, Bairahana, Allahabad. The dispute is of the civil nature and learned Chief Judicial Magistrate has rightly observed that as a counter blast this application under Section 156 (3) Cr.P.C. has been filed by the applicant/ revisionist. Resultantly, the revision is liable to be dismissed.

The criminal revision is hereby dismissed.

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

1. This criminal revision has been directed against the judgment and order dated 16.05.2013 passed by the learned Chief Judicial Magistrate, Allahabad on Misc. Application No.409/XII/13 (Hirendra Nandi vs. Vinod Kumar and others), whereby the application under Section 156(3) Cr.P.C. dated 01.04.2013 moved by the revisionist has been rejected.

2. Heard Sri Pankaj Kumar, learned counsel for the revisionist along with Sri Jainendra Kumar Mishra, learned counsel for the opposite party nos. 3 and 4 and Ms. Anita Srivastava, learned A.G.A. for the State and perused the record.

3. Learned counsel for the revisionist has relied upon **Lalita Kumari vs. Government U.P. and others** reported in **(2014) 2 SCC 1.**

4. Learned counsel for the revisionist has submitted that the Police of Police Station- Kydganj, Allahabad reached at the home of revisionist and informed him that non-bailable warrant has been issued against him. When the revisionist reached at the Police Station- Kydganj, he was informed on the cellular phone that opposite parties are trying to take possession of his house forcefully after breaking open the lock and they are also throwing out the household goods. When the Station Officer was shown the order passed by this Court dated 2.11.2012, the Station Officer did not pay any heed towards it. The Station Officer and other Police personnel of Police Station- Kydganj, has compelled the revisionist to sign on four cheques of total amount of Rs.10,00,000/- in favour of Ram Kumar Verma and also forced his mother to put her thumb impression upon one stamp paper and also registered one forged F.I.R. under Sections 386, 323, 504, 506 I.P.C. against the revisionist.

5. On perusal of the impugned F.I.R. and order dated 16.05.2013 passed by the learned Chief Judicial Magistrate, Allahabad, it appears that it has been observed in the impugned order that civil litigation is pending between the parties in the court of learned Additional Civil Judge (Senior Division)/ A.C.J.M., Room No.6, Allahabad and also one order dated 31.1.2013 was also available on the file regarding contempt application Civil No. 529 of 2013 passed by this Court. This also reveals that there is dispute pending amongst the parties in this Court. This has been observed by the learned Chief Judicial Magistrate that the dispute is of the civil nature and as a counter blast, this application under Section 156(3) Cr.P.C. has been preferred which is liable to be rejected and it was rejected by the learned Chief Judicial Magistrate, Allahabad vide order dated 16.05.2013.

6. Counter affidavit filed on behalf of the opposite party no.3, deponent, Ram Kumar Verma reveals that there is dispute regarding one house situated in the locality of Bairahana, Tehsil- Sadar, District- Allahabad and one F.I.R. in Crime No. 371 of 2012 under Sections 386, 323, 504, 506 I.P.C., Police Station- Kydganj, District- Allahabad has been registered on 03.12.2012 at about 21:20 hours regarding 4/5 part of house No. 41/34, Bairahana, Police Station- Kydganj, District-

Allahabad against the accused persons namely Smt. Meera Nandi, Hirendra Nath Nandi, Smt. Devyani Nandi and Avilesh Nandi.

7. Moreover, the Suit No. 1278 of 2010 (Smt. Meera Nandi and others vs. Ram Kumar Verma and others) was pending in the court of learned Additional Civil Judge (Senior Division)/ A.C.J.M., Room No.6, Allahabad and temporary injunction application-6C was decided on merits by the learned Additional Civil Judge (Senior Division)/ A.C.J.M., Room No.6, Allahabad on 02.11.2012. One Civil Revision No. 480 of 2012 (Ram Kumar Verma vs. Smt. Meera Nandi and othes) was also decided on 4.10.2012 by this Court.

8. As per the above discussions, it appears that there is a long drawn civil dispute between both the parties regarding above house No. 41/34, Bairahana, Allahabad. The dispute is of the civil nature and learned Chief Judicial Magistrate has rightly observed that as a counter blast this application under Section 156 (3) Cr.P.C. has been filed by the applicant/ revisionist. Resultantly, the revision is liable to be dismissed.

9. The criminal revision is hereby **dismissed**.

(2016) 9 ILRA 245
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 557 Of 2011
&
Sales/Trade Tax Revision No.- 558 Of 2011

M/S. Tata Motors Limited ...Applicant

Versus

The Commissioner, Commercial Taxes, U.P. Lucknow ...Opposite Party

Counsel for Applicant:
Krishna Agrawal

Counsel for Opposite Party:
C.S.C.

The revisionist is a company having its registered office in Mumbai in the State of Maharashtra. It is engaged in the business of manufacture and sale of motor vehicles, chassis and other parts. During the assessment year in question a motor vehicle was sold by the revisionist to M/s Motor & General Sales Limited, Karnal, Haryana vide Bill No. 30698 dated 24 March 1992. The aforesaid vehicle is stated to have been sold by M/s Motor & General Sales on hire purchase to one Sri Naseem Ahmad. It transpires that Sri Naseem Ahmad obtained a Form 34 on 13 June 1992 at the entry check post at Kairana, District Muzaffarnagar for the purposes of taking the vehicle to the State of Bihar. This Form 34 was not got cancelled at the exit checkpost of the State of U.P. On 25 January 2005, a tax of Rs. 39,000/ came to be levied upon the revisionist by the Assistant Commissioner, Trade Tax on the ground of violation of Section 28B of the U.P. Trade Tax Act, 19481. By a separate order (challenged in Trade Tax Revision No. 558 of 2011) a penalty of Rs. 1,24,800 came to be imposed upon the revisionist in terms of the provisions of Section 15A(1) (g) of the 1948 Act.

Hon'ble Court finds that a vehicle sales invoicescumdelivery challan dated 24 March 1992 also existed. This invoice established a sale of the chassis by the revisionist to Motor and General Sales Limited Karnal. The vehicle was identified both by chassis number as well as engine number. On 5 June 1992 Motor and General Sales Limited Karnal drew up a sale certificate and delivery receipt in favour of Naseem Ahmad. These documents too identified the vehicle both by its engine and chassis number. Emphasis has been deliberately laid upon this aspect in order to indicate that the vehicle in question stood appropriated to the contract by identification of its chassis and engine numbers. The hire purchase agreement was of course between the revisionist and Naseem Ahmad and came to be executed on 29 June 1992. The issue which therefore primarily arises is whether the rebuttable presumption which stood raised under Section 28B stood discharged or not. As was noted in Sodhi Transport a rebuttable presumption is not evidence and is only indicative of the person upon whom the burden of proof initially lies and rests. A rebuttable presumption is clearly distinct from one which is conclusive in character. Under a rule of rebuttable presumption all that a person is obliged to do is to establish by way of evidence that the real fact is not as presumed. The character of the burden of proof placed upon the party has been described by the Supreme Court by the use of the words "fairly and reasonably tending to show". It has then been explained that if the evidence tendered tends to show that the

real fact is not as presumed, the purpose of the statutory presumption is over and it is then for the party concerned by way of evidence to establish the true nature of the fact. The respondents in the present case had before them not just the invoices of sale executed by the revisionist in favour of Motor and General Sales Limited but also the delivery and sale invoice executed in favour of Naseem Ahmad. These documents evidenced a sale by way of hire purchase outside the State of U.P. The documents and evidences so led clearly tended to dislodge the rebuttable presumption raised. Whether the test of "tending to show" is applied or the test of "preponderance of probability", it is apparent that the presumption raised against the revisionist stood clearly discharged. In the opinion of this Court the evidence led before the respondents was clear and convincing and worthy of being placed in the category of evidence which fairly and reasonably showed that the real fact was not as presumed.

Accordingly, these revisions shall consequently stand allowed.

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

1. Heard Sri Krishna Agrawal, learned counsel for the revisionist and Sri B.K. Pandey, learned Standing Counsel.

2. These two revisions having arisen from proceedings taken by the respondent authorities in respect of a singular transaction, have with the consent of parties been taken up for disposal together. The facts upon which there is not much dispute are as follows:

3. The revisionist is a company having its registered office in Mumbai in the State of Maharashtra. It is engaged in the business of manufacture and sale of motor vehicles, chassis and other parts. For the purposes of effecting sales of the articles manufactured by it, it establishes regional sales offices in various States throughout the country. During the assessment year in question a motor vehicle was sold by the revisionist to M/s Motor & General Sales Limited, Karnal, Haryana vide Bill No. 30698 dated 24 March 1992. The aforesaid vehicle is stated to have been sold by M/s Motor & General Sales on hire purchase to one Sri Naseem Ahmad. It transpires that Sri Naseem Ahmad obtained a Form - 34 on 13 June 1992 at the entry check post at Kairana, District Muzaffarnagar for the purposes of taking the vehicle to the State of Bihar. This Form - 34 was not got cancelled at the exit check-post of the State of U.P. On 25 January 2005, a tax of Rs. 39,000/- came to be levied upon the revisionist by the Assistant Commissioner, Trade Tax on the ground of violation of Section 28-B of the U.P. Trade Tax Act, 19481. By a separate order (challenged in Trade Tax Revision No. 558 of 2011) a penalty of Rs. 1,24,800 came to be imposed upon the revisionist in terms of the provisions of Section 15A(1)(g) of the 1948 Act.

4. Sri Krishna Agarwal, learned counsel for the revisionist has assailed both the levy of tax as well as the imposition of penalty and has advanced the following submissions.

5. Sri Agarwal submits that admittedly the vehicle in question had been sold to M/s Motors and General Sales Limited at Karnal in the State of Haryana. It is his submission that since the sale had taken place at Karnal in the State of Haryana itself, the presumption of sale which stands engrafted in Section 28-B of the 1948 Act did not arise. Sri Agarwal further referred to and relied upon the judgment rendered by the Supreme Court in **Asea Brown Boveri Ltd. Vs. Industrial**

Finance Corporation of India and Ors.[2] to submit that a hire purchase agreement is imbued with the primary purpose of financing the purchase of assets or equipment. While in law, the hirer may continue to be the owner of the asset or equipment, for all practical purposes the borrower becomes the owner of the property and enjoys full rights over the asset or equipment including the right to take delivery, enjoy use of occupation, maintain, operate and bear risks of loss or damage. He has also placed reliance upon a judgment rendered by a learned Single Judge of this Court in **Commissioner Trade Tax, U.P., Lucknow Vs. S/s Shrimati Harjeet Kaur, Kanpur**[3] to contend that the hirer in view of the explanation appended to Section 28-B is deemed to be the owner of the vehicle. Referring then to the fact as noted in the orders impugned, Sri Agarwal submitted that undisputedly Naseem Ahmad appears to have sold the vehicle to one Ali Mohammad after it had crossed into the State of U.P. He submits that neither the actions taken by Sri Naseem Ahmad post the delivery and sale of the vehicle or the infraction of registration laws by him could by any stretch of imagination be said to attach a liability of tax upon the revisionist.

6. Sri Pandey, learned Standing Counsel while countering the above submissions has contended that a hire purchase agreement by its very nature does not result in a sale or a transfer of property in goods. He, therefore, submits that the revisionist continued to be the owner of the vehicle and was consequently correctly held liable to be proceeded against for violation of the provisions of Section 28-B. He further referred to the fact that the hire purchase agreement itself was one which was executed between the revisionist and Naseem Ahmad and therefore submitted that the revisionist was the owner who admittedly failed to comply with the provisions of Section 28-B. In addition to the above Sri Pandey placed emphasis upon the facts as gathered by the respondent-authorities and which stood recorded in the orders impugned. He highlighted the findings recorded in the order of the Tribunal to the effect that the vehicle had come to be registered with the transport authorities at Gorakhpur while the address of the selling dealer was shown to be at Azamgarh. This, Sri Pandey submits, has compelled the Tribunal to correctly come to a conclusion that the vehicle had been sold within the State of U.P. He further placed reliance upon Clause (2) of the hire purchase agreement to submit that the owner of the chassis in question was shown to be the revisionist itself and in view of the above he submitted that both the levy of tax and imposition of penalty was clearly justified. It is these rival submissions which fall for consideration.

7. Since the determination of the rival submissions would pivot around the provisions of Section 28-B, it would be apposite to extract the said section which is in the following terms: -

"Section 28-B. Transit of goods by road through the State and issue of transit pass.

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 sub-section (1) of section 28-A, passes through the State, the driver or other person incharge of such vehicle shall obtain in the prescribed manner a transit pass from the officer-in-charge of the first check-post or barrier after his entry into the State and deliver it to the officer-in-charge of the last check-post or barrier before his exist from

the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person-in-charge 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 person-in-charge of the vehicle.

Explanation : In a case where a vehicle owned by a person is hired for transportation of goods by some other person, the hirer of the vehicle shall for the purposes of this Section, be deemed to be the owner of the vehicle."

8. As is evident from a reading of the above provision, the section imposes an obligation upon the driver or other person in charge of a vehicle to obtain a transit pass at the first check-post barrier after entry into the State of U.P. and surrender the same to the officer in charge of the last check-post or barrier before exiting the State of U.P. The provision itself stands attracted to cases where goods coming from any place outside the State are transiting through the State and are bound for a place outside U.P. The section then also engrafts a presumption against the driver or other person-in-charge of the vehicle to the effect that if the transit pass is not surrendered at the last check post or barrier, it shall be presumed that the goods have been sold within the State by the owner or person-in-charge of the vehicle. While the obligation to obtain a transit pass is placed upon the driver or other person-in-charge of the vehicle, it becomes apposite to note that the presumption of sale stands raised against the owner or the person in charge of the vehicle. The Explanation appended to the provision provides that in a case where the vehicle in question is hired for transportation of goods, the hirer of the vehicle shall for the purposes of the provision be deemed to the owner of the vehicle. It becomes pertinent to note here that the presumption of sale embodied in Section 28-B has been held to be a rebuttable presumption in **Sodhi Transport Co. Vs. State of U.P.**[4]. The Supreme Court described the ambit of a rebuttable presumption in the following words:

"14. A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates that production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

16. In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned

the power to levy a tax which the legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

17. We are of the view that the words contained in Section 28-B of the Act only require the authorities concerned to raise a rebuttable presumption, that the goods must have been sold in the State if the transit pass is not handed over to the officer at the check-post of the barrier near the place of exit from the State. The transporter concerned is not shut out from showing by producing reliable evidence that the goods have not been actually sold inside the State. It is still open to him to establish that the goods had been disposed of in a different way. He may establish that the goods have been delivered to some other person under a transaction which is not a sale, they have been consumed inside the State or have been re despatched outside the State without effecting a sale within the State etc. It is only where the presumption is not successfully rebutted the authorities concerned are required to rely upon the rule of presumption in Section 28-B of the Act. It is, therefore, not correct to say that a transaction which is proved to be not a sale is being subjected to sales tax. The authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the State and in doing so relies upon the statutory rule of presumption contained in Section 28-B of the Act which may be rebutted by the person against whom action is taken under Section 28-B of the Act. When once a finding is recorded that a person has sold the goods which he had brought inside the State, then he would be a dealer even according to the definition of the word 'dealer' as it stood from the very commencement of the Act subject to the other conditions prescribed in this behalf being fulfilled. A person who sells goods inside the State of Uttar Pradesh and fulfills the other conditions prescribed in that behalf is a dealer even as per amendments made in 1959, 1961, 1964, 1973 and 1978 to the said definition. There is, therefore, no substance in the contention that a transporter was being made liable for the first time after 1979 with retrospective effect to pay sales tax on a transaction which is not a sale. Tax becomes payable by him only after a finding is recorded that he has sold the goods inside the State though with the help of the presumption which is a rebuttable one."(emphasis supplied)

9. **Sodhi Transport**, we may note, was subsequently noticed and explained in **Heinz India (P) Ltd. Vs. State of U.P.** [5] wherein the Supreme Court observed as under:-

"56. Mr Chandra, however, laid considerable emphasis on the words "tending to show that the real fact is not as presumed", to argue that the test applied by this Court in rebuttable presumptions had been the test of "preponderance of probability". We do not think so. It is well settled that a decision is an authority for the point it decides. It is equally well settled that the text of the decision cannot be read as if it were a statute. That apart the expression used by this Court is "evidence fairly and reasonably tending to show", which signifies that it is not just any evidence, howsoever shaky and nebulous, that would satisfy the test of preponderance of probability to rebut the statutory presumption but evidence that can by proper and judicial application of mind be said to be fairly and reasonably showing that the real fact is not as presumed. In other words the evidence

required to rebut a statutory presumption ought to be clear and convincing, no matter that the degree of proof may not be as high as proving the fact to the contrary beyond a reasonable doubt.

57. The heightened standard of proof required to rebut a presumption raised under the statute at hand is in our view applicable for two distinct reasons. The first and foremost is that the presumption is raised in relation to a fiscal statute. While the amount payable is not a tax, it is nevertheless a statutory levy which is attracted the moment the transaction of sale takes place within the market area. Goods admittedly produced within the market area and not consumed within such area are presumed to be leaving pursuant to a transaction of sale unless the contrary is proved. That the goods are produced within the market area is not in dispute in the instant case. That they left the market area is also admitted. In the ordinary course, therefore, the presumption would be that the goods left pursuant to a sale unless the appellants are in a position to prove the contrary.

58. The second reason for applying a higher standard of proof than mere preponderance of probability is that the nature of transaction pursuant to which the goods are removed from the market area is within the exclusive knowledge of the appellants or the persons to whom such goods are being dispatched. In other words, the circumstances in which the transactions, which the statute presumes to be sales, but which the appellants claim are simple transfer of stocks are within the exclusive knowledge of the appellants. The entire evidence relevant to the transactions, being available only with the appellants and the true nature of the transactions being within their special knowledge, there is no reason why the rebuttal evidence should not satisfy the higher standard of proof and clearly and convincingly establish that the fact presumed is not the actual fact. Our answer to Question 2 accordingly is that the evidence intended to rebut the statutory presumption under Section 17 of the Adhiniyam ought to be clear and convincing evidence showing that what is presumed under the provision is not the real fact." (emphasis supplied)

10. **Heinz** it becomes relevant to note does not detract from the basic principles enunciated in **Sodhi Transport**. It, of course, with reference to fiscal statutes holds that the degree of proof must be clear and convincing.

11. From the material that was placed before the respondent authorities, this Court finds that a vehicle sales invoices-cum-delivery challan dated 24 March 1992 also existed. This invoice established a sale of the chassis by the revisionist to Motor and General Sales Limited Karnal. The vehicle was identified both by chassis number as well as engine number. On 5 June 1992 Motor and General Sales Limited Karnal drew up a sale certificate and delivery receipt in favour of Naseem Ahmad. These documents too identified the vehicle both by its engine and chassis number. Emphasis has been deliberately laid upon this aspect in order to indicate that the vehicle in question stood appropriated to the contract by identification of its chassis and engine numbers. The hire purchase agreement was of course between the revisionist and Naseem Ahmad and came to be executed on 29 June 1992. The issue which therefore primarily arises is whether the rebuttable presumption which stood raised under Section 28-B stood discharged or not. As was noted in **Sodhi Transport** a rebuttable presumption is not evidence and is only indicative of the person upon whom the burden of proof initially lies and rests. A rebuttable presumption is clearly distinct from one which is conclusive

in character. Under a rule of rebuttable presumption all that a person is obliged to do is to establish by way of evidence that the real fact is not as presumed. The character of the burden of proof placed upon the party has been described by the Supreme Court by the use of the words *"fairly and reasonably tending to show"*. It has then been explained that if the evidence tendered tends to show that the real fact is not as presumed, the purpose of the statutory presumption is over and it is then for the party concerned by way of evidence to establish the true nature of the fact. The respondents in the present case had before them not just the invoices of sale executed by the revisionist in favour of Motor and General Sales Limited but also the delivery and sale invoice executed in favour of Naseem Ahmad. These documents evidenced a sale by way of hire purchase outside the State of U.P. The documents and evidences so led clearly tended to dislodge the rebuttable presumption raised. Whether the test of *"tending to show"* is applied or the test of *"preponderance of probability"*, it is apparent that the presumption raised against the revisionist stood clearly discharged. In the opinion of this Court the evidence led before the respondents was clear and convincing and worthy of being placed in the category of evidence which fairly and reasonably showed that the real fact was not as presumed.

12. It becomes pertinent to note here that the department does not rely upon or rest its case against the revisionist upon any other independent material or evidence.

13. Additionally, this Court finds merit in the submission of Sri Agarwal who relying upon the principles enunciated by the Supreme Court in **Asea Brown Boveri** submitted that the owner of the vehicle was for all practical purposes Naseem Ahmad and that therefore the levy of tax and imposition of penalty was clearly unjustified. The Supreme Court in **Asea Brown Boveri** held as under:

"In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property inasmuch as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the above mentioned expenses. The period of lease extends over and covers the entire life of the property for which it may remain useful divided either into one term or divided into two terms with clause for renewal. In either case, the lease is non-cancellable." (emphasis supplied)

14. Whether Naseem Ahmad is treated to be the owner of the vehicle for all practical purposes or is viewed as the person in charge of the vehicle, the liability of tax and penalty foisted upon the assessee is unjustified and cannot be sustained.

15. Accordingly, these revisions shall consequently stand **allowed**. The orders of the authorities below are set aside. The questions are answered in favor of the assessee.

(2016) 9 ILRA 252
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.09.2016

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Service Single No.- 3167 Of 2008

Muzammil Husain & Ors. ...Petitioners

Versus

M.D. U.P.S.R.T.C.Corporation Lko.& Ors. ...Respondents

Counsel for Petitioners:
P.K.Upadhyay

Counsel for Respondents:
Prabhakar Tewari, Chandra Shekher Pandey

After the death of Sri Mahmood Husain, the petitioner no. 2, moved an application seeking compassionate appointment on the ground that she and her children were facing extreme financial difficulties as she had no other source of livelihood and on the request made by petitioner no. 2 she was required to complete certa in formalities in order to enable the respondents to give compassionate appointment to her but the petitioner no. 2, instead of doing the needful, admittedly wrote to the respondents that her son was a minor and as soon as he became major and acquired the requisite qualification for Government service she would move an application for compassionate appointment. After more than 17 years and 7 months, the petitioner no. 2 wrote to the respondents seeking compassionate appointment for her son. Compassionate appointment is neither a source of employment nor there could be reservation of a vacancy till such time as the petitioner became a major after a number of years.

Court held that Compassionate appointment was offered to the petitioner no. 2 but she did not accept the same. It is thus apparent that the petitioners had some alternative source of livelihood and they have been able to pull on without any difficulty for almost 26 years since the death of Sri Mahmood Hussain. Once the crisis is over, the petitioners cannot be offered compassionate appointment. As well as the petitioners have not approached the Court with clean hands. They have not only concealed material facts but have deliberately and intentionally made a false averment. This is highly improper. The writ petition is liable to be dismissed on this ground alone. This Court has, however, considered the merits of the case and even on merits, the petitioners have no case.

The writ petition deserves to be dismissed and is accordingly dismissed.

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

1. Sri Mahmood Husain, while working as Superintendent of Store at the Regional Workshop of the Uttar Pradesh State Road Transport Corporation, Lucknow (for short 'Corporation') at Azamgarh unfortunately died on 06.11.1990.

2. On 05.06.2008, after almost 17 years and seven months to be precise, his son Muzammil Husain, the petitioner no. 1, and his widow Shahjahan Bano, the petitioner no. 2 have jointly preferred this writ petition praying for the following reliefs:-

"(i) a writ order or direction in the nature of mandamus commanding the opp. parties to decide the representations of petitioners which is contained in Annexure No. 2, 5 & 6 of this writ petition.

(ii) to pass any other order or direction which this Hon'ble Court deems fit and proper in facts and circumstances of the case.

(iii) to allow the writ petition with costs."

The Managing Director and the Regional Manager of the Corporation (Azamgarh Region) have been impleaded as respondent nos. 1 & 2 to the writ petition.

3. On 19.03.1991, immediately after the death of her husband, the petitioner no. 2, admittedly, made a representation (annexure no. 2 to the writ petition) to the respondent no. 2 seeking compassionate appointment. The petitioner no. 2, thereafter, is alleged to have sent reminders on 15.06.1994 and 21.06.1994. According to the petitioners, as no action, whatsoever, was taken by the respondents on the said representations, the petitioner no. 2 personally met the respondents. The respondents, it is alleged, expressed their unwillingness to appoint petitioner no. 2. Instead, they advised her to wait till her son attained majority. On 09.08.2006, the petitioner no. 2 again sent a representation (annexure no. 5 to the writ petition) by registered post seeking compassionate appointment for her son, the petitioner no. 1, and then finally, the petitioner no. 1 is alleged to have made a representation on 14.09.2006 (annexure no. 6 to the writ petition) seeking compassionate appointment for himself. It is on the strength of the categorical averment made in the writ petition, that the representations preferred by the petitioners have not been disposed of, that the petitioners have approached this Court by means of the present writ petition, seeking a direction to the respondents to dispose of the representations contained in annexure nos. 2, 5 and 6 to the writ petition.

4. The respondents have denied all the material averments made in the writ petition. In their counter affidavit, the respondents have categorically stated that in response to the letter dated 19.03.1991 of the petitioner no. 2, the Regional Manager, Azamgarh by his letter dated 02.11.1993 directed the petitioner no. 2 to appear in his office along with the necessary documents, so that her case for compassionate appointment could be considered. Thereafter, reminders were sent to the petitioner no. 2 on 11.03.1994 and 05.11.1996 but the petitioner no. 2 neither appeared before the respondents nor completed the necessary formalities. In the circumstances, it is alleged, the petitioners are not entitled to seek compassionate appointment.

5. In the rejoinder affidavit the petitioners have reiterated the averments made in the writ petition.

6. Sri P.K. Upadhyay, learned counsel for the petitioners has contended that Mahmood Husain had died in harness and despite numerous representations, the petitioners' request for compassionate appointment has not been considered and disposed of. The counsel submits that since the circumstances for the grant of compassionate appointment continue to subsist, the respondents are obliged to consider the case of the petitioner no. 1 for compassionate appointment.

7. Sri Chandra Shekhar Pandey, learned counsel for the respondents, on the other hand, vehemently made the following submissions:-

(a) The petitioners have not only concealed material facts but have made a false averment in the writ petition and then reiterated it in the rejoinder affidavit that the request made by the petitioner no. 2 for compassionate appointment was never considered by the respondents. The writ petition, according to the learned counsel, is liable to be dismissed on this ground alone.

(b) After the death of her husband, compassionate appointment was offered to the petitioner no. 2 but she did not accept the same. As the petitioners have been able to pull on for the last 26 years since the death of Sri Mahmood Hussain, the petitioners cannot be permitted to seek compassionate appointment once the crisis is over.

8. The contention of the learned counsel for the respondents that the petitioner is guilty of concealment of material facts and of making false averments is not without substance.

9. Admittedly, soon after the death of her husband Mahmood Husain, the petitioner no. 2 by her letter dated 19.03.1991 had sought compassionate appointment for herself on the ground that after the death of her husband she was facing acute financial hardship in maintaining herself and her children as she had no other source of livelihood. The letter dated 19.03.1991 is extracted below:-

"सेवा में,

श्रीमान क्षेत्रीय प्रबन्धक
उत्तर प्रदेश परिवहन निगम, आजमगढ़।

महोदय,

सादर अवगत कराना है कि प्रार्थिनी के पति स्व0 महमूद हुसैन सिद्दीकी जो आपके अधीनस्थ आजमगढ़ क्षेत्रीय भण्डार में भण्डार अधीक्षक के पद पर कार्यरत थे, जिनकी मृत्यु दिनांक 6.11.90 को हार्ट फेल हो जाने के कारण हो गया। प्रार्थी के पति ही परिवारिक देख रेख करते थे। परन्तु उनके देहान्त हो जाने कारण प्रार्थिनी एवं उसके बच्चे अत्यन्त अधिक कठिनाई का सामना कर रहे हैं *क्योंकि प्रार्थिनी के पास जीवकोपार्जन का कोई साधन नही है।*

अतः सादर अनुरोध है कि प्रार्थिनी के दयनीय परिस्थितियों पर सहानुभूति पूर्वक विचार करते हुए अपने अधीनस्थ *प्रार्थिनी को मृतक आश्रित होने के कारण किसी भी पद पर नियुक्ति प्रदान करने की कृपा करें ताकि प्रार्थिनी अपने एवं अपने अनाथ बच्चों के जीवकोपार्जन का साधन जुटाने में समर्थ हो सके।* इसके निमित्त प्रार्थिनी आपकी आजीवन आभारी होगी।

आदर सहित

प्रार्थिनी,
(शाहजहॉ बानों) ''
(emphasis supplied)

10. In response to the letter dated 19.03.1991 of the petitioner no. 2, the respondent no. 2 sent a letter no. 6308 dated 02.11.1993 requiring the former to complete the necessary formalities in order to enable the latter to give compassionate appointment to her. Thereafter, letter no. 550 dated 11.03.1994 and letter no. 2620 dated 05.11.1996 were sent to the petitioner no. 2. In the letter dated 05.11.1996, which was sent to the petitioner no. 2 in continuation of the earlier letters dated 02.11.1993 and 11.03.1994, it was specifically stated that a last opportunity was being given to her, and in case she did not turn up along with relevant documents it would be presumed that she was not interested in compassionate appointment and accordingly she would not be considered for the same in the future. The letter dated 05.11.1996 (annexure no. CA-1 to the supplementary counter affidavit dated 13.04.2015) is extracted below:-

''कार्यालय क्षेत्रीय प्रबन्धक
उ0प्र0 राज्य सड़क परिवहन निगम रजिस्टर्ड

पत्रांक2620 / आजम0 / क्षे0प्र0 / स्था0 / मृ0भा0 / 96 दिनांक 5.11.96

श्रीमती शाहजहॉ बानों
पत्नी स्व0 महमूद हुसैन सिद्वदकी ;भू0पू0 भण्डार अधीक्षकद्ध
मो0 बसन्तपुर तकिया, पो0 तकिया, जिला गोरखपुर

विषय– मृतक आश्रित के रुप में सेवायोजित करने के सम्बन्ध में–

उपरोक्त विषयक इस कार्यालय के पत्र संख्या 6308 आजम0 / क्षे0प्र0 / मृ0आ0 / 93 दिनांक 2.11.93 तथा स्मृति पत्र संख्या 550 आजम0 / क्षे0प0 / स्था0 मृ0आ0 / 94 दिनांक 11.3.94 का संदर्भ ग्रहण करें। *उक्त पत्र द्वारा आपको सूचित किया गया था कि आप पत्र प्राप्ति के 07 दिन के अन्दर आवश्यक कागजात लेकर उस कार्यालय में उपस्थित होवें ताकि आपको मृतक आश्रित के रुप में नौकरी प्रदान की जा सके। परन्तु आप आज तक उस कार्यालय में उपस्थित नहीं हुई।*

अतः *पुनः आपको अन्तिम रुप से सूचित किया जाता है कि आप पत्र प्राप्ति के उपरान्त 07 दिन के अन्दर आवश्यक कागजात सहित इस कार्यालय में उपस्थित नही होती है तो यह समझा जायेगा कि आप मृतक आश्रित के रुप में नौकरी नहीं करना चाहती है, तथा भविष्य में आपको मृतक आश्रित के रुप में नौकरी भी नहीं दी जा सकती है।*

ह0 क्षेत्रीय प्रबन्धक
आजमगढ़
दिनांक 21.11.96''
(emphasis supplied)

11. The petitioner no. 2 did not complete the formalities and belatedly, in response to the letter dated 05.11.1996, wrote an undated letter to the respondent no. 2 in which it was stated by her that she could not respond to the letter dated 05.11.1996 as her son was not eligible for Government

service on account of his age and qualification. It was stated that as soon as her son became eligible for Government service, she would move an application seeking compassionate appointment for him. The undated letter (annexure no. CA-2 to the supplementary counter affidavit dated 13.04.2015) written by the petitioner no.2 in response to the letter dated 05.11.1996 is extracted below:-

"श्रीमान कार्यालय क्षेत्रीय प्रबन्धक महोदय

उ0प्र0 परिवहन निगम, आजमगढ़ जोन

विषय– मृतक आश्रित के रुप में सेवायोजित करने के सम्बन्ध में–

महोदय,

उपरोक्त विशेयक कृपया कार्यालय प्रत्रांक 2620/आजम/क्षे0/स्थान/मृतक आश्रित/96 दिनांक 5.11. 1996 जो प्रार्थिनी का सम्बोधित है का सन्दर्भ ग्रहण करने की कृपा करें। विषय प्रसादर अवगत कराना है कि प्रर्थिनीय के पुत्र की उम्र एवं शिक्षा अभी सरकारी नौकरी के योग्य न होने के कारण उपरोक्त सेवायोजन के सम्बन्ध में अपना आवेदन पत्र आपकी सेवा में प्रस्तुत न कर सकी। साथ ही साथ प्रार्थिनीय का स्वास्थय अत्यधिक खराब होने के कारण आप द्वारा प्रेषित पत्र का समय से जवाब देने में अस्मर्थ रही

अतः श्रीमान से सादर अनुरोध है कि प्रार्थिनीय के पुत्र की उम्र एवं शिक्षा ज्योंही सरकारी नौकरी के लायक होगी तुरन्त ही प्रार्थिनीय उपरोक्त लाभ हेतु अपना आवेदन पत्र आपकी सेवा में आवश्यक कार्यवाही हेतु प्रस्तुत कर देगी। तब तक के लिए सादर अनुरोध है कि मानवीय दृष्टिकोण अपनाते हुए प्रार्थिनीय के मृतक आश्रित के रुप में सेवायोजन का हक सुरक्षित रखने की कृपा करे। प्रार्थिनीय आपकी इस असीम कृपा एवं उदारता के लिए आजीवन आभारी रहेगी।

सादर सूचनार्थ।

प्रार्थिनी
शाहजहॉ बानो"

(emphasis supplied)

12. On 09.08.2006, after almost 16 years after the death of Mahmood Husain, the petitioner no. 2 sent an application by registered post to the respondent no. 2 praying that her son, the petitioner no. 1 who had attained the age of majority be given compassionate appointment so that she may get some financial help to take care of herself and her daughters. A copy of letter dated 09.08.2006 (annexure no. 5 to the writ petition) is reproduced below:-

"सेवा में,

श्रीमान क्षेत्रीय प्रबन्धक,

उत्तर प्रदेश परिवहन निगम, आजमगढ़–क्षेत्र

विषयः– मृतक आश्रित के रूप में सेवायोजित करने के सम्बन्ध में।

महोदय,

उपरोक्त विषयक कृपया अपने कार्यालय पत्र संख्या–2620/आजम0/ क्षे0प्र0स्था0/मृ0आ0/96 दिनांक–05–11–96 के क्रम में मेरे अनुरोध–पत्र दिनांकः समदिनांकित का अनुदर्भ ग्रहण करने की कृपा करें। उक्त पत्र के माध्यम से प्रार्थिनी द्वारा महोदय को यह अवगत कराते हुए कि चूंकि मेरे पुत्र की शिक्षा एवं सरकारी सेवा योग्य निर्धारित आयु उक्त अवधि में पूर्ण नहीं थी, के कारण मृतक आश्रित के रूप में सेवायोजन का हक सुरक्षित रखने का अनुरोध किया गया था, के क्रम में यह अवगत कराना है कि प्रार्थिनी के पुत्र की उम्र वर्तमान में सरकारी सेवा के योग्य हो चुकी है एवं मेरे पुत्र मे इस वर्ष इण्टरमीडिएट की परीक्षा भी उत्तीर्ण कर ली है।

अतः अनुरोध है कि मेरे पुत्र को मृतक आश्रित के रूप में सेवायोजित करने की कृपा करें, ताकि मुझ विधवा को अपने एवं अपने ऊपर आश्रित पुत्र/पुत्रियों के भरण–पोषण के निमित्त आर्थिक मदद मिल सके। इस असीम कृपा के निमित्त प्रार्थिनी आपकी आजीवन आभारी रहेगी।

प्रार्थिनी,
(शाहजहां बानो)"

(emphasis supplied)

13. Almost two years after having written the letter dated 09.08.2006, the present writ petition was filed.

14. In the writ petition the petitioners have specifically and categorically alleged that the respondents did not take any decision on the representations made by the them, whereas, according to the respondents, in response to the representation dated 19.03.1991 of the petitioner no. 2, she was asked to complete necessary formalities but since the petitioner no. 2 did not respond to the directions issued to her, she could not be offered compassionate appointment. In their rejoinder affidavit the petitioners reiterated the averments made in the writ petition on the ground that the respondents had not annexed any document alongwith their counter affidavit in support their contention. The respondents, thereafter, filed a supplementary counter affidavit dated 13.04.2015 annexing therewith the letter no. 2620 dated 05.11.1996 as well as the undated letter of the petitioner no. 2 in response to the said letter no. 2620. The petitioners have not filed any rejoinder affidavit to the supplementary counter affidavit filed on behalf of the respondents. Paragraphs 6, 7, 8 and 10 of the writ petition, paragraph 5 (relevant portion) of the counter affidavit and paragraph 5 (relevant portion) of the rejoinder affidavit are extracted below:-

Paragraphs 6, 7, 8 and 10 of the writ petition

"(6) That the petitioner no. 2 moved an application before the opp. party no. 2 on dated 19.3.91 making the prayer that she should be appointed on the any post as she is the dependent on the deceased Govt. Servant but the opp. party no. 2 took no decision on the same. Copy of the representation dated 19.3.91 is being filed as Annexure No. 2 to the writ petition.

(7) That the petitioner no. 2 moved another application on dated 15.6.94 before the opp. party no. 2 praying that she should be appointed on any post as she is dependent of the deceased Govt. Servant but the opp. party no. 2 took no decision. Copy of the representation dated 15.6.94 is being filed as Annexure No. 3 to the writ petition.

(8) That the petitioner no. 2 moved another representation before the opp. party no. 1 on dated 21.06.94 but the opp. party no. 1 did not take any decision with regard to the appointment of the mother of the petitioner. Copy of representation dated 21.6.94 is being filed as Annexure No. 4 to the writ petition.

* * *

(10) That the petitioner no. 2 gave another application to the opp. party no. 2 on dated 9.8.06 and also sent the same application to the opp. party No. 1 through registered post but neither the opp. no. 1 & 2 have taken any decision with regard to the appointment. Copy of the application dated 9.8.06 is being filed as Annexure No. 5 to the writ petition."

(emphasis supplied)

Paragraph 5 (relevant portion) of the counter affidavit

"5. ...It is stated further that after lapse of so many years the petitioner/dependents of the deceased cannot claim any benefit under the above Rules as his claim is barred by time. However, the office of the respondent no. 2 send a registered letter on 02.11.1993, 11.03.1994 and thereafter reminder was also issued on 05.11.1996 calling upon the petitioner No. 2 that she should complete all the requisite formalities and approached to the office of Regional Manager, but neither she approached the office of the Regional Manager nor sent any formalities, in order to get the job. It is stated further that even the petitioner has not informed anything to the said office for engagement under Dying-in-Rules, 1974 and as such Corporation is not at fault in any manner. In view of above she herself did not want to get job in place of the deceased."

Paragraph 5 (relevant portion) of the rejoinder affidavit

"5. That in reply to the contents of para 5 of counter affidavit it is stated that the father of the petitioner died on 6.11.90 and the first application was given by the mother of the petitioner on 19.3.91 which is within 5 years from the death of petitioner's father but the opposite party no. 2 did not take any action and on this the mother of the petitioner gave one more application to opposite party no. 2 on 15.06.1994 and to the opposite party no. 1 on 21.6.94 but no action was taken. It is further to state that the mother of the petitioner moved another application on 9.8.2006 stating that her son was minor and did not hold the requisite qualification on the death of his father and no he holds all the requisite qualifications so he may be given appointment but no action is taken till today."

(emphasis supplied)

15. In exercising power under Article 226 of the Constitution this Court is not just a Court of law, but is also a Court of equity and a person who invokes the writ jurisdiction of this Court is duty-bound to place all the facts before the Court without any reservation. It is well settled that in exercising jurisdiction under Article 226 of the Constitution, this Court always keeps in mind the conduct of the party who is invoking such jurisdiction. If the petitioner does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. In Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449, the Apex Court has observed that the said rule has been evolved in larger public interest to -

"deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

(emphasis supplied)

16. In K.D. Sharma v. Steel Authority of India Limited, (2008) 12 SCC 481, the Apex Court reiterated that the petitioners approaching this Court under Article 226 of the Constitution must disclose all the material facts without any qualification. It was held as under:-

"38. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows law but not facts".

39. If the primary object as highlighted in Kensington Income Tax Commrs. [(1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)] is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

(emphasis supplied)

17. In the case at hand, the essence of the dispute is the averment in the writ petition that the representation made by the petitioner no. 2 on 19.03.1991 seeking compassionate appointment in place of her deceased husband was not considered and disposed of by the respondents. The respondents did not stop there. They went on to reiterate the averments made in the writ petition in their rejoinder affidavit. In the writ petition there is no mention of the letters dated 02.11.1993, 11.03.1994 and 05.11.1996, whereby the petitioner no. 2 was asked by the respondent no. 2 to complete the necessary formalities in order to enable the respondents to consider her case for grant of compassionate appointment. A perusal of the letter dated 09.08.2006 (annexure 5 to the writ petition) would show that the said letter has been written by the petitioner no. 2 in continuation of the undated letter sent by her to the respondent no. 2 which in turn was written by her in response to the letter no. 2620 dated 05.11.1996 of the respondent no.2. The aforesaid undated letter sent by petitioner no. 2 has already been extracted above. Thus, the petitioners have not only concealed the letters dated 02.11.1993, 11.03.1994 and 05.11.1996, but they have also made a false averment in the writ petition that the case of the petitioner no. 2 for compassionate appointment was never considered by the respondents.

18. From the narration of the facts above, it is apparent that the petitioners have deliberately and intentionally concealed the material facts and have tried to mislead the Court. The writ petition is liable to be dismissed on this ground alone.

19. Even on merit, the writ petition is liable to be dismissed. The object of providing employment to the dependent of a Government servant dying in harness in preference to anybody else is to enable the penurious family of the deceased employee to tide over the sudden financial crisis and not to provide employment. The mere death of an employee does not entitle his family to compassionate appointment. By a series of judgments of the Apex Court, it is settled that compassionate appointment is not a vested right which can be exercised at any time in future. It is not a mode of employment and cannot be claimed and offered after a long lapse of time and after the crisis is over.

20. In Umesh Kumar Nagpal v. State of Haryana & Ors., (1994) 4 SCC 138, the Apex Court has held as under:-

"2. ...The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on

compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.

* * *

6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

(emphasis supplied)

21. The principle laid down in the case of Umesh Kumar Nagpal (supra) has been reiterated by the Apex Court time and again. (see Jagdish Prasad v. State of Bihar & Anr., (1996) 1 SCC 301: Managing Director, MMTC Ltd., New Delhi v. Pramoda Dei Alias Nayak, (1997) 11 SCC 390: State of U.P. v. Paras Nath, (1998) 2 SCC 412: S. Mohan v. Govt. of T.N. & Anr., (1998) 9 SCC 485: Sanjay Kumar v. State of Bihar & Ors., (2000) 7 SCC 192:

22. In Union of India & Ors. v. Bhagwan Singh, (1995) 6 SCC 476, where the widow and two major sons did not apply for compassionate appointment immediately after the death of the employee and an application for compassionate appointment was moved after 20 years by the minor son of the deceased, the Apex Court in paragraph 8 of the report held that:

"It is evident, that the facts in this case point out, that the plea for compassionate employment is not to enable the family to tide over the sudden crisis or distress which resulted as early as September 1972. At the time Ram Singh died on 12.9.1972 there were two major sons and the mother of the children who were apparently capable of meeting the needs in the family and so they did not apply for any job on compassionate grounds. For nearly 20 years, the family has pulled on, apparently without any difficulty. In this background, we are of the view that the Central Administrative Tribunal acted illegally and wholly without jurisdiction in directing the Authorities to consider the case of the respondent for appointment on compassionate grounds and to provide him with an appointment, if he is found suitable."

23. In State of J&K & Ors. v. Sajad Ahmed Mir, (2006) 5 SCC 766 the Apex Court held that:

"11. ..... Once it is proved that in spite of death of the breadwinner, the family survived and substantial period is over, there is no necessity to say "goodbye" to the normal rule of appointment and to show favour to one at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution."

24. In Eastern Coalfield Limited v. Anil Badyakar & Ors., (2009) 13 SCC 112, immediately after the death of the employee in the year 1981, initially his widow sought compassionate appointment.

Subsequently on 07.03.1983 the elder daughter staked her claim. Ultimately in pursuance of an understanding between the family second daughter's husband was nominated for seeking appointment and by an order dated 10.05.1993 he was given compassionate appointment on provisional basis but the competent authority by its order dated 23.09.1993 cancelled it on the ground that the appointment could not be given after 12 years after the death of an employee. Upholding the order dated 23.09.1993, the Apex Court held as under:-

"20. The principles indicated above would give a clear indication that the compassionate appointment is not a vested right which can be exercised at any time in future. The compassionate employment cannot be claimed and offered after a lapse of time and after the crisis is over."

(emphasis supplied)

25. After the death of Sri Mahmood Husain, the petitioner no. 2, moved an application seeking compassionate appointment on the ground that she and her children were facing extreme financial difficulties as she had no other source of livelihood and on the request made by petitioner no. 2 she was required to complete certain formalities in order to enable the respondents to give compassionate appointment to her but the petitioner no. 2, instead of doing the needful, admittedly wrote to the respondents that her son was a minor and as soon as he became major and acquired the requisite qualification for Government service she would move an application for compassionate appointment. After more than 17 years and 7 months, the petitioner no. 2 wrote to the respondents seeking compassionate appointment for her son. As already mentioned above, compassionate appointment is neither a source of employment nor there could be reservation of a vacancy till such time as the petitioner became a major after a number of years.

26. Compassionate appointment was offered to the petitioner no. 2 but she did not accept the same. It is thus apparent that the petitioners had some alternative source of livelihood and they have been able to pull on without any difficulty for almost 26 years since the death of Sri Mahmood Hussain. Once the crisis is over, the petitioners cannot be offered compassionate appointment.

27. In the case on hand, the petitioners have not approached this Court with clean hands. They have not only concealed material facts but have deliberately and intentionally made a false averment. This is highly improper. The writ petition is liable to be dismissed on this ground alone. This Court has, however, considered the merits of the case and even on merits, the petitioners have no case.

28. For the foregoing reasons, the writ petition deserves to be dismissed and is accordingly dismissed.

29. This Court was inclined to saddle the petitioners with exemplary cost but, keeping in view the fact that the claim of the petitioners was for compassionate appointment, this Court has refrained itself from doing so.

(2016) 9 ILRA 263
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.09.2016

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No.- 20681 Of 2016

Akhand Pratap Singh ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioner:
Shiv Pal Singh

Counsel for Respondents:
C.S.C.

In the present writ petition the petitioner, who has successfully competed in the Lekhpal (Revenue) Examination 2015 and is awaiting issuance of appointment order/letter, has filed this writ petition challenging the order dated 17.08.2016, passed by the District Magistrate, Amethi whereby the representation made by the petitioner for verification of his character has been rejected. The said order dated 17.08.2016 has been passed by the District Magistrate in purported compliance of an order dated 01.08.2016, passed by this Court while disposing of the earlier writ petition filed by the petitioner, namely, Writ Petition No.17349 (S/S) of 2016. For being appointed as a government servant, verification of the character and antecedents of an applicant is required to be done so as to judge his suitability to serve as a government servant. Having been selected when the petitioner was not being issued appointment order/letter, though others were already issued appointment orders, he filed the aforesaid Writ Petition No.17349 (S/S) of 2016. The petitioner had earlier approached the District Magistrate, Amethi by moving an application on 01.07.2016 for issuing the appointment letter and giving him posting. An endorsement on the said application dated 01.07.2016 was made that as per the report submitted by the Superintendent of Police, Amethi, there is a case registered against the petitioner at Police Station-Kotwali, District-Amethi, under Sections 323, 308, 504 and 506 I.P.C.

In the instant case, the Superintendent of Police has reported that a criminal case against the petitioner is registered under Sections 323, 308, 504 and 506 I.P.C. at Police Station Kotwali, District Amethi. The said information was sent by the Superintendent of Police to the District Magistrate by letter dated 01.07.2016. On receipt of the said report, it was incumbent upon the District Magistrate to have sent for the petitioner and give him an opportunity of hearing and it is only thereafter that the District Magistrate would have formed his opinion. After forming his opinion, all the necessary papers i.e. the report of the Superintendent of Police, statement of the petitioner and District Magistrate's findings should have been sent to the appointing authority as is the procedure prescribed in the Government Order dated 28.04.1958.

After a close scrutiny of the provisions of the Government Order dated 28.04.1958 clearly indicate that in case where report submitted by the Superintendent of Police is unfavourable, the District Magistrate should require the candidate concerned to make his statement before him by providing an opportunity of hearing. The record produced by the learned Standing Counsel does not disclose that the aforesaid procedure as prescribed in the Government Order dated 28.04.1958 has been followed in the instant case.

The present case is not a case which can be categorized amongst the cases where suppression of any information has occurred at the instance of the petitioner while making the application for selection to the post in question. The application form did not require the petitioner to disclose any such information. At any point of time, neither the appointing authority, nor the Superintendent of Police, nor even the District Magistrate required the petitioner to furnish any information in relation to his antecedents, therefore, non disclosure of the registration of the criminal case against the petitioner would not fall in the category of cases where suppression of fact has occurred. It is also noticeable further that even in case of conviction, the District Magistrate is required to weigh all relevant factors while applying his mind for forming his opinion to verify the suitability of a candidate for employment as a government servant.

Resultantly, the writ petition is **allowed.** The impugned order dated 17.08.2016 passed by the District Magistrate, Amethi is hereby quashed.

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

1. Heard learned counsel for the petitioner and learned Standing Counsel appearing for the State-respondents.

2. The petitioner, who has successfully competed in the Lekhpal (Revenue) Examination 2015 and is awaiting issuance of appointment order/letter, has filed this writ petition challenging the order dated 17.08.2016, passed by the District Magistrate, Amethi whereby the representation made by the petitioner for verification of his character has been rejected. The said order dated 17.08.2016 has been passed by the District Magistrate in purported compliance of an order dated 01.08.2016, passed by this Court while disposing of the earlier writ petition filed by the petitioner, namely, Writ Petition No.17349 (S/S) of 2016.

3. For being appointed as a government servant, verification of the character and antecedents of an applicant is required to be done so as to judge his suitability to serve as a government servant. Having been selected when the petitioner was not being issued appointment order/letter, though others were already issued appointment orders, he filed the aforesaid Writ Petition No.17349 (S/S) of 2016. The petitioner had earlier approached the District Magistrate, Amethi by moving an application on 01.07.2016 for issuing the appointment letter and giving him posting. An endorsement on the said application dated 01.07.2016 was made that as per the report submitted by the Superintendent of Police, Amethi, there is a case registered against the petitioner at Police Station-Kotwali, District-Amethi, under Sections 323, 308, 504 and 506 I.P.C. In the aforesaid view, the petitioner was not offered appointment letter. When he approached this Court by filing Writ Petition No.17349 (S/S) of 2016, the Court considered the matter and required the District Magistrate to consider verification of his antecedents and character in the light of the observations made by the Hon'ble Supreme Court in the case of ***Avtar Singh vs. Union of India ans others, decided on 21.07.2016 [Special Leave Petition (C) No.20525/2011]***. The District Magistrate has passed the impugned order while noticing the judgment of Hon'ble Supreme Court in the case of ***Avtar Singh (supra)***, however, he has rejected the representation made by the petitioner seeking verification of his character and antecedents stating therein that police verification of the character of the selected candidates was got done and in the said process the Superintendent of Police, Amethi had reported in his report dated 09.06.2016 that the petitioner is

involved in Case Crime No.414-A/2010, under Sections 323, 308, 504 & 506 I.P.C. The District Magistrate while passing the impugned order has further observed that the Hon'ble Supreme Court in the case of ***Avtar Singh (supra)*** has observed that any applicant seeking appointment in government service is under obligation to submit complete and true information regarding any criminal case either pending or registered against him. The District Magistrate has observed in the impugned order that the fact relating to pendency/registration of the criminal case against the petitioner came into light only once the police verification of his character was being conducted and further that the petitioner did not intimate the appointing authority about the pendency/registration of the criminal case.

4. The reason indicated in the impugned order by the District Magistrate is that the concerned Superintendent of Police has not made any recommendation for verifying the character of the petitioner and further that the petitioner himself had concealed the correct information, though at the time of making application for selection no such information was sought. However, the District Magistrate has further observed that after the final selection and before the police verification of the character, in the application submitted by the petitioner for issuing appointment order, the petitioner should have mentioned the correct facts relating to the pendency/registration of the criminal case against him.

5. From a perusal of the impugned order dated 17.08.2016 one aspect of the matter is indisputedly clear, which is the fact that at the time of making of the application for selection, information regarding pendency/registration/involvement of a candidate in a criminal case was not required to be submitted. The application form required to be filled in by the candidates for selection to the post in question has been annexed by the petitioner as annexure no.5 to the writ petition which does not contain any such column requiring the candidate to furnish information relating to pendency/registration/involvement of the candidate concerned in any criminal case. Thus, the reason indicated by the District Magistrate in the impugned order that the petitioner had concealed information regarding his involvement in the criminal case is no longer relevant.

6. A detail procedure for verification of the character and antecedents of the government servants before their first appointment can be found in a government order issued on 28.04.1958 by the appointment department of the State Government addressed to all Heads of the departments, Commissioners of Divisions and District Magistrates. The said Government Order quotes the rule regarding character of a candidate for appointment as follows:-

"The character of a candidate for direct appointment must be such as to render him suitable in all respects of employment in the service or post to which he is to be appointed. It would be the duty of the appointing authority to satisfy itself on this point."

7. Thus, primarily it is the duty of the appointing authority to record its satisfaction as to the character of a candidate for direct recruitment which renders him suitable for employment in the service or on the post to which the candidate is to be appointed.

8. As per the aforesaid Government Order dated 28.04.1958 every direct recruit is required to produce a certificate of conduct and character from the head of the educational institution where he last studied and certificates of character from two persons. The said Government Order further provides that in case of any doubt, the appointing authority may either ask for further references, or he may refer the case to the District Magistrate concerned. The District Magistrate, on such a reference, may then make such further enquiries as he considers necessary. The aforesaid Government Order further provides that in case of direct recruits, the appointing authority shall refer all cases to the Deputy Inspector General of Police, Intelligence and the District Magistrate of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry. The District Magistrate is thereafter required to get the reports in respect of the candidates from the Superintendent of Police, who in turn is required to consult the District Police Records and records of the Local Intelligence Unit. On receipt of the report from the District Police or Local Intelligence Unit, the District Magistrate shall then report his views to the appointing authority. The District Magistrate is required to provide an opportunity of hearing to the candidate in case the District Police or the Local Intelligence Unit reports adversely against the candidate, and it is only thereafter that the District Magistrate will form his opinion and send his report. Thus, it is the opinion to be formed by the District Magistrate on the basis of the report to be submitted by the Superintendent of Police and also on the basis of candidate's statement, which is relevant and which will be sent to the appointing authority. The District Magistrate is, hence, under legal obligation under the provisions of the aforesaid Government Order dated 28.04.1958 to form his own opinion on the basis of the report submitted to him by the Superintendent of Police and also taking into account all the relevant factors including the statement to be made before him by the candidate concerned.

9. Another relevant extract from the Government Order dated 28.04.1958 is quoted below:

"In the case of direct recruits to the State Services under the Uttar Pradesh Government besides requiring the candidates to submit the certificates mentioned in paragraph 3(a) above the appointing authority shall refer all cases simultaneously to the Deputy Inspector General of Police, Intelligence and the District Magistrate [of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry] giving full particulars about the candidate. The District Magistrate shall get the reports in respect of the candidates from the Superintendent of Police who will consult District Police Records and records of the Local Intelligence Unit. The District Police or the District Intelligence Unit shall not make any enquiries on the spot, but shall report from their records whether there is anything against the candidate, but if in any specific case the District Magistrate, at the instance of the appointing authority asks for an enquiry on the spot, the Local Police or the Local Intelligence Units will do so and report the result to him. The District Magistrate shall then report his own views to the appointing authority. Where the District Police or the Local Intelligence Units report adversely about a candidate, the District Magistrate may give the candidate a hearing before sending his report."

10. While forming an opinion about the character and antecedents of a candidate what is to be kept in mind by the District Magistrate is as to whether the candidate's character is such that renders him suitable for employment in the service or post to which he is seeking appointment. Merely on account of the pendency/involvement/registration of a criminal case against the candidate will not be a ground not to verify the character and antecedents of the candidate by the District Magistrate. In this regard, the Note (a) as finds mentioned in the Government Order dated 28.04.1958 is relevant to be noticed, according to which, conviction of a candidate need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account and if they involve no moral turpitude or association with crimes of violence or with a movement which has as its object to overthrow by violent means of Government of India as by law established, in free India the mere conviction need not be regarded as disqualification. Relevant note occurring in the said Government Order dated 28.04.1958 is quoted below:-

*"**Notes.**-(a) A conviction need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account and if they involve no moral turpitude or association with crimes of violence or with a movement which has as its object to overthrow by violent means of Government as by law now established in free India the mere conviction need not be regarded as disqualification. (Conviction of a person during his childhood should not necessarily operate as a bar to his entering Government service. The entire circumstances in which his conviction was recorded as well as the circumstances in which he is now placed should be taken into consideration. If he has completely reformed himself on attaining the age of understanding and discretion, mere conviction in childhood should not operate as a bar to his entering Government service)."*

11. Thus, unless and until a criminal case found against the candidates, which has even resulted in conviction, involves moral turpitude or association of the candidate with crimes of violence or association of the candidate with a movement having an object to overthrow the Government established by law by violent means, any involvement in the criminal case need not be necessarily recorded as disqualification. In fact, the entire circumstances in which a candidate's involvement in a criminal case is found has to be weighed by the District Magistrate while reporting the matter to the appointing authority about the character verification of the candidate and about giving report regarding antecedents of the candidate concerned who is seeking employment with the Government against any post.

12. In the instant case, the Superintendent of Police has reported that a criminal case against the petitioner is registered under Sections 323, 308, 504 and 506 I.P.C. at Police Station Kotwali, District Amethi. The said information was sent by the Superintendent of Police to the District Magistrate by letter dated 01.07.2016. On receipt of the said report, it was incumbent upon the District Magistrate to have sent for the petitioner and give him an opportunity of hearing and it is only thereafter that the District Magistrate would have formed his opinion. After forming his opinion, all the necessary papers i.e. the report of the Superintendent of Police, statement of the petitioner and District Magistrate's findings should have been sent to the appointing authority as is the procedure prescribed in the Government Order dated 28.04.1958.

13. Learned Standing Counsel has produced the original record which nowhere reveals that any such procedure as has been laid down in the Government Order dated 28.04.1958 in respect of the verification of character and antecedents has been followed.

14. A close scrutiny of the provisions of the Government Order dated 28.04.1958 clearly indicate that in case where report submitted by the Superintendent of Police is unfavourable, the District Magistrate should require the candidate concerned to make his statement before him by providing an opportunity of hearing.

15. As observed above, the record produced by the learned Standing Counsel does not disclose that the aforesaid procedure as prescribed in the Government Order dated 28.04.1958 has been followed in the instant case.

16. Further, another aspect of the matter needs consideration by this Court in this case and that is while disposing of the earlier writ petition No.17349 (S/S) of 2016, this Court by means of the order dated 01.08.2016 had required the District Magistrate to look into the entire matter relating to character verification of the petitioner in the light of the observations made by Hon'ble Supreme Court in the judgment of ***Avtar Singh (supra)***. Hon'ble Supreme Court in the said judgment has summarized its conclusions and has clearly held that for determining suppression of correct facts or furnishing of false information, only such information which is required to be specifically mentioned has to be disclosed. Hon'ble Supreme Court has further observed that if information is not asked for but is relevant and comes to the notice of the employer, the same has to be considered in an objective manner while addressing the question of fitness.

17. The instant case is not a case which can be categorized amongst the cases where suppression of any information has occurred at the instance of the petitioner while making the application for selection to the post in question. The application form did not require the petitioner to disclose any such information. At any point of time, neither the appointing authority, nor the Superintendent of Police, nor even the District Magistrate required the petitioner to furnish any information in relation to his antecedents, therefore, non disclosure of the registration of the criminal case against the petitioner would not fall in the category of cases where suppression of fact has occurred. It is also noticeable further that even in case of conviction, the District Magistrate is required to weigh all relevant factors while applying his mind for forming his opinion to verify the suitability of a candidate for employment as a government servant. The First Information Report lodged against the petitioner is on record as annexure no.9 to the writ petition. The incident as disclosed in the First Information Report is said to have occurred at 4:00 p.m. in the evening of 12.05.2010. The First Information Report appears to have been lodged by one Smt. Pushpa Giri, who is the resident of the same village where the petitioner resides. The petitioner has been described as co-accused in the First Information Report along with three others and as per the disclosure made in the First Information Report at around 4:00 O'clock on 12.05.2010 when the complainant Smt. Pushpa Giri was cleaning the temple, all the accused persons including the petitioner, who are the residents of the same village, entered into some altercation with the complainant and thereafter assaulted her with lathi and danda and when her husband came to her

rescue, the accused persons including the petitioner assaulted her husband, who sustained injuries in his head. On the basis of the First Information Report, a case under Sections 323, 308, 504 and 506 I.P.C. has been registered against the petitioner.

18. Looking into the nature of allegations made in the First Information Report and also looking into the nature of incident which is said to have occurred at the temple of the same village where the petitioner was residing and also taking into account the general nature of allegations against all the accused persons, it was incumbent upon the District Magistrate to have analyzed the entire material before forming his opinion about the suitability of the petitioner for the job in question. The District Magistrate on the other hand, while passing the impugned order has not taken into account the circumstances in which the incident is said to have occurred, neither has he analyzed as to whether any particular role was assigned to the petitioner in the said incident of Marpeet. The District Magistrate has also not provided an opportunity of hearing to the petitioner as is mandated by the procedure prescribed in the Government Order dated 28.04.1958, neither has he recorded the statement of the petitioner and has simply declined to verify the character and antecedents of the petitioner on the basis of the report submitted by the Superintendent of Police.

19. The original record from the office of District Magistrate, Amethi, which has been produced by the learned Standing Counsel, does not even disclose that the First Information Report on the basis of which criminal case against the petitioner has been registered is available on the said record. The absence of First Information Report of the incident and any other material relating to incident on the basis of which the case against the petitioner has been registered, on record of he District Magistrate, makes it clear that all relevant factors in respect of the matter at hand have not been considered by the District Magistrate while passing the impugned order refusing to verify the character of the petitioner which would render him unsuitable for being employed on the post in question.

20. As already observed above, the aforesaid consideration by the District Magistrate is to be done on the basis of all relevant materials including the report of the Superintendent to of Police, statement of the candidate concerned and any other material, namely, the First Information Report, the circumstances in which the incident is said to have occurred and other factors which the District Magistrate finds appropriate to consider for the purposes of forming his opinion as to the suitability of the candidate concerned for verifying his character and antecedents which would make him suitable for being appointed on the post in question. In absence of any such exercise, as contemplated in the Government Order dated 28.04.1958, having been conducted by the District Magistrate before passing the impugned order, in my considered opinion, the order under challenge in this petition dated 17.08.2016 cannot be permitted to be sustained.

21. Resultantly, the writ petition is **allowed**. The impugned order dated 17.08.2016 passed by the District Magistrate, Amethi is hereby quashed. The matter is remitted to him for decision afresh in accordance with law, in the light of the observations made by Hon'ble Supreme Court in the case of ***Avtar Singh (supra)*** and also taking into account the observations made herein above in the body of this judgment. The said consideration shall be made by the District Magistrate bearing

the provisions of the Government Order dated 28.04.1958 in mind, expeditiously, say within a period of eight weeks from the date of production of certified copy of this order.

22. To facilitate the decision to be taken by the District Magistrate under this judgment, the petitioner shall furnish a fresh representation in support of his case taking therein all the pleas which may be available to him and annexing therewith all the documents on which he intends to rely, including the Government Order dated 28.04.1958. The decision thereon shall be taken by the District Magistrate concerned following the observations made herein above by passing a reasoned and speaking order.

23. There will be no order as to costs.

(2016) 9 ILRA 271
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.09.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Service Single No.- 3691 Of 2012

Rajesh Kumar Gupta ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioner:
Arvind Kumar Vishwakarma, Amar Pal Singh

Counsel for Respondents:
C.S.C.

The petitioner is a Constable in Civil Police. He is aggrieved by an order passed by the third respondent dated 16th February, 2012, whereby his claim for promotion on the post of Sub- Inspector, Civil Police, has been turned down on the ground that he is differently abled person and for the said reason, he is not qualified to hold the said post. The order further says that there is no provision for giving relaxation in the physical efficiency test to the differently abled persons.

Court observed that the petitioner appeared in the written test for promotion on the post of Sub-Inspector and he qualified the said test. He is unable to participate in the physical efficiency test on the ground that while he was on duty, he has suffered physical disability, therefore, he cannot participate in such test due to the said disability. The disability certificate, which the petitioner has brought on the record, has not been disputed by the State. From a perusal of the impugned order it is evident that the third respondent has not taken into consideration the provisions of the Act, 1995. The object of the said Act provides that to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region, the said Act has been enacted by the Parliament. The provisions of the Act, 1995 have been considered recently by the Supreme Court in the case of Jeeja Ghosh and another v. Union of India and others, (2016) 7 SCC 761.

The writ petition is disposed of by issuing a direction upon the first respondent to consider the application of the petitioner dated 16th December, 2015 and pass the appropriate order in accordance with law expeditiously, preferably within three months from the date of communication of this order.

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

1. The petitioner is a Constable in Civil Police. He is aggrieved by an order passed by the third respondent dated 16th February, 2012, whereby his claim for promotion on the post of Sub-Inspector, Civil Police, has been turned down on the ground that he is differently abled person and

for the said reason, he is not qualified to hold the said post. The order further says that there is no provision for giving relaxation in the physical efficiency test to the differently abled persons.

2. A brief reference to the factual aspects would suffice. The petitioner was initially appointed as a Constable in Civil Police. He claims his promotion on the post of Sub-Inspector. The service conditions of the post of Sub-Inspector including recruitment and promotion etc. are regulated by the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (for short, the "Rules, 2008"). The petitioner for promotion to the post of Sub-Inspector appeared in the written test, which he qualified. After the said test, he was asked to participate in the physical efficiency test. The petitioner moved an application for relaxation in the physical efficiency test on the ground that he is differently abled person and has relied on a certificate issued on 16th September, 2006 by the appropriate authority. When no action was taken on the said application, the petitioner preferred a writ petition, being Writ Petition No. 4637 (S/S) of 2011 (Rajesh Kumar Gupta v. State of U.P. and others). The said writ petition was disposed of by this Court on 19th January, 2012 by issuing a direction upon the appropriate authority to consider the grievance of the petitioner.

3. In compliance thereof, the impugned order dated 16th February, 2012 has been passed rejecting the claim of the petitioner on the ground mentioned herein-above.

4. I have heard Sri A.P. Singh, learned counsel for the petitioner, and learned Standing Counsel.

5. It is contended on behalf of the petitioner that the petitioner has sustained injury during the course of duty while complying with an order passed by the superior authority, therefore, he is entitled for the benefit provided under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, the "Act, 1995"). It is urged by the learned counsel for the petitioner that the provisions of the said Act, 1995 have not been taken into consideration while passing the order by the third respondent. He lastly urged that under the Rules, 2008 the State Government has power to grant relaxation in case any provision of the said Rules causes hardship to an employee. It is stated that the petitioner has made an application to the State Government on 16th December, 2015 for giving relaxation in respect of the physical efficiency test and extending the benefit provided in the Act, 1995, which is a Central Act. The said application of the petitioner is still pending.

6. Learned Standing Counsel submits that Rule 6 of the Rules, 2008 clearly provides that a differently abled person would not be entitled for any promotion. No other submission was made.

7. In rejoinder, learned counsel for the petitioner submits that Rule 6 of the Rules, 2008 is not applicable in the case of promotion as it would be applicable only in respect of the direct recruitment.

8. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

9. It is a common ground that the petitioner appeared in the written test for promotion on the post of Sub-Inspector and he qualified the said test. He is unable to participate in the physical efficiency test on the ground that while he was on duty, he has suffered physical disability, therefore, he cannot participate in such test due to the said disability.

10. The disability certificate, which the petitioner has brought on the record, has not been disputed by the State. From a perusal of the impugned order it is evident that the third respondent has not taken into consideration the provisions of the Act, 1995. The object of the said Act provides that to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region, the said Act has been enacted by the Parliament. The provisions of the Act, 1995 have been considered recently by the Supreme Court in the case of **Jeeja Ghosh and another v. Union of India and others, (2016) 7 SCC 761**. The relevant portion of the judgment, being paragraphs-41 & 42, is extracted below:

"**41.** Earlier the traditional approaches to disability have depicted it as health and welfare issue, to be addressed through care provided to persons with disabilities, from a charitable point of view. The disabled persons are viewed as abnormal, deserving of pity and care, and not as individuals who are entitled to enjoy the same opportunities to live a full and satisfying life as other members of society. This resulted in marginalising the disabled persons and their exclusion both from the mainstream of the society and enjoyment of their fundamental rights and freedoms. Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care. Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs, which has resulted in severe isolation for people with disabilities and their families.

42. However, the nations have come a long way from that stage. Real awareness has dawned on the society at large that the problems of differently-abled are to be viewed from human rights perspective. This thinking is reflected in two major declarations on the disability adopted by the General Assembly of the United Nations on 20-12-1971 and thereafter in the year 1975. The position was reiterated in the Beijing Conclave by the Government of Asian and Pacific Countries that was held from 1-12-1992 to 5-12-1992 and in order to convert the resolutions adopted therein into reality, the Indian Parliament also passed the enactment i.e. the 1995 Act."

11. There is no doubt that the Act, 1995, which is a Central Act, is applicable to all the disabilities which have been defined under Section 2(i) thereof. Sub-section (2) of Section 47 of the Act, 1995 provides that no promotion shall be denied to a person merely on the ground of his disability.

12. In the case of **Pradep Kumar Maity v. Chinmoy Kumar Bhunia and others, (2013) 11 SCC 122**, the Supreme Court has held that the Act, 1995 will have overriding effect vis-a-vis all the contrary law of the State. The relevant portion of the judgment reads as under:

"13. Since the legal regime applicable to amelioration of the persons suffering from disabilities has been argued before us, we need to dwell upon it briefly. Briefly, because this aspect of the law is so well entrenched in our jurisprudence that only a succinct reiteration is justified. The Constitution of India is the grund norm, demanding meticulous allegiance from all other laws. Statutes, Central/parliamentary or of State Legislatures, must mandatorily comply with our Constitution. We must hasten to emphasise that statutes must also conform with the discipline of the three lists contained in the Seventh Schedule to the Constitution. Most statutes postulate the promulgation of Rules, through delegated legislation, which, if they are not ultra vires the statute inasmuch as they are operational within the parameters of their parent pandects, require adherence. Executive orders or administrative instructions cease to have legal efficacy the moment they are contrary to their superiors i.e. the Constitution, a statute, or any delegated legislation in the form of rules or regulations. This is also referred to as "dominion paramountcy" by some courts. There is a plethora of precedents on this proposition, as also on the tiers of subservience, including the adumbration in Saiyad Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab [(1998) 4 SCC 343] and K.P. Sudhakaran v. State of Kerala [(2006) 5 SCC 386 : 2006 SCC (L&S) 1105]. The Disabilities Act pays obeisance to the Constitution and had it concerned itself with improving the lot of the disabled by also providing for compulsory relaxation of age stipulations for employment having regard to disability, all other contrary forms of law-making by State Legislatures or State Governments would have fallen foul of it, and consequently would have ceased to command legal authority. Thus, the definition of deafness or hearing impairment contained in the extant government orders must immediately measure to the definition contained in the Disabilities Act. But since the Disabilities Act postulates age relaxation only as directory or expectant, the government order will continue to hold the field."

13. It is an admitted case that the application of the petitioner is still pending before the State Government for grant of relaxation. Hence, in my view, without expressing any opinion with regard to the benefit of the Act, 1995 at this stage, it would be appropriate that the State Government may be directed to pass the order on the application of the petitioner to grant him relaxation in terms of Rule 28 of the Rules, 2008.

14. Accordingly, the writ petition is disposed of by issuing a direction upon the first respondent to consider the application of the petitioner dated 16th December, 2015 and pass the appropriate order in accordance with law expeditiously, preferably within three months from the date of communication of this order. The petitioner is granted liberty to file a fresh representation along a certified copy of this order and it will be open to the petitioner to raise the plea therein, which he wants to place before the State Government. It is made clear that the impugned order dated 16th February, 2012 shall abide by the fresh order passed by the State Government. The State Government shall pass the order independently without being influenced by the order passed by the third respondent dated 16th February, 2012.

15. No order as to costs.

(2016) 9 ILRA 275
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2016

BEFORE

THE HON'BLE ABHAI KUMAR, J.

Application U/S 482 No.- 22243 Of 2016

Dr. Kuldeep Kaushik ...Applicant
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Applicant:
Sunil Kumar

Counsel for Opposite Parties:
G.A., Vinod Singh

Present application under Section 482 Cr.P.C. has been moved for quashing the impugned order dated 14.7.2016 passed by the Additional Chief Judicial Magistrate, Court No. 2, Bulandshahar in Misc. Surrender Application No. Nil of 2016 (State Vs. Dr. Kuldeep Kaushik) in connection with Case Crime No. 179 of 2016, under Sections 304, 314 IPC, Police Station – Siyana, District – Bulandshahar. It is further prayed to direct the Additional Chief Judicial Magistrate, Court Room No. 2, Bulandshahar to decide the surrender application dated 25.6.2016 afresh on its merit after due examination of the grounds taken by the applicant. It is next prayed that the operation, effect and consequences of the impugned order dated 14.7.2016 as well as the proceeding of taking any coercive action as against the applicant on the instant of Investigating Officer in the present matter may also be stayed during the pendency of the present matter.

There are two basic points that are for consideration before this court. Firstly, whether along-with surrender application a prayer for sending the papers that can be relevant or irrelevant for the purposes of investigation can be submitted, and whether magistrate is duty bound to send these papers to the Investigating Officer, and further can any direction be issued in this regard by the magistrate. The second point that is involved in the matter is regarding the scope of section 167-A of the Code, which is inserted by State Amendment as referred above.

Court observed that the magistrate is all empowered to monitor the investigation and in case it is required then proper direction may also be issued and if in view of the Code certain papers that are being filed by the accused to be sent to the Investigating Officer, that right can very well be given to the accused, although magistrate will refrain from expressing any opinion regarding the papers and further accused can also not claim that papers may be taken into consideration by the Investigating Officer and after taking all those papers, opinion should be found by the Investigating Officer and only then the wanting report be submitted. It is always expected from Investigating Officer to do the investigation in a proper manner and to collect all the evidence that are relevant for the purpose of free, fair and impartial investigation. The matter of investigation is a State-affair, if State is doing any act, he is not doing on behalf of any person, rather act is being done in pursuance to bring the justice to all, and in case any paper throw the light upon the innocence of the accused person, that is certainly ought to be taken into consideration, but rider is that magistrate cannot say that such papers ought to have been taken into consideration in a particular perspective and in that regard Investigating

Officer is fully empowered to take its own decision and the paper furnished and critical analysis cannot be demanded by the accused persons as has been demanded in the present case and if Investigating Officer can show the magistrate that on the basis of the relevant evidence that is being collected during the investigation, there is a case made out against the accused, then a report against the accused person can be submitted to the court for taking him into custody.

In the present case applicant never tried to submit the papers before the Investigating Officer. There is nothing on record on which it can be accepted that papers were being tried to be given to the Investigating Officer either personally by the accused or through anybody and Investigating Officer has refused to accept these papers, and if in the circumstances learned Magistrate passed the impugned order that applicant is not cooperating with the investigation then this observation cannot be said to be perverse, illegal or arbitrary.

Court is of the view that the order passed by the learned magistrate was justified. In the circumstances it cannot be said that there is any irregularity, illegality or perversity in the order on the ground that applicant never moved to the Investigating Officer alongwith papers that are being asked to be sent alongwith Surrender Application upon which impugned order was passed.

The application lacks merit and is accordingly dismissed.

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

1. This application under Section 482 Cr.P.C. has been moved for quashing the impugned order dated 14.7.2016 passed by the Additional Chief Judicial Magistrate, Court No. 2, Bulandshahar in Misc. Surrender Application No. Nil of 2016 (State Vs. Dr. Kuldeep Kaushik) in connection with Case Crime No. 179 of 2016, under Sections 304, 314 IPC, Police Station - Siyana, District - Bulandshahar. It is further prayed to direct the Additional Chief Judicial Magistrate, Court Room No. 2, Bulandshahar to decide the surrender application dated 25.6.2016 afresh on its merit after due examination of the grounds taken by the applicant. It is next prayed that the operation, effect and consequences of the impugned order dated 14.7.2016 as well as the proceeding of taking any coercive action as against the applicant on the instant of Investigating Officer in the present matter may also be stayed during the pendency of the present matter.

2. Brief facts of the case are as follows.

3. Applicant is a B.A.M.S. Doctor from Chhatrapati Shahuji Maharaj University Kanpur and he is a registered medical practitioner with the Medical Council of India, Uttar Pradesh. Hospital of the applicant is also established as per provisions of law duly licensed and registered hospital as per law with regional Ayuervedic and Unani Officer, Bulandshahar. Deceased died in the hospital when she was under surveillance of competent medical practitioner in a competent hospital, so neither the present case is of medical negligence nor is it a case of commission of any criminal offence at all. In the circumstances, no wrong has been committed by Dr. Anil Kumar Singh, M.B.B.S. M.D.(General Sargon). Smt. Satto, who died was duly informed about the risk of the operation and after signing of the relevant document by the authorised person required treatment was given. Dr. Anil Kumar Singh, who treated the patient Smt. Satto, was a competent

doctor and was eligible to provide the treatment to her as well as to do her surgical operation. The deceased died due to medical reasons in spite of proper treatment.

4. The investigation of the present case is still going on. A criminal Misc. Writ petition No. 15592 of 2016, Dr. Kuldeep and two other Versus State of U.P. and others, against the FIR of the present case was filed but the same was dismissed by this court vide order dated 6.7.2016. Applicant has been made an accused in the present case without any apparent evidence against him as such the applicant filed a surrender application on 25.5.2016 before the court of Additional Chief Judicial Magistrate, Court No. 2 Bulandshahar but the same was dismissed by the impugned order dated 14.7.2016 on the ground that interference in the investigation cannot be done and by the surrender application it has been prayed that various papers allongwith surrender application be sent to Investigating Officer and after taking into consideration the papers, report may be called for from the Investigating Officer.

5. It is submitted by the learned counsel of the applicant that the observations made by the court below in the impugned order are perverse in nature and the grounds shown for rejection of the surrender application are also not legally sustainable. Provisions of section 167-A of the Cr.P.C. is made applicable in the State of U.P. Amendment Act No. 18 of 1978.

6. It is further submitted by the learned counsel that magistrate is under obligation to apply his judicial mind regarding the involvement of the accused person in a criminal case whenever he is brought or appears before the court and if allegations made against the accused are illfounded or not proper then remand can be refused and accused will not be sent to jail at all. It is further submitted that the impugned order does suffers from serious illegality, infirmity, incorrectness which is apparent on the face of the record itself.

7. Learned counsel for respondent no. 3 submitted that hospital of the applicant is registered with Regional Ayurvedic and Unani Officer, Bulandshahar, but modern medicines is being practiced there, for which the hospital is not authorised and due to negligence of the Hospital, Doctors and Staffs, Smt. Satto died and applicant is also equally responsible for above crime.

8. There are two basic points that are for consideration before this court. Firstly, whether along-with surrender application a prayer for sending the papers that can be relevant or irrelevant for the purposes of investigation can be submitted, and whether magistrate is duty bound to send these papers to the Investigating Officer, and further can any direction be issued in this regard by the magistrate. The second point that is involved in the matter is regarding the scope of section 167-A of the Code, which is inserted by State Amendment as referred above.

9. The liberty of the person cannot be curtailed without due process of law as has been guaranteed by the Constitution under Article 21. Moreover, if any action is to be taken against any person, enquiry or trial, regarding that should be fair, impartial, without any prejudice, and more importantly, compliance of natural justice should also be there. In a recent judgment of the Supreme Court in ***Lalita Kumari Vs. State of U.P. and others, (2014) 2 SCC 1,*** it has been held

that the essential requirement for recording the FIR is that there must be information and that information must disclose a cognizable offence. If information falling within the meaning of Sub-Section (1) of Section 154 is laid before an officer in-charge of a police station, he has no option but to enter substance of that information in the prescribed form and register a case on the basis of such information. Section 154(1) Cr.P.C. significantly uses the expression information without qualification of an adjective, such as reasonable or credible, hence registration of an FIR is not preceded by a credible information but information relating to the commission of cognizable offence is sufficient, but the arrest of an accused immediately on the registration of an FIR has been held not to be mandatory. Police Officer can foreclose an FIR before any investigation under section 157 Cr.P.C. If it appears to him that there is no sufficient ground to investigate, the police officer is also empowered to investigate the matter and file a final report under section 173 Cr.P.C. seeking closure.

10. Whenever an FIR is being lodged, it does not mean that investigation is certainly to be taken place and there is no inbuilt safeguards with the Code to prevent a likelihood of misuse. It is further held by the constitution bench in Lalita Kumari that after receipt of information relating to the commission of a cognizable offence is mandatory, yet there may be instances where a preliminary enquiry is required. The observation of the Supreme court court are as follows:

"120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/ family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry."

11. It is worthwhile to mention here that present case also comes under the category of death by medical negligence and in the circumstances it can be said that this is one of the case where utmost caution was required for launching any criminal proceeding against accused persons who are said to be guilty of committing a cognizable offence. In the context of this matter, applicant is liable to be probed.

12. Learned magistrate while passing the impugned order observed that court cannot interfere in the investigation. The observation of the magistrate can be correct up to certain extent, but what does interfere mean is entirely dependent upon the facts and circumstances of the case. Applicant before the magistrate clearly based its arguments on the basis of law propounded by the Apex Court in the Case of Sakiri Vasu Vs. State of U.P. and others, (2008) 2 SCC 409.

13. By the impugned order it was observed that the facts of that case was different and were not applicable in the matter. But the observation of the trial court can hardly said to be correct. Hon'ble Apex Court in the matter clearly stated that magistrate is having supervisory power of the investigation although cannot get the investigation done, but certainly magistrate can very well supervise the investigation and in case, proper investigation is being not done, then certainly make an interference in that. As already said, free, fair and impartial investigation is the right of the accused person and in case any investigation is not being conducted on the said principles then interference by the magistrate can very well be made. Observation of the Apex Corut in Sakri Basu (Supra) can be summed up in the following paras:

"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

13. The same view was taken by this Court in Dilawar Singh vs. State of Delhi JT 2007 (10) SC 585 (vide para 17). We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) Cr.P.C., and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order orders as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) Cr.P.C.

14. Section 156 (3) states:

Any Magistrate empowered under Section 190 may order such an investigation as abovementioned. The words `as abovementioned obviously refer to Section 156 (1), which contemplates investigation by the officer in charge of the Police Station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order re-opening of the investigation even after the police submits the final report, vide State of Bihar vs. A.C. Saldanna AIR 1980 SC 326 (para 19).

18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

21. An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Thus in ITO, Cannanore vs. M.K. Mohammad Kunhi, AIR 1969 SC 430, this Court held that the income tax appellate tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

24. In view of the abovementioned legal position, we are of the view that although Section 156(3) is verybriefly worded, there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and /or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) Cr.P.C., we are of the opinion that they are implied in the above provision.

25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 Cr.P.C. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154(3) and Section 36 Cr.P.C. before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156(3).

14. A special duty has been casted by the Apex Court upon the magistrate while monitoring the investigation. Doctrine of implied power is also applied by the Apex Court and even asserted that Income Tax Appellate Tribunal has implied power to grant stay, although no such power expressly granted to it by the Income Tax Act.

15. It can be inferred that there is no express power to the magistrate regarding the monitoring of the investigation but under section 156 of the Cr.P.C., that implied power is there and magistrate is having whole sole authority to monitor the investigation and in case investigation is not going on proper or in fair manner in that case, magistrate is even having authority to interfere in the investigation.

16. This power alonwith the observation made by the Apex Court in Lalita Kumari. It can be said that more responsibility is casted upon the magistrate in the cases covered under the circumstances referred by the apex court. Hon'ble Apex Court in Lalita Kumar also observed that the circumstances mentioned by the court is not exhaustive and other matters may also be included in that, so in the facts and circumstances of every case, a duty is casted upon the magistrate to look the matter on the merits of the case and in case it is required then proper direction may be issued in regard to investigation.

17. Hon'ble Apex Court in the case of ***Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others reported in 2010 (8) Supreme Court 353,*** considered the provision of Section 438 Cr.P.C. regarding Anticipatory Bail wherein the power of the court is also discussed and observed by the apex court as follows:-

".....A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

It is further observed by the apex court as follows:

28. Mr. Bhushan referred to a Constitution Bench judgment in Sibbia's case (supra) to strengthen his argument that no such embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on para 15 of Sibbia's case (supra), which reads as under:

"15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a `Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

18. Any apprehension that can arose by imparting the unfettered power to the magistrate is blown away by the apex court by observing like that and that it cannot be said that if magistrate exercises such power that can be misused. What are the powers of an accused during the enquiry and trial is also to be seen, and whether a door can be shut on the face of the accused during the enquiry is also relevant factor that can be attributed to the power of a magistrate during the investigation.

19. Apex Court in the case of ***State of Orissa Vs. Debendra Nath Padhi reported in (2005) 1 SCC 568*** has clearly observed that accused is not having any right to produce any evidence or material before the court at the time of cognizance or at the time of framing of charge. The phrase that has given the right to the accused of being heard as has been mentioned in Section 227 as well as in Section 239 of the Code, does not connote any right to the accused for production of any material before the court.

20. It is further observed by the apex court that application of Section 91 is also ruled out before the trial starts. The principle held by Apex Court in ***Satish Mehra Vs. Delhi Administration reported in 1996 (9) SCC 766*** was not found to have led correct view. In Satish Mehra Vs. Delhi Administration, a two Judge Bench of Apex Court observed as follows:

".....if the accused succeeds in producing any reliable material at the stage of taking cognizance or framing of charge which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material should be looked into by the court at that stage. It was held that the object of providing an opportunity to the accused of making submissions as envisaged in Section 227 of the Code of Criminal Procedure, 1973 (for short, 'the Code') is to enable the court to decide whether it is necessary to proceed to conduct the trial. If the materials produced by the accused even at that early stage would clinch the issue, why should the court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. It was further observed that there is nothing in the Code which shrinks the scope of such audience to oral arguments and, therefore, the trial court would be within its power to consider even material which the accused may produce at the stage contemplated in Section 227 of the Code."

21. After considering the various pronouncement of the court, Hon'ble Apex Court observed as follows:-

"As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided."

22. Section 91 of the Code was also discussed. For ready reference, Section 91 is reproduced below:

"91. Summons to produce document or other thing.(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order."

23. Observation of the Apex Court in this regard is relevant to be reproduced which runs as follows:

"Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof."

24. In the above given facts, if we consider the right of the accused person, then we come to the conclusion that at the stage of cognizance as well as at the stage of charge, accused is not having any right to place any material before the court, and only right that has been given to the accused is being heard only. Therefore a precognizance stage is certainly a vital stage wherein accused is being given right, and he can certainly approach the magistrate in case proper investigation is not being done, and if it is so, the magistrate cannot say that he is powerless and any such action will be interference in the investigation.

25. This court is certainly of the view that magistrate is all empowered to monitor the investigation and in case it is required then proper direction may also be issued and if in view of the Code certain papers that are being filed by the accused to be sent to the Investigating Officer, that right can very well be given to the accused, although magistrate will refrain from expressing any opinion regarding the papers and further accused can also not claim that papers may be taken into consideration by the Investigating Officer and after taking all those papers, opinion should be found by the Investigating Officer and only then the wanting report be submitted.

26. It is always expected from Investigating Officer to do the investigation in a proper manner and to collect all the evidence that are relevant for the purpose of free, fair and impartial

investigation. The matter of investigation is a State-affair, if State is doing any act, he is not doing on behalf of any person, rather act is being done in pursuance to bring the justice to all, and in case any paper throw the light upon the innocence of the accused person, that is certainly ought to be taken into consideration, but rider is that magistrate cannot say that such papers ought to have been taken into consideration in a particular perspective and in that regard Investigating Officer is fully empowered to take its own decision and the paper furnished and critical analysis cannot be demanded by the accused persons as has been demanded in the present case and if Investigating Officer can show the magistrate that on the basis of the relevant evidence that is being collected during the investigation, there is a case made out against the accused, then a report against the accused person can be submitted to the court for taking him into custody.

27. In the present case applicant never tried to submit the papers before the Investigating Officer. There is nothing on record on which it can be accepted that papers were being tried to be given to the Investigating Officer either personally by the accused or through anybody and Investigating Officer has refused to accept these papers, and if in the circumstances learned Magistrate passed the impugned order that applicant is not cooperating with the investigation then this observation cannot be said to be perverse, illegal or arbitrary.

28. Had applicant tried to submit the papers before the Investigating Officer and had he refused for taking the papers into consideration, only then the right of accused could have accrued for praying the magistrate to direct the Investigating Officer for a proper investigation under Section 156 Cr.P.C.

29. The second point raised regarding the provision of Section 167-A of the Code incorporated by U.P. Amendment and same is reproduced below:

"167-A. Procedure on arrest by Magistrate. - For the avoidance of doubts, it is hereby declared that the provisions of Section 167 shall, so far as may be, apply also in relation to any person arrested by, or under any order or direction of, a Magistrate, whether executive or judicial."

30. Controversy regarding the taking of surrender application by magistrate is removed by the amendment and Section 167-A has been incorporated and from that it can be inferred that if under the order of magistrate either executive or judicial, a person is being arrested then provisions of Section 167 shall so far as may apply.

31. It is submitted by the learned counsel that whenever a report is being submitted under Section 167-A Cr.P.C., a complete report is not submitted rather only report that is being submitted before the magistrate that is called upon on the application of accused is a short one regarding the wanting of accused and proper papers are not being produced and in the circumstances a proper remand under Section 167 Cr.P.C. cannot be given by the magistrate unless he thinks fit.

32. It is further submitted by the learned counsel that in absence of complete report and proper papers, bail application of the accused can also not be decided by the magistrate and he is bound to fix date in the matter wherein disposal of the bail application by the magistrate on the same day is required.

33. There are slight difference when accused is arrested under Section 167 Cr.P.C. and when he is being taken into custody under Section 167-A of the Cr.P.C.

34. Under Section 167 Cr.P.C. Investigating Agency gets 24 hours of time after the arrest of the accused as has been fixed by Section 57 of the Cr.P.C. wherein there is no such time provided to the Investigating Officer whenever accused is taken into custody under Section 167-A of Cr.P.C. but the apprehension of learned counsel is illfounded. Whenever a report is being asked from the Investigating Agency by the court then Investigating Officer is bound to submit a report regarding the association of accused in the matter and alongwith that satisfaction of the Investigating Officer is also required to be submitted that on the basis of evidence that is before the Investigating Officer accused can be taken into custody as per provision of Section 167-A of the Cr.P.C. Whenever such report is being submitted, it is upon the magistrate to take into consideration all the relevant facts and if magistrate thinks fit remand can be extended to the police. The word 'thinks fit' is certainly a discretionary word but even then whenever a magistrate passes any order that is a judicial order after applying the judicial mind. Any discretion that is being used should be used judiciously. Remand under Section 167 Cr.P.C. draws different elucidation at different stage. In Section 167(2) the word thinks fit is being used whenever the detention of the accused in custody either judicial or police is being made for a period not exceeding 15 days a whole although whenever a police custody is being given then reasons are to be recorded as per provision of Section 167(3) Cr.P.C. but no such reason is required to be given by the magistrate when judicial custody is authorised under Section 167(2) Cr.P.C. A proviso is appended to Section 167(2) of the Cr.P.C. and the relevant Sub-Section (2A) is reproduced below:-

"Section 167(2)(a). the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding.-

[(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that Chapter;]

35. Hereinabove it is provided that magistrate may authorise the detention of the accused person otherwise than in custody of the police beyond the period of 15 days if he is satisfied with adequate grounds exist to do so.

36. So there is difference between granting the remand first time under Section 167(2) and in that case no specific reasons are required to be given by the magistrate and if magistrate thinks fit a remand can be given but after fifteen days there should be satisfaction to the magistrate that adequate grounds exist for providing further remand only then further remand can be given.

37. In the ensuing facts it can be said that whenever a report is being submitted by the Investigating Officer or the police that certain person is required in connection of commission of a cognizable offence and relevant facts are being provided to the magistrate. It is upon the magistrate to look into the matter whether remanding the accused either in police custody or judicial custody and pass order accordingly and in case magistrate does not think so, remand can also be refused by the court but no hard and fast rule can be drawn regarding that and in every case magistrate is to decide this as per its discretion, certainly a judicial discretion.

38. The next contention of the learned counsel is regarding the bail that is to be decided by the magistrate court on the day of presentation of bail application and it is submitted by the learned counsel that in absence of all the relevant papers, bail application cannot be disposed of properly by the magistrate and in that circumstances magistrate should accord the benefit of the principle that is being laid down by the full bench of this court in ***Amrawati and another Versus State of U.P. reported in 2004 (57) ALR 290.***

39. The constitution bench of this court in Amrawati (supra) has not accorded the benefit to the accused before the magistrate, so this court is also refraining exercising any opinion regarding that but in Amrawati's case itself it has been directed by the court that bail application of the accused will be decided by the magistrate on the same day and in case it is not decided by the court on the same day then reasons will have to be given for not deciding that.

40. The grounds for providing remand under Section 167(2) Cr.P.C. and granting bail to the accused under Sections 436 and 437 Cr.P.C. by the magistrate are entirely on different grounds and grounds for both cannot be intermingled. Once remand under Section 167(2) Cr.P.C. is being ordered by the magistrate and if any bail application is being moved then it is to be considered by the magistrate as per provision of Section 436 and 437 of the Cr.P.C. as the case may be and magistrate is liable to decide the same on the same day, but if is not being done by him on the same day then specific reasons are to be mentioned regarding that and for that the law propounded by constitution bench of this court in the case of Amrawati (supra) is to be followed.

41. On the basis of discussion above, this court is of the view that the order passed by the learned magistrate was justified. In the circumstances it cannot be said that there is any irregularity, illegality or perversity in the order on the ground that applicant never moved to the Investigating

Officer alongwith papers that are being asked to be sent alongwith Surrender Application upon which impugned order was passed.

42. Applicant cannot be allowed to bye-pass the regular procedure and only on the apprehension that applicant will be arrested, he cannot be allowed not to cooperate with the investigating agency and thereby prolonging the investigation. Prayer for quashing of FIR by co-accused Dr. Kuldeep Kaushik and others is also refused by this Court.

43. From the discussion above it can be said that there are no grounds for warranting interference by this Court and prayer for quashing the impugned order dated 14.7.2016 passed by the Additional Chief Judicial Magistrate, Court No. 2, Bulandshahar in Misc. Surrender Application No. Nil of 2016 (State Vs. Dr. Kuldeep Kaushik) in connection with Case Crime No. 179 of 2016, under Sections 304, 314 IPC, Police Station - Siyana, District - Bulandshahar, is hereby refused.

44. The application lacks merit and is accordingly dismissed.

(2016) 9 ILRA 289
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 29310 Of 2002

Dr. Chandrakant Sharma ...Petitioner

Versus

Vice Chancellor Dr. B.R. Ambedkar University & Ors. ...Respondents

Counsel for Petitioner:
R.B. Singhal, A.B. Singhal

Counsel for Respondents:
S.C., Anil Tewari, Sanjai Kumar Singh

Present writ petition filed under Article 226 of Constitution of India, petitioner has sought a writ of mandamus commanding respondents to release Rs. One Lac withheld by respondents, forthwith, along with interest and also to pay interest on Rs. 1,56,825/ which was payable on 01.02.1997, but actually paid, highly belatedly, i.e. on 01.05.2002.

Petitioner was appointed as Deputy Librarian in Dr. B.R. Ambedkar University, Agra hereinafter referred to as 'University') and after attaining age of superannuation retired from the post of Librarian on 31.01.1997. The last pay drawn by petitioner at the time of retirement was in the scale of Rs. 13000 50016000/. The required no objection certificate from various sections of University was given on 07.01.1997 and even Accounts Department issued a clearance certificate on 03.04.1998 Finance Department issued such clearance on 16.04.1999. Despite thereof, retiral benefits including pension, provident fund etc. was not paid to petitioner for which he also made representations dated 22.04.1999, 29.07.1999 and 23.09.1999.

Court observed that Time and again this Court has said that retiral benefits are not bounty but legal and fundamental right of an employee, being his earned but deferred wage after rendering service for a long period. It is a part of right to earn livelihood under Article 21 of Constitution of India. An employer, for valid reasons may withheld retiral benefits to the extent and in the manner it is permissible under the Rules. If an employee is denied or deferred his retiral benefits for whimsical, fancy and arbitrary assumption or inaction of employer or for fault of authorities of employer, it is most abhorring and condemnable attitude on their part. It amounts to harassment of a person who is now a senior citizen having retired from service but at this advanced age, he/she and family are made to suffer financial and otherwise, for no fault on their part and this sufferance is on account of apathy, inaction and whimsical attitude of non caring officials to the needs and rightful dues of retired employees. Withholding of retiral benefits of retired employees for years together is not only illegal and arbitrary but a sin, if not an offence since no law has declared so. The officials, who are still in service and are instrumental in such delay causing harassment to the retired employee must however be ashamed and feel afraid of committing such a sin. It is morally and socially obnoxious. It is also against the concept of social and economic justice which is one of the founding pillar of our constitution.

In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

Court held that non payment of retiral benefits to petitioner is wholly arbitrary and unreasonable. There was no justification at all for respondents to delay payment thereof.

Writ petition is accordingly allowed.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri R.B. Singhal, learned counsel for petitioner and Sri Sanjai Kumar Singh counsel for respondents .

2. By means of this writ petition filed under Article 226 of Constitution of India, petitioner has sought a writ of mandamus commanding respondents to release Rs. One Lac withheld by respondents, forthwith, along with interest and also to pay interest on Rs. 1,56,825/- which was payable on 01.02.1997, but actually paid, highly belatedly, i.e. on 01.05.2002.

3. Brief facts giving rise to this petition are that, petitioner was appointed as Deputy Librarian in Dr. B.R. Ambedkar University, Agra (hereinafter referred to as "University') and after attaining age of superannuation retired from the post of Librarian on 31.01.1997. The last pay drawn by petitioner at the time of retirement was in the scale of Rs. 13000-500-16000/-. The required no objection certificate from various sections of University was given on 07.01.1997 and even Accounts Department issued a clearance certificate on 03.04.1998 Finance Department issued such clearance on 16.04.1999. Despite thereof, retiral benefits including pension, provident fund etc. was not paid to petitioner for which he also made representations dated 22.04.1999, 29.07.1999 and 23.09.1999.

4. Petitioner's mother was seriously ill and due to non payment of retiral benefits he had serious financial scarcity, hence requested respondents to release his funds. After hectic efforts, a sum of Rs. 50,000/- was paid in first week of December, 1999 but it was too late, since petitioner's mother died on 25.11.1999. Petitioner then approached this Court in Writ Petition no. 17671 of 2001 for a direction for release of his retiral benefits. The said writ petition was disposed of on 09.05.2001 with following directions:-

"Heard learned counsel for the parties.

This petition is disposed of with the direction to the authority concerned to decide the petitioner's representation dated 22.04.1999 (annexure 3 to the writ petition) expeditiously preferably within 6 weeks in accordance with law. If petitioner is found entitled to any dues by the said order he shall be paid the same within 6 weeks thereafter.

Petition is disposed of."

5. Pursuant thereto a sum of Rs. 1,56,825/- was paid to petitioner vide cheque no. 336017 dated 01.05.2002 payable at Allahabad Bank of Agra University but still a sum of Rs. One Lac was withheld by respondents for reasons not known to petitioner. Despite various efforts the aforesaid amount withheld by respondents was not released. Hence this writ petition.

6. University filed a short counter affidavit sworn on 31.10.2003 stating that during petitioner's tenure as Librarian a fund of Rs. Fifty Lacs was sanctioned by University Grants Commission for Library. There was allegation of misappropriation etc. Hence State of U.P. ordered for vigilance enquiry and due to pendency of such enquiry, retiral benefits of petitioner were initially withheld which were subsequently released after retaining only Rs. One Lac. Since vigilance enquiry is still pending, hence said amount of Rs. One Lac has not been released.

7. Status of enquiry in 2012 was not known to University, hence this Court directed State of U.P. to be impleaded as respondent 4 vide order dated 17.07.2012. Despite that nothing happened. Hence on 23.07.2013 this Court passed following order:-

"It appears that the State of U.P. through Secretary Higher Education, Lucknow has been impleaded as respondent no. 4 to the writ petition vide order dated 17.07.2012. The learned Standing Counsel as well as the Registrar, Dr. B.R. Ambedkar University, Agra shall file an affidavit giving current status of the departmental enquiry as well as vigilance enquiry conducted by the State of Government as alleged by the counsel for the University.

List peremptorily in the week commencing 5th August, 2013."

8. Pursuant thereto University through Registrar submitted an affidavit stating that University has inquired about status of enquiry from Deputy Superintendent of Police, Vigilance Department, Agra vide letter dated 13.08.2003 but has not received any information. So far as State of U.P. is concerned it did not respond at all. In these circumstances as a last opportunity, an order was passed by this Court on 23.10.2013 as under:-

"This matter pertains to the retiral dues of the petitioner. Inspite of several opportunities granted to the State of U.P. through Secretary, Higher Education, Lucknow, counter affidavit has not been filed.

It appears that a sum of Rs. 1 lac of the petitioner has been withheld on the pretext that some inquiries are pending against him. This writ petition is of the year 2002. The State was

granted time for filing counter affidavit vide order dated 17.7.2012, since then more than one year has passed but no counter affidavit has been filed.

As a last opportunity, we grant 3 weeks' time to the State for filing counter affidavit. ***In case the counter affidavit is not filed within the aforesaid period, we are of the view that in absence of any counter affidavit rebutting the averments made in the writ petition, the amount, if any, be paid to the petitioner and in future in case any amount is found due against the petitioner, the same may be recovered from Erring official concerned.***

List the matter after 3 weeks.

Learned Standing counsel shall inform about this order to the Secretary, Higher Education, Lucknow within two weeks by fax."

(emphasis added)

9. Still State of U.P. chose not to respond. Hence on 30.08.2016 this Court passed following orders:-

"1. Despite order dated 6.7.2016 by which one week's time was allowed to learned Standing Counsel to seek instructions about status of alleged vigilance enquiry, he has received no instructions in the matter.

2. As requested by him, put up on 6.9.2016; on which date learned Standing Counsel shall obtain instructions lest this Court shall pass appropriate order to summon the officer concerned."

10. Pursuant thereto learned Standing Counsel produced before this Court a letter dated 16.07.2016 sent by Superintendent of Police, Vigilance Department, Agra. It has informed that an open vigilance enquiry was conducted. Report dated 27.12.2005 was submitted to State Government finding petitioner responsible if causing undue gain, to book publishers in purchase of books. Vigilance recommend for a departmental enquiry, but petitioner, since already retired in 1997, and more than eight years had passed, no disciplinary enquiry was permissible under Rules, hence no further action was taken.

11. Learned Standing Counsel clearly stated that neither any enquiry is contemplated nor pending since it is already barred by time and cannot be conducted now. He also could not dispute that there was no justification for non-payment of retiral benefits to petitioner in time and also not to release withheld amount, when vigilance report was submitted on 27.12.2005, making it clear that though petitioner was prima facie responsible for causing gains to book publishers in purchase of books but no departmental enquiry is possible since more than eight years have passed from his date of retirement.

12. With respect to delay in payment of Rs. 1,56,825/- almost more than five years and for non release of Rs. One Lac for the last nineteen years, we find a total lapse on the part of respondents and no legal and valid justification for such delayed payment, particularly for withholding of Rs. One Lac for more than nineteen years.

13. Time and again this Court has said that retiral benefits are not bounty but legal and fundamental right of an employee, being his earned but deferred wage after rendering service for a long period. It is a part of right to earn livelihood under Article 21 of Constitution of India. An employer, for valid reasons may withheld retiral benefits to the extent and in the manner it is permissible under the Rules. If an employee is denied or deferred his retiral benefits for whimsical, fancy and arbitrary assumption or inaction of employer or for fault of authorities of employer, it is most abhorring and condemnable attitude on their part. It amounts to harassment of a person who is now a senior citizen having retired from service but at this advanced age, he/she and family are made to suffer financial and otherwise, for no fault on their part and this sufferance is on account of apathy, inaction and whimsical attitude of non caring officials to the needs and rightful dues of retired employees.

14. Withholding of retiral benefits of retired employees for years together is not only illegal and arbitrary but a sin, if not an offence since no law has declared so. The officials, who are still in service and are instrumental in such delay causing harassment to the retired employee must however be ashamed and feel afraid of committing such a sin. It is morally and socially obnoxious. It is also against the concept of social and economic justice which is one of the founding pillar of our constitution.

15. The respondents being "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed above, under our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees and their legal heirs like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow

itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful inaction or illegal exercise of power on the part of the public functionaries.

16. In our system, the Constitution is supreme, but the real power vest in the people of India. The Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee.

17. Regarding harassment of a common man, referring to observations of **Lord Hailsham in Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and **Lord Devlin in Rooks Vs. Barnard and others 1964 AC 1129,** the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

18. The above observations as such have been reiterated in **Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17.**

19. In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

20. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

21. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

22. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

23. Now, coming to another aspect of the matter, if retiral benefits are paid with extra ordinary delay, Court should award suitable interest which is compensatory in nature so as to cause some solace to the harassed employee. No Government official should have liberty of harassing a helpless old and retired employee or his heirs by withholding his/her lawful dues for a long time and thereafter to expect an escape from any liability so as to boast that nobody can touch him even if he commits an ex facie illegal, unjust or arbitrary act. Every authority howsoever high must always keep in mind that nobody is above law. The hands of justice are meant not only to catch out such person but it is also constitutional duty of a Court of law to pass suitable order in such matters so that such illegal acts may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing such unjust act.

24. Interest on delayed payment on retiral dues has been upheld time and against in a catena of decision. This Court in **Shamal Chand Tiwari Vs. State of U.P. & Ors. (Writ Petition No.34804 of 2004)** decided on 6.12.2005 held:

"Now the question comes about entitlement of the petitioner for interest on delayed payment of retiral benefits. Since the date of retirement is known to the respondents well in advance, there is no reason for them not to make arrangement for payment of retiral benefits to the petitioner well in advance so that as soon as the employee retires, his retiral benefits are paid on the date of retirement or within reasonable time thereafter. Inaction and inordinate delay in payment of retiral benefits is nothing but culpable delay warranting liability of interest on such dues. In the case of State of ***Kerala and others Vs. M. Padmnanaban Nair, 1985 (1) SLR-750****, the Hon'ble Supreme Court has held as follows:*

"Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following months. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasized and it would not be unreasonable to direct that the liability to pay panel interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement."

In this view of the matter, this Court is of the view that the claim of the petitioner for interest on the delayed payment of retiral benefits has to be sustained."

25. It has been followed and reiterated in **O.P. Gupta Vs. Union of India and others (1987) 4 SCC 328, R. Kapur Vs. Director of Inspection (1994) 6 SCC 589, S.R. Bhanrate Vs. Union of India and others AIR 1997 SC 27, Dr. Uma Agarwal Vs. State of U.P. & another (1999) 3 SCC 438 and S.K. Dua Vs. State of Haryana and another (2008) 3 SCC 44.**

26. A Division Bench of this Court has also considered the question of award of interest on delayed payment of retiral benefits recently in **Rajeshwar Swarup Gupta Vs. State of U.P. & others 2011 (2) ADJ 608** and, relying on the Apex Court decision in **M. Padmnanaban Nair (supra)** and its several follow up as also an earlier Division Bench judgement of this Court in **Smt. Kavita Kumar Vs. State of U.P. & others (2008) 119 FLR 787**, has awarded 12% interest in the said case.

27. In view of the above, we have no hesitation in holding that non payment of retiral benefits to petitioner is wholly arbitrary and unreasonable. There was no justification at all for respondents to delay payment thereof.

28. In a case where the person who has invoked extraordinary equitable jurisdiction satisfying the Court that in the hands of authorities of state instrumentality, individual has suffered grievously, the Court, while deciding the matter, can also pass an order of exemplary cost compensatory in nature so that such authorities may not recur the similar negligence in future. **In Gurpal Singh Vs. State of Punjab and another AIR 2005 SC 2755** it was held that the Court must do justice by promotion of good faith and prevent law from crafty invasion.

29. The harassment made to petitioner is also writ large from the fact that he was under serious financial condition when his mother fell ill but in that regard also a partial amount of Rs. 50,000/- was released but before that his mother expired. If this is not an action which has to be deprecated and condemned, what else could be.

30. We really find it surprising that all the respondent authorities, did not care whatsoever not only to ensure payment of outstanding dues of retiral benefits of petitioner not only in due time

but also showed an attitude of complete defiance and negligence by not responding to this Court for almost fourteen years.

31. In these facts and circumstances, we are satisfied that the petitioner deserves for the relief as prayed for but also due interest and exemplary cost.

32. Writ petition is accordingly allowed.

33. Respondents are directed to release the entire outstanding retiral amount to the petitioner which has not been paid along with interest at the rate of 12% per annum. On the partial retiral dues paid to petitioner in 2002 he shall be paid interest @ 12% per annum which shall be computed after one month from the date of retirement till the date of actual payment. The said amount shall be paid to him within two months from the date of production of certified copy of this order before respondents.

34. Petitioner shall also be entitled for exemplary cost which we quantify to Rs. 20,000/-.

(2016) 9 ILRA 298
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ A No.- 36165 Of 2014

Ramsiya Yadav **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Sanjay Pratap Singh

Counsel for Respondents:
C.S.C.

The present writ petition is directed against the order dated 12.11.2013 passed by the respondent No.2 namely Superintendent of Police, District Jalaun in holding that the petitioner is entitled for only interim pension on account of pendency of criminal case.

The submission of learned counsel for the petitioner is that he was selected and appointed as Constable Driver in the Police Department on 18.6.1975. He was honestly performing his duties and retired on 30.9.2013. The post retiral benefits of the petitioner have not been paid in full. No gratuity has been paid and he is getting interim pension only. The submission is that the sole ground of pendency of criminal proceedings/judicial proceedings cannot be a valid ground for withholding gratuity.

The legal position for withholding gratuity during the pendency of the judicial proceedings is considered by two Division Benches of the Court which are as follows:-

The Division Bench in the case of **State of U.P. & 2 Others v. Jai Prakash** (Supra) had held that the Government has the power to withhold or withdraw the pension and the power to recover any pecuniary loss suffered.

Having considered the legal position relating to withholding of gratuity, it is clear that the said exercise of power cannot be mechanical but has to be utilized looking to the nature of offence alleged against the employee.

In the instant case, the petitioner has been accused in a Criminal Case under Section 342, 217, 218, 120B, the charges against him are that he alongwith other Police Personnels conspired to implicate three innocent persons in Criminal cases and, further, false evidences were collected during investigation to implicate them. The charges levelled against the petitioner are of conspiracy to implicate innocent persons in criminal charges and then conspiring in collecting false evidence against them during investigation. The allegations of lapses in discharge of duty with utmost integrity and honesty are serious charges.

Court held that it does not find any illegality in the order passed by the Superintendent of Police. The petitioner will be entitled for gratuity only after the criminal proceeding against him are culminated.

The writ petition is, accordingly, **dismissed.**

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

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

2. The present writ petition is directed against the order dated 12.11.2013 passed by the respondent No.2 namely Superintendent of Police, District Jalaun in holding that the petitioner is entitled for only interim pension on account of pendency of criminal case.

3. The submission of learned counsel for the petitioner is that he was selected and appointed as Constable Driver in the Police Department on 18.6.1975. He was honestly performing his duties and retired on 30.9.2013. The post retiral benefits of the petitioner have not been paid in full. No gratuity has been paid and he is getting interim pension only.

4. It appears that on 13.11.1998 the First Information Report was registered against the petitioner and 12 others bearing Case Crime No.118 of 1998 under Section 342, 217, 218, 120B, 195, 467, 468 & 471 I.P.C., Police Station Majhagawa, District Hamirpur. After retirement, the petitioner represented the authorities to pay him gratuity and full pension. The representation was rejected vide order dated 12.11.2013, hence this writ petition.

5. The submission is that the sole ground of pendency of criminal proceedings/judicial proceedings cannot be a valid ground for withholding gratuity. The Apex Court and this Court has held time and again that gratuity cannot be withheld. Only in cases where the proceedings are pending against the incumbent are going to culminate giving rise to the situation that the Government would suffer loss on account of conduct of the employee, in other words, where there is any allegation of loss to the Government and some recovery is to be made from the incumbent, the gratuity can be withheld.

6. Reliance is placed upon the judgment of this Court in **Shiv Sewak Prasad Mishra v. State of U.P. & Others**[1] and in **Bhagwat Prasad Yadav v. State of U.P. & Others**[2].

7. Learned Standing Counsel, on the other hand, placing reliance upon the judgment of this Court in **(State of U.P. & 2 Ors. v. Jai Prakash) being Special Appeal Defective No.1278 of 2013** submits that the gratuity can be withheld in a case where judicial proceedings are pending on the serious charges against employee.

8. The legal position for withholding gratuity during the pendency of the judicial proceedings is considered by two Division Benches of the Court which are as follows:-

9. The Division Bench in the case of **State of U.P. & 2 Others v. Jai Prakash** (Supra) had held that the Government has the power to withhold or withdraw the pension and the power to recover any pecuniary loss suffered.

10. Regulation 351-A of the Civil Services Regulation postulates that there has to be a determination in departmental or judicial proceedings.

11. Regulation 351-AA of the Civil Services Regulation deals with the situation where a departmental or judicial proceeding or any enquiry by the Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement, a provisional pension under Regulation 919-A may be sanctioned. Regulation 351-AA stipulates that a provisional pension would be admissible and the modalities for the payment of a provisional pension are prescribed under Regulation 919-A. The provisional pension is to be authorized for the period of commencement from the date of retirement upto and including the date of conclusion of departmental or judicial proceedings or, the enquiry by the Administrative Tribunal, as the case may be.

12. Regulation 919-A (3) contains the expression "prohibition on the payment of death-cum-retirement gratuity to a Government Servants" until the conclusion of the department proceeding, judicial proceeding or, an enquiry by the Administrative Tribunal, as the case may be.

13. Regulation 41 provides that except when the 'pension' is used in contradistinction to gratuity, 'pension would include gratuity'.

14. Consequently, Regulation 919-A(3) which contains a bar on the payment of gratuity till the conclusion of departmental or judicial proceeding would allow the payment of provisional pension stipulated in Clause (1) of Regulation 919-A.

15. Thus, in view of the specific prohibition which is contained in Regulation 919-A (3) no death-cum-retirement gratuity would be admissible until the conclusion of a departmental or judicial proceeding. The expression 'judicial proceeding' would necessarily include the pendency of a criminal case.

16. It was, therefore, held that the order passed by the Superintendent of Police, Jalaun, withholding the payment of gratuity until the conclusion of the criminal trial was correct and proper being in accordance with the provisions of Regulation 351-AA read with Regulation 919-A (3) of the Civil Service Regulations.

17. In subsequent Division Bench judgment in **Special Appeal Defective No.416 of 2014 (State of U.P. & 3 Others v. Faini Singh)**, the question raised was whether the power under Section 351-AA read with Regulation 919-A can be used mechanically and on the ground of pendency of any judicial proceeding against the Government Servant without considering the allegations against the retired Government Servant, the Competent Authority would be empowered to withhold the gratuity and full pension.

18. It was observed in **Faini Singh** (supra) that every power vested in Authority has to be utilized *bona fidely* for the purpose for which such power is given, the discretion given should not consume the power where such discretion is to be exercised.

19. It was found that in the said case the petitioner/respondent was accused of committing the fraud in taking loan by one Shriram son of Hari Ram from U.P. Financial Corporation. The petitioner, Faini Singh was guarantor, the total amount of loan involved was Rs.20,000/-.

20. It was found that the entire loan amount was repaid as soon as the notice was received by Shri Faini Singh and that no loss was caused to the U.P. Financial Corporation.

21. However, the Superintendent of Police, Bijnor had withheld the gratuity and pension only on the ground that the criminal case was pending. It was considered that there is power with the State Government to withhold gratuity in a case where there are allegations of serious crime or grave misconduct or any pecuniary loss caused to the Government by misconduct or negligence during the service including services rendered on re-employment after retirement. It was held that the object of these powers clearly demonstrates that these powers have to be exercised with circumspection and caution and have to be utilized for the purpose for which they have been vested in the State Government. Such powers cannot be used mechanically on the pendency of any judicial proceedings. The delay in judicial proceedings is also required to be taken into consideration and counted for the purposes of exercise of such powers.

22. It was lastly, held that mere pendency of any judicial proceedings cannot be a ground to exercise the powers under Article 351-AA read with Regulation 919-A for withholding the retirement dues. The nature of allegations and the gravity of charge has to be taken into consideration by the Competent Authority before making an order to withhold the retiral dues.

23. Thus in the facts and circumstances of the said case, it was held that the existence of the power by itself did not justify the exercise of power.

24. This view taken by the Special Appellate Bench in the case **State of U.P. v. Faini Singh** (supra) has been followed in **Special Appeal Defective No.45 of 2016 (Mohan Ram v. State of U.P. And 3 Others)** and in **Special Appeal Defective No.52 of 2016 (Hargovind Singh v. State of U.P. And 7 Others).**

25. Having considered the legal position relating to withholding of gratuity, it is clear that the said exercise of power cannot be mechanical but has to be utilized looking to the nature of offence alleged against the employee.

26. In the instant case, the petitioner has been accused in a Criminal Case under Section 342, 217, 218, 120B, the charges against him are that he alongwith other Police Personnels conspired to implicate three innocent persons in Criminal cases and, further, false evidences were collected during investigation to implicate them. These accused have been shown to be arrested

simultaneously from different places by the local police and they have wrongly been implicated. The charges levelled against the petitioner are of conspiracy to implicate innocent persons in criminal charges and then conspiring in collecting false evidence against them during investigation. The allegations of lapses in discharge of duty with utmost integrity and honesty are serious charges. The charge-sheet has been filed against the petitioner and the criminal trial is going on.

27. In view of the above facts, this Court does not find any illegality in the order passed by the Superintendent of Police. The petitioner will be entitled for gratuity only after the criminal proceeding against him are culminated.

28. The judgment in the case of **Shiv Sewak Prasad Mishra** and **Bhagwat Prasad Yadav** (supra) proceeded only on the premise that where there are no allegations of loss to the Government in a criminal case and no recovery is required to be made, the gratuity, therefore, cannot be withheld.

29. This preposition with all due respect is not in comfirmity with the provisions of Civil Services Regulations as interpreted by the Division Benches of this Court.

30. The writ petition is, accordingly, **dismissed**.

(2016) 9 ILRA 303
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 41732 Of 2016

Bharat Sanchar Nigam Ltd. & Ors. ...Petitioners
Versus
Shri Adesh Kumar Gupta & Anr. ...Respondents

Counsel for Petitioners:
Pradeep Kumar Pandey

Counsel for Respondents:
Harish Chandra Mishra

This writ petition has been filed by Bharat Sanchar Nigam Limited and its authorities, assailing an interim order dated 12.08.2016 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No. 1053 of 2016.

In the present case, if not mala fide in fact, still malice in law on the part of petitioners is apparent. Order of transfer passed on 12.05.2016 is clearly an offshoot of such malicious act on the part of petitioners so as to render adjudicatory process pending before Tribunal ineffective, inoperative and infructuous and to some extent, petitioners succeeded also when this Court in Writ Petition No. 28675 of 2016 agreed to the contention of petitionersBSNL that after withdrawal of transfer order dated 24.07.2015, vide order dated 10.05.2016, O.A. already pending before Tribunal rendered infructuous and now subsequent order dated 12.05.2016 could have been challenged in a fresh O.A.

Tribunal has rightly passed interim order observing that here is a case of clever and tactical approach adopted by BSNL and its authorities and their action lacks bona fide. Undeterred by the conduct, which has been commented otherwise by Tribunal, petitioners have shown audacity of continuing with avoidable litigation which shows that they have taken it as a fight for ego and not to show a fair, impartial and justified attitude with its officers and employees. In chain this is petitioners' third writ petition and we find that this writ petition is nothing but a sheer abuse of process of law and could have been avoided by petitioners. Instead they could have approached Tribunal requesting for an early hearing of matter, which, it appears, Tribunal was already doing, still petitioners have chosen to continue litigation by filing writ petition before this Court also. No attempt has been made by petitioners to request Tribunal to decide O.A. expeditiously finally and adjudicate issue in question once and for all. On the contrary, entire attempt is to somehow or other ensure transfer and joining of Respondent1 at any other place except NOIDA so that person, whom petitioners wanted to accommodate at NOIDA, may not get disturbed. This also suggests that ground taken by petitioners that NOIDA authorities and BSNL are also favouring an individual officer to accommodate at NOIDA, has some force.

Court after considering the entire facts of the case they are satisfied prima facie that this is a thoroughly ill advised and misconceived writ petition. This approach and attitude on the part of petitioners can neither be appreciated nor expected from en employer, i.e., a Government Company, who is expected to work as a model employer. Time and again Courts have always reminded authorities and litigants not to come and file frivolous cases.

In the present case, exercise and attempt on the part of petitioners is nothing but a gross abuse of process of law and looking to the entire facts as discussed above, Court find's it justified that petitioners herein have not approached this Court consistent with principle that one who seek equity must do equity and come with clean hands. It is a clear misuse and gross abuse of process of law and hence it is a fit case where writ petition deserves to be dismissed with exemplary cost.

Writ petition was dismissed with cost of Rs. 5 lacs.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Pradeep Kumar Pandey, Advocate for petitioners and Sri Harish Chandra Mishra, Advocate for respondents.

2. This writ petition has been filed by Bharat Sanchar Nigam Limited *(hereinafter referred to as the "BSNL")* and its authorities, assailing an interim order dated 12.08.2016 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad *(hereinafter referred to as the "Tribunal")* in Original Application (*hereinafter referred to as the "O.A.")* No. 1053 of 2016.

3. Respondent-1, Sri Adesh Kumar Gupta, is an Officer of Indian Telecom Services *(hereinafter referred to as the "ITS")* and came to be posted in BSNL after its creation in 2001. It is said that he remained posted at NOIDA from time to time, i.e., 01.05.2001 to 30.11.2001, 01.04.2003 to 31.01.2004, 03.12.2006 to 29.06.2008, 01.04.2009 to 14.09.2009 and lastly from 08.11.2013 to 16.05.2016. The name of Respondent-1 was included in Agreed List 2015, prepared, of the officers likely to be transferred. It was circulated by BSNL Head Quarters to Senior General Manager (Personnel), New Delhi vide letter dated 24.04.2015. On 24.07.2015, an order of transfer was issued transferring Respondent-1 from NOIDA, U.P. West Circle to Meerut, U.P. West Circle.

4. The aforesaid order was challenged by Respondent-1 in O.A. No. 330/00994/2015 under Section 19 of Administrative Tribunal Act, 1985 *(hereinafter referred to as the "Act, 1985")* and by order dated 31.07.2015, Tribunal found that against existing policy of transferring persons after four years, Respondent-1 was sought to be transferred within a period of less than two years and consequently stayed the same.

5. Petitioners put in appearance and filed counter affidavit alongwith stay vacation application. Tribunal, from pleadings, found that Respondent-1 had also made out a case that impugned transfer was to accommodate one Arun Kumar who was impleaded as Respondent-3 in aforesaid O.A. as also against the policy of Government that there shall not be any punitive transfer

unless there is sufficient material or conclusion that an officer is lacking integrity. By order dated 21.08.2015, Tribunal rejected stay vacation application and confirmed interim order dated 31.07.2015. Petitioners thereafter without having final adjudication on the validity of transfer order dated 24.07.2015,, on their own, cancelled order of transfer vide order dated 10.05.2016 and thereafter, simultaneously passed another order within a gap of two days i.e. on 12.05.2016 transferring Respondent-1 to Dehradun and retaining Arun Kumar in place of Respondent-1.

6. Respondent-1 moved a miscellaneous application before Tribunal challenging order dated 12.05.2016 and this order of transfer was also stayed by Tribunal. Petitioners challenged this order of stay before this Court in Writ Petition No. 26022 of 2016 on the ground that O.A., whereby transfer order dated 24.07.2015 was challenged, rendered infructuous when transfer order was cancelled on 10.05.2016, hence it was not permissible for Tribunal to subsequently entertain miscellaneous application assailing subsequent transfer order dated 12.05.2016. This Court vide order dated 30.05.2016 disposed of the writ petition by directing Tribunal to take a final decision in O.A. as well as miscellaneous application, on the next date fixed which was 31.05.2016. Tribunal looked into the matter and found that there was an attempt on the part of BSNL and its authorities to play hide and seek by withdrawing transfer order dated 24.05.2015, which was stayed by Tribunal, so as to technically render O.A. infructuous and simultaneously passing a new order of transfer on 12.05.2016. Tribunal found that both these orders are interconnected, hence O.A. could have been amended challenging subsequent orders and granted opportunity to Respondent-1 to do needful and fixed matter on 07.07.2016 extending interim order to continue.

7. Again BSNL and its authorities came to this Court in Writ Petition No. 28675 of 2016. Learned counsel for the parties were heard on 06.07.2016 and this Court recorded statement of counsel for Respondent-1 that, by order dated 10.05.2016, whereby transfer order dated 24.07.2016 has been revoked, O.A. has rendered infructuous, then Respondent-1 is entitled to file fresh O.A. against subsequent order dated 12.05.2016 and he may do so by filing a fresh case to challenge subsequent order dated 12.05.2016. Writ Petition to this limited extent was allowed vide judgment dated 06.07.2016.

8. In these facts and circumstances, Respondent-1 filed O.A. No. 330/1053/2016 challenging second transfer order dated 12.05.2016 which was passed after withdrawing earlier transfer order dated 24.07.2015 vide order dated 10.05.2016.

9. In the meantime, though interim order of Tribunal was continuing, since this Court decided second writ petition, i.e., Writ Petition No. 28675 of 2016 filed by petitioners-BSNL on 06.07.2016 still BSNL Authorities passed order on 16.05.2016 declaring that Respondent-1 stands relieved and struck off from the strength of U.P. West Telecom Circle with instruction to report to Chief General Manager (Telecom), Dehradun.

10. Tribunal in second O.A. filed by Respondent-1, in the above facts and circumstances, found that by rendering earlier O.A. infructuous by withdrawing earlier order of transfer which was stayed by Tribunal, whereby Respondent-1 was transferred from NOIDA to Meerut and passing

almost simultaneous another order on 12.05.2016, transferring Respondent-1 from NOIDA to Dehradun, but continued to accommodate Arun Kumar at NOIDA, this time also, it seems to be a case of clever and tactical move on the part of BSNL and its authorities and having said so, Tribunal stayed transfer order dated 12.05.2016 as well as relieving order dated 16.05.2016. This interim order dated 12.08.2016 passed by Tribunal has been challenged in this writ petition by BSNL and its authorities.

11. Learned counsel for petitioners contended that transfer is an incidence of service. Respondent-1 was in Agreed List 2015 which used to be prepared in the light of guidelines issued by BSNL Corporate Office. Under the instructions of Vigilance Head of BSNL, posts have been identified as sensitive and non-sensitive. NOIDA has been classified as sensitive where Respondent-1 was posted. He was to be transferred and shifted to a "non-sensitive post" for the reason that his name appeared in Agreed List 2015 which is prepared in respect of officers supposed to be transferred on non-sensitive posts. It is contended that in the matter of transfer, Tribunal ought not to have interfered and interim order passed by Tribunal is patently illegal. Reliance is placed on this Court's decision in **Dr. Krishna Chandra Dubey Vs. Union of India, 2005 (6) AWC 6017.**

12. Learned counsel appearing for Respondent-1, however, contended that transfer of Respondent-1 is malicious in law and patently illegal. He also submitted that petitioners have not come to this Court with clean hands inasmuch as Respondent-1 was wrongly placed in Agreed List and for dropping his name in Agreed list, Chief General Manager (Telecom), U.P. West Circle has already suggested long back. No discreet inquiry was conducted as contemplated in Office Memorandum of Ministry of Home Affairs dated 05.05.1966 with regard to integrity of Respondent-1. During his tenure revenue of department has increased largely and it is only to malign his reputation and to harass him on incorrect facts, petitioners in a clandestine manner are proceeding to shift him and for that purpose are going to any extent including the mode of hide and seek before Court.

13. From para 13 of the writ petition we find that new Agreed List was published on 05.05.2016 by the office of Chief Vigilance Officer for the Year 2016-17 communicated to BSNL and therein name of Respondent-1 was not included and this shows that the very basis of transfer of Respondent-1 disappeared. Therefore, to suggest that Respondent-1 was sought to be transferred on account of some questionable integrity etc. is admittedly not existing in view of averments made in para 13 of writ petition by petitioners themselves.

14. So far as issue on merits is concerned, whether action of transfer of BSNL and its authorities of Respondent-1 from NOIDA to anywhere else, is a matter yet to be adjudicated by Tribunal, therefore, we do not propose to make any observation or discuss matter on merits, touching validity of transfer order. However, facts discussed above makes it clear that petitioners on their own did not allow Tribunal to decide correctness of transfer order and instead played a vicious role in the matter by endeavoring to render adjudication of earlier O.A. infructuous, in which transfer order dated 24.07.2015 was challenged, by withdrawing same, without taking

Tribunal into confidence or without seeking any leave of Tribunal though not only transfer order was stayed by Tribunal but even stay vacation application was rejected. BSNL and its authorities on their own took upon themselves authority to withdraw transfer order without assigning any reason as to why said order was withdrawn and thereafter contended that O.A. in which transfer order was stayed and stay order was confirmed, has rendered infructuous.

15. Lack of bona fide and arbitrariness on the part of present petitioners, i.e., BSNL and its authorities is further writ large from the fact that order withdrawing transfer order dated 24.07.2015 was passed on 10.05.2016 and within two days, i.e., on 12.05.2016, they passed another order transferring Respondent-1, to another place, i.e., instead of Meerut to Dehradun. Justification for withdrawal of transfer order dated 24.07.2015 was not shown to be placed either before Tribunal or even before this Court.

16. In the entire Writ Petition virtually nothing has been said as to why transfer order dated 24.07.2015, which was yet to be adjudicated by Tribunal, was withdrawn. The only reason we can cull out from aforesaid facts is that there was a deliberate and intentional attempt to frustrate adjudication process initiated by Respondent-1, by availing remedy of filing O.A. under Section 19 of Act, 1985 before Tribunal wherein matter was under consideration and with regard to interim order Tribunal, after hearing both parties had confirmed the same. The hurried exercise undertaken by petitioners in passing almost simultaneously fresh order of transfer fortifies above inference and we find at least no reason pleaded in the present writ petition to draw another inference except that it was a very considered, mischievous and tactical approach on the part of BSNL to wriggle out of the question of adjudication of correctness of earlier transfer order and also to wriggle out of the consequences of interim orders passed by Tribunal which was confirmed and not interfered even by this Court in first writ petition filed by petitioners, i.e., Writ Petition No. 26022 of 2016.

17. Transfer is an incident of service and there is no doubt but still judicial review in respect of an order of transfer is permissible for well known reasons, namely, (i) if it is by way of mala fide which includes malice in law; (ii) if it is without jurisdiction; and, (iii) if it is in contravention of statutory provisions.

18. In the present case, if not mala fide in fact, still malice in law on the part of petitioners is apparent. Order of transfer passed on 12.05.2016 is clearly an offshoot of such malicious act on the part of petitioners so as to render adjudicatory process pending before Tribunal ineffective, inoperative and infructuous and to some extent, petitioners succeeded also when this Court in Writ Petition No. 28675 of 2016 agreed to the contention of petitioners-BSNL that after withdrawal of transfer order dated 24.07.2015, vide order dated 10.05.2016, O.A. already pending before Tribunal rendered infructuous and now subsequent order dated 12.05.2016 could have been challenged in a fresh O.A.

19. Tribunal passed impugned interim order dated 12.08.2016 prima facie observing that it is a case of clever and tactical move on the part of petitioners and it also prima facie shows that they are adamant to transfer Respondent-1 and adjust Arun Kumar in his place at NOIDA and are

displaying a high degree of obduracy and vindictiveness. We prima facie find substance therein. In the backdrop of facts, interim order has been passed by Tribunal and we find apparently nothing manifestly illegal therein.

20. When called upon, learned counsel for the petitioners could not tell as to why petitioners did not await adjudication of O.A. No. 330/00994/2015 and withdrew earlier order of transfer dated 24.07.2015. It also could not explain why another order within two days was passed.

21. In these facts and circumstances, we have no manner of doubt but to draw an inference at this level also that the only reason was to render adjudicatory process pending before Tribunal infructuous and redundant and to wriggle out of the interim order operating against petitioners-BSNL. If that be so, petitioners are clearly guilty of malice in law and the action of subsequent transfer is malicious in law.

22. Malice in law does not mean malice in fact. Court has summarised "malice in law " in **(Smt.) S.R. Venkatraman Vs. Union of India and another, AIR 1979, SC 49** as under :

"It is equally true that there will be an error of fact when a public body is prompted by a ***mistaken belief in the existence of a non-existing fact or circumstance.*** *This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another." (Para 8)*

(emphasis added)

23. Court, further in para 9 of the judgment in **S.R. Venkatraman (supra)**, has observed:

"9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."

24. In **Mukesh Kumar Agrawal Vs. State of U.P. and others JT 2009 (13) SC 643** Court said :

"We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved."

25. In **Somesh Tiwari Vs. Union of India and others 2009 (2) SCC 592** dealing with the question of validity of an order of transfer on the ground of malice in law, Court, in para 16 of the judgment, observed as under:

"16. .... Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of ***malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment.*** *When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal." (emphasis added)*

26. In **HMT Ltd. and another Vs. Mudappa and others JT 2007(3) SC 112**, Court in paras 18 and 19, defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:

*"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "****malice in law" means "something done without lawful excuse'.*** *In other words, "it is an* ***act done wrongfully and wilfully without reasonable or probable cause,*** *and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others."*

"19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide." (emphasis added)

27. In brief "malice in law" can be said to exist when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-est or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. [See **Manager Govt. Branch Press and another Vs. D.B. Belliappa AIR 1979 SC 429; Punjab Electricity Board Vs. Zora Singh and others AIR 2006 SC 182; K.K.Bhalla Vs. State of U.P. and others AIR 2006 SC 898; P. Mohanan Pillai Vs. State of Kerala and others (2007) 9 SCC 497; M.P.State Corporation Diary Federation Ltd. and another Vs. Rajneesh Kumar Zamindar and others (2009) 6 SCALE 17; Swarn Singh Chand Vs. Punjab State Electricity Board and others (2009) 7 SCALE 622 and Sri Yemeni Raja Ram Chandar Vs. State of Andhra Pradesh and others JT (2009) 12 SC 198].**

28. We also enquired from learned counsel for petitioners as to why petitioners did not request Tribunal to decide O.A. at the earliest and instead have rushed to this Court by filing this writ petition particularly when in similar circumstances, an attempt on the part of State to assail an interim order passed by Tribunal, was not approved by Supreme Court in **State of Uttar Pradesh Vs. Sunanda Prasad, (1999) 6 SCC 34** and it was held that High Court should not have interfered against an interim order passed by Tribunal when matter on merits is yet to be decided by Tribunal. In paragraphs 3, 4 and 5 of judgment, Court said:

"3. Though ordinarily this Court does not interfere with an interim order passed by the High Court, but in the case in hand the High Court having entertained a writ petition while the grievance of the respondents is still pending before the Central Administrative Tribunal and having passed an interim order annulling the order of the Tribunal, we think it appropriate to interfere with the impugned order of the High Court.

4. We have no doubt in our mind that the High Court exceeded its jurisdiction in entertaining a writ application when the legality of the order; of transfer is a subject-matter of a pending proceeding before the Central Administrative Tribunal and the Tribunal has passed an order of status quo. If the appellant authority has violated any interim direction of the Tribunal, the appropriate remedy is to file an application for contempt and we are told that such application has been filed, which is pending before the Tribunal. The Tribunal has also fixed up the hearing of the matter on 16-7-1999.

5. In the aforesaid circumstances, the impugned order of the High Court stands quashed. The writ petition is also dismissed. The Tribunal is requested to dispose of the matter on the date on which the matter has already been fixed for hearing."

29. Learned counsel for the petitioners could not reply except arguing that in transfer matters, Court should not have interfered. In our view, aforesaid observations are squarely applicable in the case in hand. Thus, in chain it is the third writ petition filed by the petitioners-BSNL against interim orders passed by Tribunal and it appears that petitioners are not interested in final disposal and adjudication of issue by Tribunal.

30. In our view, Tribunal has rightly passed interim order observing that here is a case of clever and tactical approach adopted by BSNL and its authorities and their action lacks bona fide. Undeterred by the conduct, which has been commented otherwise by Tribunal, petitioners have shown audacity of continuing with avoidable litigation which shows that they have taken it as a fight for ego and not to show a fair, impartial and justified attitude with its officers and employees. In chain this is petitioners' third writ petition and we find that this writ petition is nothing but a sheer abuse of process of law and could have been avoided by petitioners. Instead they could have approached Tribunal requesting for an early hearing of matter, which, it appears, Tribunal was already doing, still petitioners have chosen to continue litigation by filing writ petition before this Court also. No attempt has been made by petitioners to request Tribunal to decide O.A. expeditiously finally and adjudicate issue in question once and for all. On the contrary, entire

attempt is to somehow or other ensure transfer and joining of Respondent-1 at any other place except NOIDA so that person, whom petitioners wanted to accommodate at NOIDA, may not get disturbed. This also suggests that ground taken by petitioners that NOIDA authorities and BSNL are also favouring an individual officer to accommodate at NOIDA, has some force.

31. Be that as it may, to our mind, from entire facts of the case we are satisfied prima facie that this is a thoroughly ill-advised and misconceived writ petition. This approach and attitude on the part of petitioners can neither be appreciated nor expected from en employer, i.e., a Government Company, who is expected to work as a model employer. Time and again Courts have always reminded authorities and litigants not to come and file frivolous cases.

32. This Court cannot be oblivious of the fact that it is already reeling under extreme pressure of extra ordinary pendency of cases, for one or the other reasons, causing huge delay in disposal of cases. Everyday, on various platforms, people cry of denial of justice. They are frequently reminding us that "justice delayed is justice denied" but on account of massive litigation exodus, Courts are under mounting pressure of huge number of cases, pending. Lack of infrastructure and other supporting establishment, is another hurdle in speedy disposal of cases. It is virtually a day dream to think of an early disposal of a case, yet a few litigants, assisted by officers of this Court, do not hesitate in filing frivolous cases adding to mounting arrears. This is high time when such frivolous and uncalled for litigation must be endeavoured to be curtailed by taking hard steps. This Court should not show its misplaced sympathy to such persons, who indulge in filing frivolous cases before this Court so as to consume a sufficient time in those matters, depriving Court's precious time to be utilized in other substantial issues.

33. Stressing upon the ways to discourage filing of vexatious and frivolous cases against all kinds of orders or at every stage of proceedings, irrespective of the fact whether application like the present one would be permissible in law or not, Apex Court in the context of practice of filing SLPs against all kinds of orders of High Court or other authorities, came heavily in **Mathai @ Joby vs. George and Anr, 2010 (4) SCC 358** and said that if all such sundry kinds of cases are allowed, the Court will soon be flooded with a huge amount of backlog and it will not be able to deal with important questions relating to the Constitution or the law or where grave injustice has been done. The Court has limited time at its disposal and the Judges are struggling with unbearable burden with zeal to dispense justice to whom it is highly needed yet being obstructed by such frivolous and vexatious matters, a trend is developing to bring all kinds of trivial and flimsy matters to Court causing wastage of not only public money, but also precious time of the Court, which can be used for other substantial matters.

34. The Apex Court in Phool Chandra & Anr. Vs. State of U.P., 2014(3) RCR (Criminal) 30, observed:

"..the time of the Court which is becoming acutely precious because of the piling arrears has to be wasted on hearing such matters. There is an urgent need to put a check on such frivolous litigation. Perhaps many such cases can be avoided if learned Counsel who are officers of

the court and who are expected to assist the court tender proper advice to their clients. The Bar has to realise that the great burden upon the Bench of dispensing justice imposes a simultaneous duty upon them to share this burden and it is their duty to see that the burden should not needlessly be made unbearable. The Judges of this Nation are struggling bravely against the odds to tackle the problem of dispensing quick justice. But, without the cooperation of the gentlemen of the Bar, nothing can be done."

35. The Court in **Phool Chandra & Anr. (supra)** referring to earlier decisions in **Varinderpal Singh Vs. Hon'ble Justice M.R. Sharma and Ors., 1986 Supp SCC 719; Ramrameshwari Devi and Ors. Vs. Nirmala Devi and Ors., (2011) 8 SCC 249; and Gurgaon Gramin Bank Vs. Khazani and Anr., AIR 2012 SC 2881** has said:

"It is high time that the Courts should come down heavily upon such frivolous litigation and unless we ensure that the wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigation. In order to curb such kind of litigation, the courts have to ensure that there is no incentive or motive which can be ensured by imposing exemplary costs upon the parties as well as on learned Counsel who act in an irresponsible manner."

36. We may also repeat hereat observation made by the Court in **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India, JT 2005 (6) SC 486** stating that award of costs must be treated generally as mandatory. It is the liberal attitude of the Courts in not awarding costs which has led to frivolous points or litigation before the Courts. Costs should invariably follow the event and reasons must be assigned for not awarding costs.

37. In the present case, exercise and attempt on the part of petitioners is nothing but a gross abuse of process of law and looking to the entire facts as discussed above, we find it justified that petitioners herein have not approached this Court consistent with principle that one who seek equity must do equity and come with clean hands. It is a clear misuse and gross abuse of process of law and hence it is a fit case where writ petition deserves to be dismissed with exemplary cost.

38. We, therefore, dismiss this writ petition with cost of Rs. 5 lacs.

39. However, we make it clear that any observation made by us in this judgment shall not be construed as an expression or opinion on merits of issue which is pending for adjudication by Tribunal, and, would be confined only for the purpose of considering present writ petition before this Court. Tribunal shall proceed to decide matter on merits independently on the basis of material available before it.

(2016) 9 ILRA 313
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.09.2016

BEFORE

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Writ Petition No.- 4621 (M/S) Of 2015

Ram Naresh ...Petitioner
Versus
State Of U.P. & Ors. ...Opposite parties

Present writ petition under Article 226 of the Constitution of India, inter-alia seeking a direction to the Appar Sachiv Madhymic Shiksha Parishad, Kshtriya Karyalaya, Allahabad to withdraw recognition of said Swami Vivekanand Ucchtar Madhyamic Vidyalaya, Hardoi and to communicate its decision to the petitioner forthwith. Petitioner is also seeking a direction to restrain opposite party No.6-Sub-Divisional Magistrate, Bilgram, Hardoi to interfere in the property of the Institution.

It is settled law that one should approach the court with clean heart and clean mind to get a relief and one who does not come with clean heart and clean mind dis-entitles himself from getting any relief from the Court.

It is clear that the petitioner has filed this writ petition with oblique motives and has not presented the correct facts just to gain undue advantage. Such type of practice should always be discouraged and is highly deprecated. They belong to the category of persons who not only attempt, but succeed in polluting the course of justice.

In the instant case, the petitioner in paragraph 3 of the writ petition has stated in clear words that the petitioner is a elected Manager of Swami Vivekanand Higher Secondary School Bilgram, Hardoi. On coming to know about the filing of the instant writ petition, the elected Manager of Committee of Management of the Institution, namely, Hasnain Navab Zada filed an application for impleadment together with an application for dismissal of the writ petition on account of non-joinder of necessary parties. In the affidavit filed in support of application, it has been stated that the petitioner is in habit of indulging in filing frivolous writ petitions. As a matter of fact on the basis of undisputed electoral college of the society, the election was held on 5.7.2015 under the supervision of the nominated Observed, namely, Sri R.K.Rao, Principal, GIC Tariyawan,Hardoi in which one Shri Ram was elected as president whereas Sri Hasnanin Navab Zada was elected as Manager apart from the other office bearers.

A litigant who has approached this Court in extra ordinary equitable jurisdiction with unclean hands, his conduct makes him liable to pay an exemplary cost for abusing the process of the Court besides wasting precious time of the Court which could have been utilized for other more deserving cases. Moreover, he is also guilty of swearing a false affidavit. Thus the petitioner must be saddled with the liability of heavy cost so that in future such thing may not recur.

In view of the aforesaid detailed facts and reasons, the writ petition is dismissed with cost of Rs.5,00,000/- (Rupees Five Lacs).

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

1. Mr. D.P. Singh, Advocate, has filed his vakalatnama on behalf of the petitioner after obtaining 'No Objection' from previous counsel Mr. R.J. Trivedi, Advocate. The same is taken on record.

2. Heard Mr. D.P. Singh, learned Counsel for the petitioner, learned Standing Counsel and Mr. Rajendra Pratap Singh, learned Counsel for the opposite party No.7.

3. Surprisingly, the petitioner, who claims himself to be the Manager of Swami Vivekanand Higher Secondary School, Bilgram, has filed the instant writ petition under Article 226 of the Constitution of India, inter-alia seeking a direction to the Appar Sachiv Madhymic Shiksha Parishad, Kshtriya Karyalaya, Allahabad to withdraw recognition of said Swami Vivekanand Ucchtar Madhyamic Vidyalaya, Hardoi and to communicate its decision to the petitioner forthwith. Petitioner is also seeking a direction to restrain opposite party No.6-Sub-Divisional Magistrate, Bilgram, Hardoi to interfere in the property of the Institution.

4. Submission of the learned Counsel for the petitioner is that Swami Vivekanand Ucchtar Madhyamic Vidyalaya, Hardoi [hereinafter referred to as ***"Institution"***] was recognized from U.P. Board, Allahabad from 27.2.2006 for imparting education upto High School level. At the time of recognition, total strength of the students in the Institution was in accordance with rules in granting such recognition and sufficient teachers were discharging their duties in the Institution but in due course of time, some dispute arose between the Committee of Management and its Member resulting in reduction of strength of the student day by day. In the academic session started from 1st April, 2015, the strength of the students had become NIL and no student has come to get admission in the Institution.

5. Further submission of the learned Counsel for the petitioner is that on account of decrease in the strength of students, the income of the institution has also been reduced and it was impossible to make payment of salary of the teachers, therefore, teachers, who were posted in the Institution, had also resigned from the Institution. Therefore, the petitioner being a Manager of the Institution has no option except to move an application to the Educational Authorities for withdrawal of the recognition after due inspection. The Committee of Management has also resolved vide resolution dated 7.6.2015 for closing down the Institution. But as no heed was paid by the Educational Authorities, the petitioner has sent a reminder on 8.7.2015 with regard to make physical verification of the Institution and recognition be withdrawn.

6. Elaborating his submission, learned Counsel for the petitioner has submitted that the petitioner being a Manager of the Institution has purchased land of the Institution for doing agricultural work from its own pocket and earning from the agricultural work was utilized for the benefit of the Institution.

7. Elaborating his submission, learned Counsel for the petitioner has submitted that the petitioner being a Manager of the Institution has purchased land and the benefit earn from the said agricultural land was invested in the benefit of the Institution. He submits that as no action has been taken by the Educational Authorities, the petitioner has approached this Court by means of the present writ petition.

8. Feeling aggrieved by the inaction on the part of official respondents, the petitioner has no option except to knock the door of this Court.

9. Per contra, learned Standing Counsel has vehemently contended that Swami Vivekanand Shiksha Samiti, Akhtiyarpur, Bilgram runs the Institution, who is recognized unaided institution upto High School level. Under the provisions of Section 7 (Ka) (Ka) of the Intermediate Education Amendment Act, 1987, the recognition of the Institution have also been given by the Upper Sachiv, Madhyamik Shiksha Parishad, Regional Office, Allahabad vide its letter dated 27.2.2006. Submission is that the election of the general body/Managing Committee could not be held from the last several years, therefore, the Committee of Management of the Institution was declared as time barred from 27.2.2009. The election of the Committee of Management of the Institution was held vide order dated 23.6.2015 by the District Inspector of Schools, Hardoi, in which Sri Hasnain Nawab Jada was elected as Manager of the Institution and his signature was also verified by the District Inspector of Schools, therefore, presently, Sri Hasnain Nawab Jada is the Manager of the Institution.

10. Elaborating his submission, learned Standing Counsel has submitted that the petitioner himself declared as Manager of the Institution and without having any right, he submitted a proposal before the District Inspector of Schools with regard to withdrawal of the recognition of the institution, upon which the District Inspector of Schools did not pay any heed as there was no substance in the claim of the petitioner in the eyes of law. However, pursuant to the order of this Court dated 18.8.2015, the Joint Director, VI Region, Lucknow and the District Inspector of Schools, Hardoi made a spot inspection on 6.11.2015. On due inspection, the Joint Director, VI Region, Lucknow and the District Inspector of Schools, Hardoi, submitted report dated 11.12.2015, which indicates that the petitioner is unauthorizedly living in the first floor of the Institution and in the institution, apart from the Principal, who is the daughter of the petitioner, ten Assistant Teachers, One Clerk and one Peon have been shown in the attendance register.

11. In the backdrop of the aforesaid factual position, it has been vehemently contended that petitioner by wrongly imposing himself to be the Manager of the Institution has filed the present writ petition by concealing the material facts with oblique motive. Therefore, the present writ petition is the misuse of process of law and is liable to be dismissed with exemplary costs.

12. Mr. Rajendra Pratap Singh, learned Counsel for the opposite party No.7, while opposing the writ petition, has vehemently contended that on being declared the erstwhile Committee of Management as time-barred, the District Inspector of Schools, Hardoi, appointed an Observer for conducting the election of the Management in accordance with the provisions

mentioned in the Scheme of Administration vide order dated 30.6.2015. Thereafter, election schedule was widely circulated and the election of Committee of Management of the Institution was held in the presence of Observer so appointed by the District Inspector of Schools on 5.7.2015. In the said election, Mr. Hasnain Nawab Jada was elected as Manager of the Institution, hence, the election dated 5.7.2015 was recognized and his signature was attested by the District Inspector of Schools vide letter dated 15.7.2015. Thereafter, the petitioner with mala fide intention has filed the present writ petition against the interest of the institution on the basis of false facts, alleging to be Manager of the institution and prayed for withdrawal of recognition of the institution on account of decreasing the strength of the students.

13. Clarifying the facts, Counsel for the opposite party No.7 has submitted that for the session 2014-15, in Class IX, there were 45 student and Class-X, there were 80 students, whereas in the session i.e. 2015-16, in Class IX, 21 students are enrolled and studying, while in Class X, 25 students are enrolled and studying.

14. So far as the contention of the learned Counsel for the petitioner that vide resolution 7.6.2015 (Annexure 3 to the writ petition), the Committee of Management has resolved that on account of reducing the strength of the Institution, the Institution be closed, learned Counsel for the opposite party No.7 has submitted that Annexure No.3 of the writ petition is a forged and fabricated document as on 7.6.2015, no meeting of the Committee of Management was held on account of non-existence and declaring time-barred of the Committee of Management on that date. In these backgrounds, submission is that the present writ petition has been filed by the petitioner against the interest of the Institution and is liable to be dismissed with heavy cost.

15. I have examined the submissions of the learned Counsel for the petitioners and gone through the records.

16. The present writ petition has been filed by the petitioner on 6.8.2015 by claiming himself as Manager of the Institution for withdrawal of the recognition of the Institution, whereas as per the counter affidavit filed on behalf of the State as well as opposite party No.7, since the Committee of Management of the Institution was time-barred, therefore, the District Inspector of Schools appointed an Observer for conducting the election in accordance with the provisions of the Scheme of Administration on 30.6.2015. In the presence of the Observer, the election of the Committee of Management was held on 5.7.2015, in which, Mr. Hasnain Nawab Jada was elected as Manager of the Institution. Subsequently, the election dated 5.7.2015 was recognized and the signature of Mr. Hasnain Nawab Jada was attested by the District Inspector of Schools vide order dated 15.7.2015, as is evident from Annexure No. CA-3 of the counter affidavit filed on behalf of the opposite party No.7.

17. From the aforesaid admitted facts, it transpires that the petitioner has deliberately with an oblique motive filed the present writ petition in the capacity of the Manager of the Institution, whereas Mr. Hasnain Nawab Jada had already been elected as the Manager of the Institution and his signatures were also attested by the District Inspector of Schools, therefore, it is beyond doubt

that the present writ petition has been filed by the petitioner on the basis of incorrect facts with oblique motive.

18. In the counter affidavit filed on behalf of the State, it has been mentioned that as per the record available on the website of Madhyamik Shiksha Parishad, U.P., Allahabad, 13 students of Class IX and 25 students of Class-X have been registered and their applications have been forwarded for examination in the academic session 2015-2016. In compliance of the order dated 18.8.2015 passed by this Court, spot inspection of the Institution was made by the Joint Director, VI Region, Lucknow and District Inspector of Schools, Hardoi on 6.11.2015, whereupon it was found that apart from the name of the Principal, the names of ten Assistant Teachers, one Clerk and One Peon have been mentioned in the attendance register and the petitioner is residing in the first floor of the institution.

19. Learned Standing Counsel, during the course of arguments, has also drawn towards the document contained at page No. 67 of the counter affidavit, which is the information published by the petitioner in the capacity of the Manager of the Institution with regard to sell the building and land of the Institution as classes for Class-IX & X were closed and, therefore, he has right to sell the building and land of the institution.

20. A specific query was put to the learned Counsel for the petitioner that as to why the petitioner has filed the present writ petition in the capacity of the Manager of the Institution, though at that relevant time, neither he was the Manager of the Institution or has any right to seek relief with regard to withdrawal of the recognition of the Institution, learned Counsel for the petitioner has failed to establish his statutory right/fundamental right, which are said to be violated by any authority. Moreover, when the petitioner had deliberately omitted to mention material facts in the writ petition, which amounts to suppression of material facts.

21. In ***Prestige Lights Ltd. v. State Bank of India*** : (2007) 8 SCC 449, the Apex Court held that in exercising power under Article 226 of the Constitution of India, the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty bound to place all the facts before the court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain petition filed under Article 226 of the Constitution. The Apex Court Court while referring to the judgment of Scrutton, LJ. in ***R v. Kensington Income Tax Commissioners***, observed as under:-

"In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise-guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete

and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

22. In ***Welcome Hotel and Ors. v. State of Andhra Pradesh and Ors. etc.*** AIR 1983 SC 1015, the Apex Court has held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

23. In **K.D. Sharma v. Steel Authority of India Ltd. and Ors.**,[2008 (12) SCC 481] the Apex Court has held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in **G. Jayshree and Ors. v. Bhagwandas S. Patel and Ors.**: (2009) 3 SCC 141.

24. In a recent decision of ***Dalip Singh Versus State of Uttar Pradesh and others*** [(2010) 2 Supreme Court Cases 114], the Apex Court seriously criticized the making of false statement on oath and the attempt of a litigant in misleading the Court.

25. It is settled law that one should approach the court with clean heart and clean mind to get a relief and one who does not come with clean heart and clean mind dis-entitles himself from getting any relief from the Court. From what has been mentioned above, it is clear that the petitioner has filed this writ petition with oblique motives and has not presented the correct facts just to gain undue advantage. Such type of practice should always be discouraged and is highly deprecated. They belong to the category of persons who not only attempt, but succeed in polluting the course of justice.

26. In ***Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and others,*** 2003 (Suppl.) 3 SCR 352, it was reiterated after referring to various earlier decisions of the Apex Court that fraud, misrepresentation and concealment of material fact vitiates all solemn acts. In *State of Andhra Pradesh & another Vs. T. Suryachandra Rao*, AIR 2005 SC 3110, the Apex Court after referring to various earlier decisions held that suppression of a material document would also amount to a fraud on the Court. The same view has been reiterated in *Bhaurao Dagdu Paralkar Vs. State of Maharashtra & others*, AIR 2005 SC 3330. In *R. Vishwanatha Pillai Vs. State of Kerala & others,* JT 2004(1) SC 88 the Apex Court observed that a person, who seeks equity, must act in a fair and equitable manner. In *Rajabhai Abdul Rehman Munshi Vs. Vasudev Dhanjibhai Mody,* AIR 1964 SC 345, it was held that if there appears on the part of a person, who has approached the Court, any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if the discretion has been exercised in revoking the leave to appeal granted even at the time of hearing of

the appeal. The same view was reiterated and followed in *Vijay Syal & another Vs. State of Punjab & others* (2003) 9 SCC 401.

27. In the instant case, the petitioner in paragraph 3 of the writ petition has stated in clear words that the petitioner is a elected Manager of Swami Vivekanand Higher Secondary School Bilgram, Hardoi. On coming to know about the filing of the instant writ petition, the elected Manager of Committee of Management of the Institution, namely, Hasnain Navab Zada filed an application for impleadment together with an application for dismissal of the writ petition on account of non-joinder of necessary parties. In the affidavit filed in support of application, it has been stated that the petitioner is in habit of indulging in filing frivolous writ petitions. As a matter of fact on the basis of undisputed electoral college of the society, the election was held on 5.7.2015 under the supervision of the nominated Observed, namely, Sri R.K.Rao, Principal, GIC Tariyawan,Hardoi in which one Shri Ram was elected as president whereas Sri Hasnanin Navab Zada was elected as Manager apart from the other office bearers.

28. The aforesaid facts made by the opposite party no.7 have been substantiated by the DIOS, Hardoi in the counter affidavit filed on behalf of opposite parties nos. 3 and 4. In paragraph 10 and 17 of the counter affidavit it has been stated that the petitioner has unauthorizedly declared himself as the Manager of the College and indirectly making postal correspondence for initiating proceeding against the college concerned. It has further been stated that the school land is recorded in the name of Committee of Management/Institute in the revenue record. Thus, it is imminently clear that absolutely incorrect and twisted statements have been made on oath with an oblique motive and has misused the process of law by filing successive writ petitions on flimsy grounds.

29. A litigant who has approached this Court in extra ordinary equitable jurisdiction with unclean hands, his conduct makes him liable to pay an exemplary cost for abusing the process of the Court besides wasting precious time of the Court which could have been utilized for other more deserving cases. Moreover, he is also guilty of swearing a false affidavit. Thus the petitioner must be saddled with the liability of heavy cost so that in future such thing may not recur.

30. In view of the aforesaid detailed facts and reasons, the writ petition is ***dismissed*** with cost of Rs.5,00,000/- (Rupees Five Lacs). The petitioner will deposit the aforesaid cost within two months from today before the Registry of this Court, failing which, the Senior Registrar of this Court shall request the District Magistrate/Collector concerned to recover the said cost as arrears of land revenue from the petitioner within next one month. On receipt of the said cost, the Senior Registrar shall transmit half of the amount to the account of Mediation and Conciliation Centre of this Court and remaining half to the account of Oudh Bar Association for purchase of books of its Library.

(2016) 9 ILRA 320
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHASHI KANT, J.

Contempt Application (Criminal) No.- 17 Of 2015

In Re ...Applicant

Versus

Pradhuman Kumar Srivastava, Advocate & Ors. ...Respondents

Counsel for the Applicant:
A.G.A., Sudhir Mehrotra

Counsel for the Respondents:
Dharam Pal Singh, Sr. Advocate, S.C. Dwivedi, A.K. Srivastava, Avanish Mishra, B.N. Singh, S. Niranjan, Suresh Gupta, U.K. Saxena

Contempt of Courts Act, 1971 — Ss. 2(c) & 10 — Criminal contempt by advocates — Assault and manhandling of judicial officer in Court — Advocates led by office-bearers of Bar Association forcibly entered Court room of Additional District & Sessions Judge, shouted slogans, abused Presiding Officer, threw CPU and pen holders, damaged Court property and physically manhandled judicial officer — Held, such acts scandalized Court, lowered dignity and authority of judiciary and substantially interfered with administration of justice, squarely constituting "criminal contempt" under S. 2(c) of Act, 1971.

Advocates — Duty as officers of Court — Maintenance of dignity of judicial institution — Court reiterated that advocates, being officers of Court, are duty bound to preserve majesty, decorum and authority of judicial institution — Even if grievance exists against conduct of judicial officer, remedy lies in lawful recourse and not in disrupting Court proceedings, damaging property or intimidating Presiding Officer.

Contempt Jurisdiction — Criminal contempt vis-à-vis offences under Penal Code — Mere fact that allegations may also constitute offences under IPC such as assault, mischief or obstruction of public servant does not bar contempt proceedings — Conduct scandalizing Court and lowering public confidence in judiciary independently attracts jurisdiction under Contempt of Courts Act, 1971.
Evidence — Video recording in contempt proceedings — Admissibility and evidentiary value — Silent video recording prepared contemporaneously by Presiding Officer depicting forcible entry, ransacking and disturbance in Court room considered along with witness statements — Held, strict provisions of Evidence Act and CrPC not applicable to contempt proceedings; substance and credibility of evidence relevant for determining contemptuous conduct.

Contempt of Court — Apology — Principles governing acceptance — Conditional apology tendered simultaneously with allegations against Presiding Officer and denial of misconduct held lacking bona fides — Apology not to be used as weapon of defence to escape punishment and must reflect genuine contrition and repentance.

Judicial Independence — Duty of High Court — Protection of subordinate judiciary — High Court emphasized constitutional obligation to ensure dignity, independence and fearless functioning of subordinate judiciary — No litigant or advocate can be permitted to tarnish administration of justice by intimidation or vilification of judicial officers.

Contempt of Courts Act, 1971 — Punishment — Sentencing — Advocates found guilty of criminal contempt sentenced to six months' simple imprisonment and fine of Rs 2,000/- each — Further direction issued restraining contemnors from entering Judgeship premises for one year and placing future conduct under supervision of District Judge.

In Result: Contempt application partly allowed; Contemnors 1, 3, 4, 7, 8, 9 and 10 convicted for criminal contempt and sentenced to six months' simple imprisonment with fine; proceedings against Contemnors 2, 5 and 6 dropped.

Cases cited:

1. State of M.P. Vs. RevashankarAIR 1959 SC 102
2. In Re: Arundhati RoyAIR 2002 SC 1375
3. Surender Nath Vs. Chief Justice and Judges of the High Court10 Calcutta 109
4. Jennison Vs. Baker1972 (1) All ER 997 (CA)
5. Mulk Raj Vs. State of Punjab1972(3) SCC 839

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

1. Criminal contempt proceedings were initiated against 10 Contemnors namely :Pradhuman Kumar Srivastava, Advocate (Contemnor no.1); Arvind Kumar Gautam, Advocate (Contemnor no.2); Gyanendra Singh Rajawat, Advocate (Contemnor no.3); Suresh Dixit, Advocate (Contemnor no.4); Raghunath Das Bishnoi, Advocate (Contemnor no.5); Yusuf Ishtiyaq, Advocate (Contemnor no.6); Karmksheta Awasthi, Advocate (Contemnor no.7); Aftab Ahmad, Advocate (Contemnor no.8); Udai Shankar Dwivedi, Advocate (Contemnor no.9); and, Pankaj Gupta, Advocate (Contemnor no.10), pursuant to an inquiry report of an incident took place on 20th November, 2014 in the afternoon, in District Judgeship Jalaun at Orai in the Court of Manoj Kumar Shukla, Additional District & Sessions Judge, Court No.3, Jalaun at Orai *(hereinafter referred to as "Informant-Presiding Officer")*.

2. The advocates alongwith the aforesaid Contemnors pressurized Informant-Presiding Officer to retire in Chamber since advocates had passed a resolution of abstention and when he resented, advocates manhandled, assaulted and insulted him. Informant-Presiding Officer narrated the entire incident to Administrative Judge on telephone and also said that District Judge did not take any appropriate action in the matter. On the recommendation of Administrative Judge, Chief Justice vide order dated 21.11.2014 directed a fact finding inquiry, which was conducted by Sri Virendra Kumar-II, Special Officer (Vigilance), High Court, Allahabad [*hereinafter referred to as "S.O. (Vig.)*"] and he submitted report on 17.12.2014. The report was accepted by Administrative Committee of Court and in the light of the findings recorded by S.O.(Vig.), matter was assigned to Committee dealing with contempt reference from subordinate courts.

3. On 23.02.2015, Committee, prima facie finding a case of criminal contempt, made recommendation whereupon Chief Justice vide order dated 28.3.2015 directed the matter to be placed before Court on judicial side having jurisdiction of criminal contempt.

4. On 7th May, 2015, Court noticing the fact that Contemnors have been found to abuse informant-Presiding Officer, shouted slogans and assaulted him by throwing CPU of computer and pen holder, creating ruckus and ransacked dais of Court, and in the incident some advocates also sustained injuries, found prima facie case of 'criminal contempt' against the aforesaid advocates since their aforesaid acts amount to scandalizing the Court, interfering and obstructing administration of justice, tarnishing image of Court and lowering down dignity and authority of Court, issued notice requiring them to show cause why they may not be punished for committing contempt.

5. Contemnors appeared before Court on 7th July, 2015 represented by Sri Dharam Pal Singh, Senior Advocate, who requested to supply a copy of enquiry report dated 17.12.2014. Court issued direction to this effect.

6. Contemnors then filed replies and after perusing the same, Court framed charge against Contemnors on 24.8.2015, which reads as under :

"You, Pradhuman Kumar Srivastava, Arvind Kumar Gautam, Gyanendra Singh Rajawat, Suresh Dixit, Raghunath Das Bishnoi, Yusuf Ishtiyaq, Karmkshetra Awasthi, Aftab Ahmad, Udai Shankar Dwivedi and Pankaj Gupta, Advocates, who are all stated to be practising lawyers and also associated with the District Bar Association of Jalaun at Orai on 20th November, 2014 at about 12.45 p.m. ***forcibly entered Court No. 3*** *presided over by Sri Manoj Kumar Shukla, the Additional District & Sessions Judge and* ***shouted slogans using unparliamentary language*** *and* ***assaulted him physically*** *by* ***throwing items on his dais*** *thereby* ***creating a ruckus*** *and* ***ransacked the court*** *resulting in injuries sustained by some of the advocates in the court room that left the court scandalized thereby lowering the esteem of the judiciary. The said incident therefore amounts to a clear interference with and an obstruction in the administration of justice and such act substantially interferes with the due course of justice which falls within the definition of criminal contempt under Section 2(c) of the Contempt of Courts Act, 1971 and, therefore, this court is of the prima facie opinion that you contemnors deserve to be tried for having committed the criminal contempt of the subordinate court as reported for which you deserve to be punished." (emphasis added*)

7. Applications were filed thereafter by Contemnors requesting to supply copies of statements recorded by S.O. (Vig.) on the basis whereof report dated 17.12.2014 was submitted and also a video footage, which was taken note in the said report. Court accepted the said request and vide order dated 01.9.2015, directed to supply the aforesaid material to Contemnors.

8. Though a large number of advocates had put in appearance on behalf of Contemnors but Sri Dharam Pal Singh, Senior Advocate, assisted by Sri Anil Kumar Srivastava has advanced

submissions on behalf of all the Contemnors except Contemnor no.5 on whose behalf Sri Avnish Mishra has advanced his submissions. Besides Sudhir Mehrotra, Special Counsel, nominated by Court to assist in this matter, has also advanced his submissions.

9. Having heard learned counsel for parties, perusing video footage and other documents and considering affidavits filed by Contemnors and other relevant material, we proceed to deal with matter on merits. The defence taken by Contemnors in the affidavits and merits would be discussed simultaneously.

10. Informant-Presiding Officer 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 Informant-Presiding Officer and stated that members of Bar Association shall abstain judicial work from 24.04.2014. Another letter dated 25.04.2014 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 10 A.M. to 5 P.M. and it was also said that Informant-Presiding Officer was not working properly and advocates are abstaining Court from 24.04.2014.

11. 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 Informant-Presiding Officer 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.

12. On 20.11.2014, following massage was received on the mobile of the then Administrative Judge of District Judgeship Jalaun at Orai from informant-Presiding Officer :

"Respected Lordship,

Today at 12.45 p.m. Advocate 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" (emphasis added)

13. 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.

14. 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.****" (emphasis added)*

15. Chief Justice thereupon ordered spot inquiry and this was conducted by S.O. (Vig.), who submitted his 94 pages report.

16. Statements of Court Reader, Orderly and a Class IV employee, were recorded by S.O. (Vig.). Perusal thereof show that at about 12.45 P.M., Informant-Presiding Officer was sitting on the dias when several Advocates entered Court room, shouting slogans, threw CPU of computer and pen-holder towards Informant-Presiding Officer; Table glass and and pen holders were broken and files fell down and scattered. Due to ruckus created by advocates, Informant - Presiding Officer got down from dias 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 informant-Presiding Officer and manhandled him, he also got indulged in scuffle.

17. 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 not 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.?"

18. After referring to evidence collected by him, he recorded his conclusion 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***.

.....

Point in issue no.2.

.....

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***.

....."

19. Now we may refer to the replies filed by Contemnors.

20. Except Contemnor 5 Raghunath Das Vishnoi, a collective reply vide affidavit of Contemnor 1, sworn on 24.8.2015, has been filed. It is said that the incident dated 20.11.2014 has not happened in the manner as alleged by 'Informant-Presiding Officer' and recorded by S.O.(Vig.) in his report. Contemnors neither abused nor assaulted Informant-Presiding Officer nor damaged court's property. The video recording, which was prepared by Informant-Presiding Officer, has been wrongly relied by S.O.(Vig.) ignoring the fact that such recording in Court is not permissible and it goes a long way to suggest/determine the own conduct of Informant-Presiding Officer. Video recording was shown to S.O. (Vig.) on 26/27.11.2014 i.e. after a gap of 6-7 days giving sufficient opportunity for manipulation in video recording. The preparation/recording of video by manipulation by several device including device of cut paste is a common feature, which the modern development of science has made easily possible. With regard to injuries sustained by some advocates, inquiry report does not refer to medical report of anyone else. Recording of Video through laptop at the time of alleged occurrence was practically not possible. Video recording timing is 01:04:08 p.m. on 20.11.2014 whereas the incident is said to have taken place between 12:45 to 1.00 p.m.

21. Then in paras 15, 16, 17, 18, 19 and 20 of affidavit, allegations are made against Informant-Presiding Officer and it would be appropriate to reproduce the same as under :

"15. That the bare perusal of the Inquiry Report would show that the learned Judge, Sri Manoj Kumar Shukla appears to be Modern Don Quijote-de-la Mancha. He posses himself to be a fighter treating all others as wrong and full of vices. ***He has complaint against all possible authorities i.e. District Judge, Police Authorities including S.S.P., District Administration including District Magistrate, prosecution lawyers and lowyers in general and litigants****, who unfortunately happen to be attending the court of the Learned Judge, Sri Manoj Kumar Shukla. Sri Shukla is in the habit of issuing notices to all possible authorities in almost every case. He is in the habit of teasing the litigants, not only in criminal cases, but also in civil cases. Inspite of receiving High Court's order of bail keeping the accused in jail for weeks is his usual habit.* ***To call Advocates, "Dalal" of District Judge and other Judicial is his daily practice****. All these facts came to the light during inquiry proceeding by the Learned Vigilance Officer.*

16. That it has also come in the inquiry report that Learned Judge, ***Sri Manoj Kumar Shukla is in the habit of abusing his own staff, like his stenographer***.

17. That the evidence of EW-23 Sri Umesh Dixit, Stenographer of Learned Judge, Sri Monoj Kumar Shukla discussed at Page 259 to 261 is sufficient to show/prove that the Learned Judge, Sri Manoj Shukla himself responsible for what happened on the day of occurrence. In view of the evidence of EW-23, the observations of the Learned Vigilance Officer with respect to the Issue No.01 are subject to more than one interpretation and not justified.

18. That the Learned Vigilance Officer has clearly found that the Learned Judge, Sri Manoj Kumar Shukla has ***manipulated/ prepared false evidence against the then Learned District Judge,*** *and S.S.P. Jalaun at Orai (Kindly see at page no.203 of the inquiry report).*

19. That the Learned Vigilance Officer has also observed (page 275 - 276) that he could not peruse the inquiry report dated 28.06.2014 and the letter dated 24.04.2014 submitted by Sri Vinod Kumar Yadav, the then district Judge, Sri Manoj Kumar Shukla.

20. That regarding the work and conduct of Pradhuman Kumar Srivastava made by Learned Vigilance Officer at page 276 of report, it is submitted here that Pradhuman Kumar Srivastava (present deponent) has never been served with a copy of any show cause notice with respect to the Transfer Application (Civil) No. 501 of 2014 filed before this Hon'ble Court. To the best of knowledge of the deponent, he has never written any letter dated 20.09.2014 is filed in the aforesaid case. If any such letter dated 20.09.2014 is filed in the aforesaid transfer application, the same is denied by the deponent. It appears that (if at all) aforesaid letter dated 20.09.2014 is a forged document prepared and produced by the parties to the litigation."

22. All these paragraphs have been sworn by Contemnor no.1- deponent of the affidavit, on personal knowledge.

23. Contemnor 5, Raghunath Das Bisnoi had filed a separate reply through Sri Suresh Gupta, Advocate, and Sri V.P.Srivastava, Senior Advocate. A preliminary objection is taken that as per Rule 6 of Chapter XXXV-E of Rules of the Court, 1952 (hereinafter referred to as "1952 Rules"), notice has not accompanied copy of SMS message sent by Informant-Presiding Officer, statement of witnesses and other documents. In the message sent by Informant-Presiding Officer, Contemnor 5 was not referred or named. Inquiry report shows that offence under Section 228 read with 323 IPC was committed, hence, in view of proviso to Section 10 of Contempt of Courts Act, 1971 (hereinafter referred to as "Act, 1971"), no cognizance could have been taken. The Informant - Presiding Officer ought to have lodged a complaint under Section 340 Cr.P.C. S.O. (Vig.) did not frame any issue regarding identity of persons actually involved in the incident dated 18.11.2014 (though incident given rise to this criminal contempt is dated 20.11.2014 but in para 3(IV), Contemnor no.5 has mentioned the date of incident as 18.11.2014). In detailed reply, it is said that S.O. (Vig.) has taken note of various incidents occurred during 20.10.2014 to 24.11.2014 though the inquiry was confined to the incident dated 20.11.2014. Contemnor 5 neither participated in the incident nor was present in the Court nor in the vicinity of Court of Informant - Presiding Officer. Wife of Contemnor 5 is a patient of Multiple Myeloma (Blood Cancer) for the last three years and

under treatment of Experts of Apollo Cancer Institute, New Delhi; Tata Memorial Hospital, Mumbai; Vendanta Hospital Gurgaon, Haryana and Rajeev Gandhi Research Institute, New Delhi.

24. Contemnor 5 had no time to indulge himself in politics of Bar Association and appears in Court when his case is taken up in respective Courts. On 20.11.2014, when resolution was passed by Association, Contemnor 5 was neither present nor signed the said resolution. Informant - Presiding Officer has personal grudge against Contemnor 5 since he was making several complaints under a wrong impression that Contemnor 5 provoked advocates for strike/demonstration against him at the instance of Sri Vinod Kumar Yadav, the then District Judge. The fact is that in three cases, narrated by Informant - Presiding Officer, neither Contemnor 5 was counsel nor had filed any transfer application. Informant - Presiding Officer has not named Contemnor 5 in the message sent to Administrative Judge on mobile and inclusion of his name is an after thought for some other reasons. None of the witnesses mentioned name of Contemnor 5 or his presence in the Court. S.O. (Vig.) himself has found Informant - Presiding Officer guilty of lying in chambers for 7-8 hours and misbehaving with his own staff. S.O. (Vig.) has used the word "patient of psychiatry" for Informant - Presiding Officer. No attempt has been made by S.O. (Vig.) to identify the advocates, allegedly involved in the incident.

25. After framing of charge, Contemnors have filed their replies and we may refer the same in brief as under :

26. **Contemnor 1:** Denying the charge, he has said that in case he is found guilty, he is offering his unconditional apology. However, it is said that S.O. (Vig.), who has relied on statements of (1) EW - 15 - Sri Raj Kumar Sengar (PAC); (2) EW - 16 - Sri Member Singh (PAC); (3) EW - 17 - Sri Ramesh Chandra Bhadauriya - Reader of the Court; (4) EW - 18 - Ram Jiyawan Shukla- Ardaly of the Court; (5) EW - 26 - Sri Neeraj Mishra - Office Peon of the Court; (6) EW - 31 - Sri Arvind Kumar Tiwari - Senior Prosecuting Officer; (7) EW - 32 - Sri Girja Shanker Dwivedi - An Advocate of long standing at Orai Courts; (8) EW - 34 - Sri Kamal Kant Kushwaha - Advocate at Orai Courts; (9) EW - 36 - CP Abeer Singh- Court Moharir of IIIrd A.D.J.; and (10) EW - 47 - Sri Sanjeev Kumar Gurjar - Assistant Government Counsel (ADGC); and if all these statements are taken together, the real picture of occurrence is not clear and free from doubt. There is a witness EW - 23 - Umesh Chandra Dixit, Court Stenographer, whose statement is otherwise. EW - 36 - CP Abir Singh, stated that Informant - Presiding Officer threatened him to depose against Contemnors. EW - 47 - Sanjeev Kumar Gurjar, ADGC, has also deposed against Informant - Presiding Officer. Video recording is nothing but a silent recording and is a manipulated act of Informant - Presiding Officer. The purpose is to remove remarks or abuses or vulgar and unparliamentary statements of Informant - Presiding Officer. The facility of video recording on laptop was not available to subordinate judiciary and the very fact that video recording has been made, shows conduct of Informant - Presiding Officer. Video recording only shows that Police Personnel were trying to obstruct entries of lawyers. **Even if lawyers were trying to enter Court room, it cannot be said that purpose of lawyers was to interfere in administration of justice.** Advocates are free to move in Court and their entry could not have been obstructed. The presence of Contemnor 1 has not been proved by any independent evidence. Work and conduct of Informant

- Presiding Officer itself was objectionable and even if he was not a corrupt officer, he had no licence to misbehave with others. The comments and findings recorded by S.O. (Vig.) against Presiding Officer fortify this inference.

27. **Contemnor 5** in his separate affidavit has stated that in the statements given by various witnesses, who are employees of the Court, Police Personnel or Government Advocates i.e. EW-15, 16, 17, 20, 23, 24, 26, 31, 36 and 42, his presence has not been found at the time of incident. Contemnor 5 has been falsely implicated by Informant - Presiding Officer.

28**. Contemnor 6** is 68 years of age and has a practice in law for the last 40 years. Against Informant-Presiding Officer, two complaints were made thereupon District Judge made inquiry and submitted report but no action has been taken by Court, which encouraged Informant-Presiding Officer to behave arrogantly and use derogatory words to the advocates and others. In Special Trial No.73 of 2005 (State Vs. Navi Bux) under Section 135 Electricity Act, P.S. Kotwali Orai, Contemnor 6 was appearing as counsel for accused and vide judgment dated 22.04.2014, Court convicted accused and sentenced for two years rigorous imprisonment and fine of Rs.75,000/-. The judgment was delivered at 3:30 P.M. Contemnor 6 prepared applications for providing certified copy of judgment, and to stay fine and enlarge accused on bail. The applications were not received in the Court and instead Informant-Presiding Officer retired to his Chamber. Ultimately, accused was released on bail by High Court in Criminal Appeal. Contemnor 6 personally met District Judge and made complaint against conduct and behaviour of Informant-Presiding Officer. He also moved an application before President, Bar Association on 22.4.2014 whereupon resolution to boycott judicial work of Court of Informant - Presiding Officer was passed from 24.4.2014 to 30.04.2014. For this reason, Informant - Presiding Officer got annoyed with Contemnor 6 and included his name in the present criminal contempt matter. On 20.11.2014, when the incident took place, Contemnor 6 was in the Court of Chief Judicial Magistrate in Case No.2052 of 2013, Roop Singh Vs. Rakesh & Ors., under Sections 147, 148, 323, 307, 504, 506 IPC, P.S. Kalpi, District Jalaun. Contemnor 6 is not shown in the video footage and none has named him except Informant-Presiding Officer. Contemnor 6 is in legal practice for the last 40 years and all employees are well known by him by his name and fact. If Contemnor 6 would have been present in the Court, then the employees of Court would have immediately identify him and told his name.

29. **Contemnor 9** in his separate affidavit/reply has stated that neither in any report of S.O. (Vig.) nor in video recording there is anything to implicate him and there is nothing to show his presence in the Court. Further video recording is not admissible in evidence as there is no voice hence it is a tempered evidence. When the incident occurred, Contemnor 9 was in the Court of Chief Judicial Magistrate and was coming from that Court. Then again some allegations are made against Informant - Presiding Officer.

30. **Contemnors 2, 3, 4, 7, 8, and 10**, have filed their replies, though separately, but taken stand similar to the reply given by Contemnor 1 hence we are not repeating the same.

31. When the matter was taken up for arguments, learned Senior Advocate appearing for Contemnors, except Contemnor 5, stated that defence taken by Contemnors in their affidavit may be perused by the Court. No argument with regard to legal or preliminary objection has been advanced and instead it is said that entire material on record show that even if some incident has taken place on the fateful day, advocates are not solely responsible for the same but there was ample contribution on the part of Informant - Presiding Officer. It is in these facts and circumstances, Court may examine the matter and take a decision so as to do justice throughout.

32. Learned Senior Advocate fairly stated that being an officer of Court, it is the bounden duty of all advocates to ensure that majesty and authority of Court is maintained by all concerned. Whatever may be the reason, no one has any justification to create a scene in Court, disturb court proceedings, raise slogans and address Court in an abusive manner and all these things are unpardonable. Since these activities are found to lower down authority of Court in the eyes of general public, it may have a serious impact on the very authority of institution. People have great faith and confidence in the institution of justice. Officers of the Court i.e. advocates, therefore, are duty bound to maintain absolute dignity, majesty and authority of the Court and behave in a proper disciplined manner. Even if there is some wanting conduct on the part of Informant - Presiding Officer at a particular point of time, the remedy lies elsewhere but not by creating a scene in Court i.e. by destroying the items kept in Court or by showing disrespect to the Chair. When a contemptuous conduct is shown in Court, it is not to show disrespect or to lower down authority of an individual but the institution and the Court itself, therefore, anybody, if has adopted ways and means having effect of lowering down authority of Court, is open to face appropriate action under the Provisions of Act, 1971. Having said so, learned Senior Advocate, however, submitted that all Contemnors implicated in this matter are not guilty of allegations levelled against them, and, in any case, there is no sufficient evidence to show that all ten Contemnors were present at the time of incident and did whatever they are charged for.

33. It is pointed out that Contemnors 1, 3 and 4 are visible in video recording and have also been named by Informant - Presiding Officer. Contemnors 5 and 6 are not visible in video recording but named by Informant - Presiding Officer. Contemnors 2, 7, 8, 9 and 10 are neither visible in video recording nor named by Informant - Presiding Officer.

34. On the request of Court, Contemnors have also identified other advocates visible in video recording, who are not named by Informant - Presiding Officer and, therefore, proceedings have not been initiated against them, and, they are; Navneet Sagar Pathak, Shanker Lal Tarsolia, Ram Lakhan Singh Chauhan and Upendra Pratap Singh.

35. With regard to authenticity of video recording, learned Senior Advocate has submitted that; length of recording is 31.12 minutes with gap of 7 - 8 minutes. It is in three parts i.e. (i) prior to entry of Advocates; (ii) on and after entry of Advocates; and (iii) after alleged incident showing peaceful functioning of Court. First part shows broken window glass panes lying on the floor. video recording is personal property of Informant - Presiding Officer, prepared by himself, on his laptop fitted with camera; It is soundless/silent video does not show either Informant - Presiding Officer or

alleged manhandling, assault etc.; The other persons visible in video recording, also identified by Contemnors, are, Sanjeev Gurjar, Advocate, Additional District Government Counsel, A.K.Tewari, Senior Prosecuting Officer, five male and one female police personal, few clients and accused persons, peon of the Court. In the third part of video recording i.e. after the incident, it also shows presence of one Sub-Inspector, Gunner of District Judge and few Policemen with Dandas.

36. Sri Sudhir Mehrotra, learned Advocate, appointed by court for assistance, contended that incident of forcible entry in the Court room, slogans shouting, abuse and manhandling is proved and presence of most of the Contemnors, in particular all Contemnors except Contemnors 5 and 6 is also well evidenced from record. Looking to the nature of conduct shown by Contemnors in Court not only charge of criminal contempt is well proved but they do not deserve any sympathetic consideration and instead most severe punishment deserve to be awarded so that in future no one else may dare to show such conduct.

37. The facts narrated above and record at least show undoubtedly that a group of advocates led by Contemnor 1 created a scene in the Court of Informant - Presiding Officer on 20.11.2014 in which some property of Court was damaged, Presiding Officer was manhandled and some advocates also sustained injuries. Informant - Presiding Officer though has named, before S.O. (Vig.), Contemnor 1 to 6 but in video recording made available to the S.O. (Vig.) and viewed by us also, presence of Contemnors 1, 3 and 4 is clearly visible and established. Besides, report shows that Contemnors 7, 8, 9 and 10 sustained injuries in the incident, which took place on 20.11.2014. In reply to the charge, all these Contemnors have filed their separate affidavits but we find not even a single averment or assertion that these Contemnors did not sustain injury at all and if they sustained injuries, how and in what manner, and kind of injuries they sustained, is also not explained.

38. One Constable Abir Singh, Court Moharir, had also sustained injuries when he tried to save Informant - Presiding Officer.

39. Though a technically objection has been raised that video recording is not admissible in evidence or that it was a private property but suffice it to mention that criminal contempt proceeding initiated by Court are not to be proceeded like a criminal trial where provisions of Code of Criminal Procedure and Evidence Act are applicable. These statutes are not applicable in contempt proceedings. The basic purpose of entire procedure is to find out whether Contemnors have shown any such conduct, which amounts to 'criminal contempt' of Court and for that purpose manner in which evidence has been collected is not relevant but it is the substance and creditworthiness of evidence which can be and has to be seen.

40. Damage of CPU, pen holder and window panes is well established. Nobody has either denied above damage nor has attempted to explain the same.

41. Contemnor 1 and some other advocates had some complaint against Informant-Presiding Officer. They repeatedly participated in resolutions of Bar Association for boycotting/abstaining Court of Informant-Presiding Officer. This is well admitted. Contemnor 1 has specifically pleaded that Informant-Presiding Officer, even if honest, that does not give him any licence to misbehave. Meaning thereby, integrity of Informant-Presiding Officer has not been doubted even by Contemnor 1, who has led entire episode to

fight with Informant-Presiding Officer, with other colleagues and have shown no misery in using all contemptuous words against Informant-Presiding Officer.

42. The defence, put up by Contemnors, is quite natural since it is not expected that they would accept guilt silently and without any protest. But factum that integrity of Informant-Presiding Officer has not been doubted even by Contemnor 1 and also evidence collected by S.O. (Vig.) showing that some advocates including officer bearers of Bar Association wanted favourable orders or favourable treatment in Court of Informant-Presiding Officer and having failed in their attempt, all these activities was done, show that there was an intentional and deliberate attempt either to knee down Informant-Presiding Officer or to get him removed by way of his transfer elsewhere. This is a conduct, whether shown by all Contemnors or some of them, but, seriously objectionable as it, ex facie, constitute 'criminal contempt' of Court. It satisfies all ingredients of definition of 'criminal contempt' as defined under Section 2(c) of Act, 1971.

43. This is also unfortunate that Contemnors and their colleagues got encouraged in going to this extent due to, either lack of appropriate administrative steps taken by District Judge or due to his silent support and encouragement. The reasons given by Informant-Presiding Officer with regard to apathy on the part of the then District Judge has not been found without any basis by S.O. (Vig.). However, in the present contempt, we are confined ourselves only to the question of 'criminal contempt' by Contemnors and not to other aspect of the matter.

44. Before proceeding further, we may consider some legal issues in the matter. One of the contention is that incident, if has actually taken place, amounts to an offence and, therefore, contempt proceedings would not lie.

45. Similar issue was considered in **State of M.P. Vs. Revashankar, AIR 1959 SC 102** in which Court said that an aspersion cast upon Court or Presiding Officer, sitting in a Court, is much more than a mere insult to learned Presiding Officer. In effect, it amounts to scandalize the Court in a way so as to distrust in popular mind and impair confidence of people in Courts. Therefore, irrespective of the fact that loss or damage of Court property may satisfy requirement of offence under some provisions of IPC, the act of Contemnor, which scandalize or tends to scandalize or lowers or tends to lower authority of the Court is a 'criminal contempt' and has to be dealt with in accordance with provisions of Act, 1971.

46. In **Re: Arundhati Roy, AIR 2002 SC 1375**, Court held that offence under IPC is different than Contempt of Court. The law of defamation under Penal Code cannot be equated with law of contempt of Court in general terms. Relying on Privy Council decision in **Surender Nath Vs. Chief Justice and Judges of the High Court, 10 Calcutta 109**, it was held that "*although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character*".

47. What is made punishable under various provisions of IPC offence of damage of a public property, obstruction in function of a public servant etc. but is foreign for proceeding for contempt of Court. If an act satisfy definition of 'criminal contempt', as defined under Section 2(c) of Act, 1971, proceedings for such act can be taken only under Act, 1971 quite apart from the fact that other remedy may also be open to aggrieved officer under various provisions of IPC.

48. It has also been argued that incident was aggravated by Informant-Presiding Officer, who got down from dias and indulged in shuffling with Advocates. In this regard we have been taken through report of S.O.(Vig.). The submission is attractive but we failed to understand how one can expect a person, who is facing a charged atmosphere, having several advocates before him abusing, shouting, throwing pen-holders, CPU in Court room, damaging glass panes and attempting to hold him, will silently suffer entire incident and shall not show even a minimum possible resistance, which a normal human being could have done in such atmosphere. This may be seen by some as counter attack. We have to look into it visualising that situation and a normal behaviour expected from a person of ordinary prudence facing such a situation. The advocates' attitude, who forcibly entered Court room was clearly hostile and threatening. Their anger is writ large from the fact that some Court and members of Bar, besides Police Constable, also who tried to defend Informant-Presiding Officer, sustained injuries. If, in such an atmosphere, Informant-Presiding Officer also hit one or two advocates an attempt to protect himself, it is difficult to hold that it is a case of attempt of manhandling by Informant-Presiding Officer and not an attempt on his part of possible self-defence. We find no reason to take this act on the part of Informant-Presiding Officer, even if correct, to mitigate in any way the act of "criminal contempt" of Contemnors, which is a multifarious and multifaceted act of lowering down authority of Court and to scandalize it.

49. The next objection is with regard to video recording. Though it has been pleaded that video recording may possibly be tempered etc., but no such Expert's opinion has been brought on record though copy of video recording was also made available to all Contemnors. The only objection raised is that recording, made available, has no sound. However, whatever is visible itself is sufficient to give an idea about the incident, which had taken place in Court. It is fortified with other material on record. It cannot be said that what is being depicted in video recording is incorrect or show inconsistency so as to suffice to disbelieve the very incident.

50. Though we have already held that in contempt proceedings, provisions of IPC and Evidence Act, as such, are not applicable but even if applicable, we find that scientific and electronic evidence is admissible in the light of Section 65B of the Evidence Act.

51. The incident of forcible entry into Court room, disturbance in Court room, damage to Court property, abuse, assault and manhandling of Informant-Presiding Officer, from the discussions made above, is well established. The presence and participation of Contemnors 1, 3, 4, 7, 8, 9 and 10 is also established. It is really a disturbing case where Officers of Court had created such an abhorrent scene in Court for some petty personal gains or otherwise.

52. We are of the view that above act and conduct constitute "Criminal Contempt", as stated, and charge stands well established against Contemnors 1, 3, 4, and 7 to 10. We hold them guilty of criminal contempt.

53. We may notice at this stage that Jalaun at Orai is not a very old District Judgeship. Number of Judicial Officers is much less comparing to number of advocates practicing thereat, which is about 600 to 700. Judicial Officers are regularly transferred, therefore, their tenure at a station is short but Class III and IV staff, normally remain posted in same district, are always in constant touch with members of Bar and for

various reasons, different relations develop among them. We find that whenever such an incident has taken place, advocates in general get united and evidence against their conduct becomes a difficult task for the reason that neither advocates nor even lower staff is readily available or dare to give evidence in respect of incident, if had taken place in the Court.

54. Jalaun is a place where number of criminal cases are very high in comparison to civil litigation. Judicial Officers work under great stress from day one, when they deal with applications filed under Section 156(3) Cr.P.C. or consider bail applications, what to talk of substantive trial. Whenever an Officer, who is tough in the sense that he is known for his hard decisions in criminal matters, advocates find him mostly inconvenient and relentless efforts are made to get such an officer transferred at the earliest or to get subdued.

55. Looking to the crime control machinery and its attitude in the State of Uttar Pradesh, we have no hesitation in observing that our Judicial Officers in Subordinate Courts, who want to discharge their duties with great devotion and integrity, find a very difficult task to deal with situation like the one, we are confronted with. That is one of the major reason that we find a large number of cases of criminal contempt across the State. The Bench presided over by one of us (Sudhir Agarwal,J) has dealt with more than fifty such a cases decided finally in the last one and half year.

56. It is the constitutional obligation of High Court to protect and save honour, dignity and authority, not only of subordinate Court but Judicial Officers also, manning the same. It is also our duty to ensure fearless atmosphere in which they may function without any cause of apprehension. Foundation of judicial system is based on independence of those, who man it. This can be ensured by providing a safe, well protected and well guarded working atmosphere to Judicial Officers working in subordinate Courts so as to ensure work with desired devotion and integrity. No one, whether a litigant or an advocate or any one else can be allowed to lead a demonstration so as to tarnish and destroy system of administration of justice by vilification of a Judge.

57. It is said that Judges need no protection. They are well capable of taking care themselves but when question of assault, manhandling arises, where an individual gets out-classed by large group of persons engaged in such activities, it is not judicial capability of such individual but on the spot capability of those who had indulged in such an activities, which has to be taken care, else it will be difficult for us to ensure a fair, unbiased and independent functioning of a Court of law. We have to take care of such a situation.

58. In this case we are really shocked and disturbed to see that officer responsible for appropriate action i.e. District Judge himself failed in tackling the situation.

59. In **Jennison Vs. Baker 1972 (1) All ER 997 (CA)**, it was observed, "... *The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope*".

60. Contemnors though have made statement of apology also in their affidavits, but, it is not only conditional but an attempt to avoid any sentence, in case case they are held guilty. It does not appear to be a bona fide repentance on their part showing an attitude of feeling guilty and forwarding an assurance that they are, by heart, intends to purge, assuring not to repeat the same in future. It is not a technical regret /apology,

which a contemnor is expected to offer to Court. It is not a weapon of defence to purge guilty of the wrong, one has committed. It is not intended to operate as an universal panacea, but it is intended to be evidence of real contriteness.

61. In **Mulk Raj Vs. State of Punjab 1972(3) SCC 839**, Court held that apology is an act of contrition. Unless an apology is offered at the earliest opportunity and in good grace, apology is shorn of penitence. If apology is offered at a time when Contemnor finds that the Court is going to impose punishment, it ceases to be an apology and it becomes an act of cringing coward.

62. In the present case, on one hand, Contemnors appears to have tendered apology but simultaneously have made serious aspersions against Informant-Presiding Officer and Court, and, have pleaded all defence for their deeds. The apology, therefore, being shallow, artificial and lacking bona fide, cannot be accepted.

63. Now, coming to the question of sentence and punishment, we find that role of individual Contemnors is not to be seen for the reason that in collusion with common intention, they have caused incident by forcibly entering Court room, disturbing Court proceedings, damaging Court property, abusing and assaulting Judicial Officer. Since all the Contemnors have participated with a common intention, factum that any individual has actually abused or assaulted Informant-Presiding Officer or not, is not material, but every Contemnor is equally responsible and guilty of committing criminal contempt of Court and responsibility of all Contemnors is equal.

64. Looking to the entire facts and circumstances, we award punishment of six months simple imprisonment upon Contemnors 1, 3, 4, 7, 8 9 and 10 and fine of Rs.2,000/- (Rupees Two Thousand only).

65. In order to ensure smooth functioning of Court, we also direct that Contemnors 1, 3, 4, 7, 8, 9 and 10 shall not enter Court premises of Jalaun at Orai for a period of one year, which shall commence from 23rd September, 2016. Further, conduct and attitude of Contemnors after expiry of aforesaid period, if they start practice of Law in Judgeship Jalaun at Orai, shall under constant watch of District Judge, Jalaun at Orai for a period of three years and if he finds any untoward activity on the part of Contemnors, he shall report to this Court forthwith.

66. So far as Contemnors 2, 5 and 6 are concerned, they are held not guilty and contempt proceedings initiated against them are dropped and they are discharged.

67. Accordingly, Contempt Application is partly allowed in the aforesaid manner.

(2016) 9 ILRA 338
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 211 Of 2007

M/S Izhar International **...Appellant**

Versus

Asst. Commissioner Of Income Tax, Cc-Ii, Varanasi **...Respondent**

Counsel for the Appellant:
S.D. Singh, Manu Ghildyal

Counsel for the Respondent:
B.J. Agrawal

Income Tax Act, 1961 — S. 80HHC — Deduction in respect of export profits — Unrealised export proceeds — Exclusion from total turnover — Assessee, a 100% export oriented unit engaged in export of handmade carpets, claimed exclusion of unrealised export payments from total turnover for purpose of computation under S. 80HHC — Assessing Officer excluded unrealised export proceeds from export turnover but included same in total turnover, thereby reducing deduction admissible under S. 80HHC — Held, where export sale proceeds were not received in or brought into India in convertible foreign exchange, same could not form part of total turnover for purposes of S. 80HHC. (Paras 7 & 8)

Income Tax — Export turnover and total turnover — Principle of parity — Amount excluded from export turnover on account of non-realisation of export proceeds cannot simultaneously be retained in total turnover — Such interpretation would distort formula prescribed under S. 80HHC and defeat legislative intent of granting deduction on actual export profits realised in India. (Paras 7 & 8)

Income Tax Act, 1961 — S. 80HHC — Meaning of "export turnover" — "Export turnover" under Explanation to S. 80HHC contemplates sale proceeds received in or brought into India in convertible foreign exchange within prescribed period — Unrealised export proceeds not satisfying statutory requirement cannot be included in computation of eligible export profits. (Paras 6 to 8)

Income Tax — Export incentive provisions — Liberal construction — Provision granting deduction to exporters intended to encourage inflow of foreign exchange and export trade — Computation formula under S. 80HHC to be interpreted harmoniously so as to avoid artificial reduction of deduction otherwise available to exporter. (Paras 6 to 8)

Income Tax Appeal under S. 260-A — Substantial question of law — Question whether unrealised export payments could be included in total turnover while excluded from export turnover answered in favour of assessee and against Revenue. (Para 9)

In Result: Appeal allowed; order of Tribunal set aside; Assessing Authority directed to recompute deduction under S. 80HHC excluding unrealised export payments from total turnover. (Para 10)

Cases cited:
Mysodet P. Ltd. Vs. Commissioner of Income Tax(2008) 305 ITR 276 (SC)

Commissioner of Income Tax Vs. Sudarshan Chemicals Industries and other connected matter(2000) 245 ITR 769 (Bom)
Commissioner of Income Tax Vs. Abad Fisheries(2002) 258 ITR 641 (Ker.)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This appeal under Section 260A of Income Tax Act, 1961 has arisen from the judgment and order dated 23.8.2006 passed by Income Tax Appellate Tribunal, Allahabad Bench, Allahabad (hereinafter referred to as the "Tribunal") in Income Tax Appeal No.62(Alld) of 2005 (Assessment Year 2001-02).

2. The appeal was admitted on following substantial question of law:

(i) Whether, unrealised export payment could be included in the Total Turnover for the purpose of Section 80HHC and simultaneously excluded from the Total Export Turnover ?

3. Assessing Authority did not exclude unrealized export payment from the total turnover as well as for the purpose of Section 80HHC of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") the benefit under Section 80HHC was reduced. The assessing Authority included the unrealised export payments and that is how the gross profit rate of Rs.18.1 declared by the appellant was rejected and finalised the assessment on 6.9.2002. Against the order dated 6.9.2002, appellant preferred appeal before Commissioner of Income Tax (Appeals) [(hereinafter referred to as "CIT(Appeals)")], which was allowed on 18.11.2004 relying on decision in **Commissioner of Income Tax Vs. Abad Fisheries, (2002) 258 ITR 641 (Ker.).** Against order of CIT(Appeals) dated 18.11.2004, respondent preferred appeal before Tribunal and the appeal was allowed vide order dated 23.8.2006 and remanded the matter to the Assessing Authority in respect of gross profit rate holding that unrealised payments could not be excluded from the total turnover over.

4. It is submitted by learned counsel for appellant that appellant is 100% Export Oriented Unit in previous year relevant to Assessment Year 2001-02. He had exported all its manufactured goods namely, handmade carpets, out side the country and total export bills were raised to a sum of Rs.15,33,43,333/-. Unfortunately, the foreign buyers did not remit payment of Rs.11,10,377/-. The said amount was requested to be excluded as unrealized export payment from the total turnover, for the purposes of Section 80HHC of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961"). Assessing Authority excluded unrealized export payment also, whereby ratio of export turnover to that of total turnover became less. It is next contended that Assessing Officer did not accept gross profit rate of 18.1% declared by appellant and instead, applied gross profit rate of 18.5%. The assessment was thus finalized on 6.9.2002.

5. Counsel for appellant contended that the issue involved in this appeal is squarely covered by decisions in **Mysodet P. Ltd. Vs. Commissioner of Income Tax, (2008) 305 ITR 276 (SC),**

Commissioner of Income Tax Vs. Sudarshan Chemicals Industries and other connected matter, (2000) 245 ITR 769 (Bom) and Commissioner of Income Tax Vs. Abad Fisheries, (2002) 258 ITR 641 (Ker) and submitted that when the amount of export payment is not realised, same cannot be excluded within export turnover as there is no logic of showing it as part of total turnover when the books of accounts were produced before authority concerned.

6. Now before examining the impugned order passed by the Assessing Authority and the Tribunal it will be appropriate to have birds eye view of relevant authorities on the subject and statutory exposition of law on this aspect. Section 80HHC is the provision which will have to be examined and it reads as under :

"Section 80 HHC : Deduction in respect of profits retained for export business.

(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise :

***Provided** that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be,) issues a certificate referred to in clause (b) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.*

(1B) For the purposes of sub-sections (1) and (1A), the extent of deduction of the profits shall be an amount equal to—

(i) eighty per cent thereof for an assessment year beginning on the 1st day of April, 2001;

[(ii) seventy per cent thereof for an assessment year beginning on the 1st day of April, 2002;

(iii) fifty per cent thereof for an assessment year beginning on the 1st day of April, 2003;

(iv) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2004,

and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.

(2)(a) This section applies to all goods or merchandise, other than those specified in clause (b), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee (other than the supporting manufacturer)] in convertible foreign exchange , within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation.--For the purposes of this clause, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.]

(b) This section does not apply to the following goods or merchandise, namely :--

(i) mineral oil ; and

(ii) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule).

Explanation 1.--The sale proceeds referred to in clause (a) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

Explanation 2.--For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to a branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 5087 of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.

(3) For the purposes of sub-section (1),--

(a) where the export out of India is of goods or merchandise manufactured or processed] by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(c) where the export out of India is of goods or merchandise manufactured or processed] by the assessee and of trading goods, the profits derived from such export shall,--

(i) in respect of the goods or merchandise manufactured or processed] by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods :

Provided *that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :*

Provided further *that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :*

Provided also *that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,--*

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme :

Provided also *that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,--*

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.--For the purposes of this clause, "rate of credit allowable" means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :]

Provided also *that in case the computation under clause (a) or clause (b) or clause (c) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of—*

(a) any sum referred to in clause (iiia) or clause (iiib) or clause (iiic), as the case may be, or

(b) any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be,

the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.]

Explanation.--For the purposes of this sub-section,--

(a) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods ;

(b) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3) ;

(c) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods ;

(d) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods ;

(e) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover ;

(f) "trading goods" means goods which are not manufactured or processed by the assessee.]

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,--

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business [***] ;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business [***] the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee.]

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section:

***Provided** that in the case of an undertaking referred to in sub-section (4C), the assessee shall also furnish along with the return of income, a certificate from the undertaking in the special economic zone containing such particulars as may be prescribed, duly certified by the auditor auditing the accounts of the undertaking in the special economic zone under the provisions of this Act or under any other law for the time being in force.]*

(4A) The deduction under sub-section (1A) shall not be admissible unless the supporting manufacturer furnishes in the prescribed form along with his return of income,–

(a) the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed on the basis of the [profits] of the supporting manufacturer in respect of his sale of goods or merchandise to the Export House or Trading House; and

(b) a certificate from the Export House or Trading House containing such particulars as may be prescribed and verified in the manner prescribed7 that in respect of the export turnover mentioned in the certificate, the Export House or Trading House has not claimed the deduction under this section :

Provided *that the certificate specified in clause (b) shall be duly certified by the auditor auditing the accounts of the Export House or Trading House under the provisions of this Act or under any other law.]*

(4B) For the purposes of computing the total income under sub-section (1) or sub-section (1A), any income not charged to tax under this Act shall be excluded.]

(4C) The provisions of this section shall apply to an assessee,--

(a) for an assessment year beginning after the 31st day of March, 2004 and ending before the 1st day of April, 2005;

(b) who owns any undertaking which manufactures or produces goods or merchandise anywhere in India (outside any special economic zone) and sells the same to any undertaking situated in a special economic zone which is eligible for deduction under section 10A and such sale shall be deemed to be export out of India for the purposes of this section.]

Explanation.--For the purposes of this section,--

(a) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder ;

(aa) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962) ;]

(b) "export turnover" means the sale proceeds, received in, or brought into, India by the assessee in convertible foreign exchange in accordance with clause (a) of sub-section (2)] of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962) ;

(ba) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962) :

Provided *that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (iiia), (iiib) , (iiic), (iiid) and (iiie)] of section 28;*

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by—

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie)] of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India ;]

(bb) [***]

(c) "Export House Certificate" or "Trading House Certificate" means a valid Export House Certificate or Trading House Certificate, as the case may be, issued by the Chief Controller of Imports and Exports, Government of India ;

(d) "supporting manufacturer" means a person being an Indian company or a person (other than a company) resident in India, manufacturing (including processing) goods or merchandise and selling such goods or merchandise to an Export House or a Trading House for the purposes of export;

(e) "special economic zone" shall have the meaning assigned to it in clause (viii) of the Explanation 2 to section 10A.

7. Provisions of Section 80HHC which has been interpreted by various Courts will go to show that the amount which was not brought in India could not be included in computation of profits and, therefore, it cannot be included in the total turnover for the purposes of Section 80HHC of Act.

8. The decision of **Commissioner of Income Tax Vs. Abad Fisheries (supra)** on which Commissioner has relied, would also be applicable in the facts of this case, amount was not brought within India and, therefore, they could not be included in total turnover for the purpose of Section 80HHC as they were unrealised export payment. The decisions in the case of **Mysodet P. Ltd. Vs. Commissioner of Income Tax (supra)** will apply to the facts of this case as for the relevant period the formula allowed the deduction was "profits derived from the export of goods or merchandise out of India". In this case also the profits did not come back to India, therefore, the appellant is entitled to the benefit under Section 80HHC.

9. The question, therefore, is answered in favour of Assessee and against Revenue.

10. The appeal is allowed. Impugned judgment of Tribunal is hereby set aside and Assessing Authority is directed to recompute the matter in the light of law as discussed above.

(2016) 9 ILRA 347
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

First Appeal No.- 309 Of 2015

Swami Vasudevanand Saraswati Disciple Of S. H. N. Saraswati ...Appellant
Versus
Jagat Guru Shankarcharya Jyotishpeeth P. S. S. N. Saraswati ...Respondent

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Counsel for the Respondent:
S.P.S. Parmar, A.B. Singhal, Anoop Trivedi, B.P. Singh, Harsh Bardhan Chaubey, Ramanand Pandey, Shashi Nandan, Shruti Agarwal, Swati Agarwal, Udayan Nandan, Vijay Gautam, Vivek Kr. Singh, W.H. Khan

Religious and Charitable Endowments — Jyotish Peeth — Appointment of Shankaracharya — Qualification of Sanyasi — Dispute related to claim over office of Shankaracharya of Jyotish Peeth and status of appellant as Dandi Sanyasi — One of Judges differed from majority view only on issue whether appellant was validly a Sanyasi — Held, appellant having renounced worldly life, embraced Dasanami order since 1989 and received Diksha under Guru-Shishya Parampara possessed qualifications of Sanyasi and Dandi Sanyasi. (Paras 2 to 4)

Religious Institutions — Guru-Shishya Parampara — Validity and continuity — Court recognised continuous lineage from Swami Brahmanand Saraswati to Swami Santanand Saraswati, thereafter to Swami Vishnudevanand Saraswati and then to appellant — Installation under established Guru-Shishya Parampara held relevant circumstance supporting appellant's religious status and claim. (Para 2)

Religious Law — Appointment of Shankaracharya — Nature of governing documents — Documents relied upon regarding appointment and qualifications of Shankaracharya held recommendatory in nature and not exhaustive procedural code — Verses/slokas merely prescribe qualities required for appointment and principle that only one Shankaracharya can preside over one Peeth. (Para 3)

Religious Office — Vacancy on Gaddi — Effect of earlier litigation — Since Swami Santanand Saraswati continued as reigning Shankaracharya pursuant to earlier litigation up to Supreme Court, plaintiff's claim of installation during subsistence of such incumbency held doubtful as no vacancy existed on the Gaddi at relevant time. (Para 2)

Appellate Jurisdiction — Concurring judgment with limited dissent — Concurring Judge agreed with operative directions and conclusions of brother Judge on all issues except findings on Issues Nos. 6 and 12 relating to status of appellant as Sanyasi — As operative directions substantially concurred, matter held not requiring reference to third Judge. (Paras 5 to 7)

In Result: Appeal partly allowed; concurring Judge upheld operative directions issued by brother Judge while differing only on finding relating to appellant's status as Dandi Sanyasi. (Para 7)

Cases cited:
1. Aarushi Dhasmanu Vs. Union of India(2013) 9 SCC 475

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Shamsher Bahadur Singh, J.)

1. Appellant filed Civil Misc. Application No.143408 of 2016, under Section 21 of Bengal, Agra and Assam Civil Courts Act, 1887 *(hereinafter referred to as "Act, 1887)*, with a prayer that record of First Appeal, under consideration, be transmitted to the Court of District Judge, Allahabad, in view of amendment in Section 21 of Act,1887 by U.P. Act No.14 of 2015 as well as notification issued by Chief Justice, dated 9.2.2016, under Section 21 (1) (b) of Act, 1887.

2. This application was assigned to the Bench presided by one of us (Hon' Sudhir Agarwal, J) by Chief Justice vide order dated 3.5.2016.

3. When matter came-up on 10th May, 2016, learned counsel for plaintiff-respondent informed that they have also filed Civil Misc. Application No.69142 of 2016, under Section 24 of Code of Civil Procedure *(hereinafter referred to as "C.P.C.")* read with Chapter XXII, Rule 1 of Allahabad High Court Rules, 1952 *(hereinafter referred to as "Rules, 1952")* for transfer of this appeal to this Court since substantial hearing has already taken place and matter having been expedited by Hon'ble Supreme Court, it be appropriate to be heard and decided by this Court. This Transfer Application was cognizable by Single Judge, hence, Division Bench again on 10.5.2016 directed the matter to be placed before Chief Justice so that both applications may be heard by same Bench.

4. Acting Chief Justice passed order dated 17.5.2016 directing that both these matters as well as other connected/incidental matters be placed before a Bench presided by one of us (Hon' Sudhir Agarwal, J) and that is how both these applications have come-up before us.

5. Sri Manish Goyal, Advocate appearing for appellant-applicant vehemently contended that valuation of appeal is less than 25 lacs and by operation of law, appeal stands transferred to Court of District Judge, hence, neither this Court has any jurisdiction nor Transfer Application is admissible nor even otherwise jurisdiction can be retained by this Court to decide this appeal as that would deny a right of second appeal to appellant.

6. On the contrary, Sri Shashi Nandan, Senior Advocate appearing on behalf of plaintiff-respondent contended that here is a case where early hearing of appeal was consented by both parties on the very first day when appeal was entertained and admitted on 26.5.2016. Since, thereafter, appeal was heard on merit substantially and for quite a long time but on account of dilatory tactics adopted by appellant, hearing could not complete despite the fact that at the instance of appellant itself, Supreme Court has also directed that this appeal should be decided by this Court,

expeditiously and it was required to be decided preferably by December, 2015 but since then even more than half of 2016 has passed, but matter has not proceeded further.

7. Before considering legal submissions advanced by both sides and other relevant aspects on merits of these applications, we find it appropriate to place on record certain background facts of this appeal.

8. This is a regular First Appeal arising from judgement dated 5.5.2015 and decree dated 15.5.2015 passed by Civil Judge (Senior Division), Allahabad in Original Suit No.503 of 1989. It could be decided by Civil Court after almost 26 years and that too when orders were passed by Supreme Court for expeditious disposal of Suit.

9. Dispute relates to Office of Jagat Guru Shankaracharya at Jyotirmath Badrikashram.

10. When appeal came-up for admission before Division Bench on 26.5.2016, looking to nature of dispute and volume of record etc., Court found that instead of keeping matter pending and deciding only interim application, it would be in the interest of parties, if appeal itself is decided on merits, expeditiously and to this, both sides agreed. Appeal was fixed for 14.7.2015 for final hearing. The relevant part of order dated 26.5.2015, is reproduced below:

".....

4. Looking to the nature of dispute and also the earlier order passed by the Apex Court by which the matter was remanded to Trial Court for deciding the suit expeditiously, we are of the view that this is a matter which should be decided expeditiously.

5. Let the record of Court below be summoned through Special Messenger. Steps shall be taken by appellant within three days.

6. Parties thereafter shall take steps to get the paper-book prepared and the same shall be filed within five weeks.

7. Learned counsels for parties agreed that this matter should be decided expeditiously and they request to have this matter for final hearing at an early date.

8. List this appeal for final hearing on 14.07.2015."

11. Lower Court record was received on 3.6.2015, but parties could not file respective paper-books. Ultimately on 3.8.2015, respondent's counsel stated that his paper-books are ready and he may be permitted to file in Office while appellant's paper-books were not ready and he sought further time.

12. Hearing on appeal commenced on 5.8.2015. After addressing Court on six dates and that too on two issues no.16 and 20, counsel for appellant stated that since hearing of appeal will

take time, therefore, Court should pass order on interim injunction application. Thereupon, with a detailed order dated 20.8.2015, application for stay of execution of decree and ad interim injunction was rejected and appeal was directed to be listed on 9.9.2015 for further hearing. This order was taken in Special Leave to Appeal (C) No.25947 of 2015, but Supreme Court declined to interfere with said order. However accepting request made by Sri Harish N. Salve, Senior Advocate, appearing for appellant Swami Vasudevanand Saraswati, Court required this Court to continue hearing of appeal and decide the same on merits, expeditiously as possible, preferably by 31st December, 2015. The order dated 21.9.2015 passed in aforesaid Special Leave to Appeal (C) No.25947 of 2015, is reproduced as under:

"We have heard learned senior counsel appearing for the parties.

We do not find any reason to interfere with the order passed by the High Court.

It appears that the High Court itself take up the matter for final hearing and fixed date. The arguments have already begun.

Hence, as agreed by Mr. Harish N. Salve, learned senior counsel, we request the High Court to continue the hearing of the appeal and decide the same on merit as expeditiously as possible, preferably by 31st December, 2015.

With the above observation, the special leave petition is disposed of." (emphasis added)

13. Thereafter, appellant moved an amendment application, seeking addition of 97 grounds in memo of appeal. The said application was also allowed vide order dated 4.11.2015 whereupon memo of appeal was amended and number of grounds, which were earlier only 50, now rose to 147. Thereafter, hearing of appeal deferred on certain dates, since learned counsels for parties sought adjournment on account of their preoccupation and other reasons.

14. In the mean time, U.P. Legislature amended Act, 1887 by publishing U.P. Civil Laws (Amendment) Act, 2015 *(hereinafter referred to as 'Amendment Act, 2015")* which received assent of President on 19.11.2015 and published in U.P. Gazette extraordinary dated 7.12.2015.

15. In view of aforesaid amendment, appeals having valuation of less than 25 lacs, stood transferred to Court of District Judge. Therefore, this Court could not proceed on an objection raised by learned counsel for appellant and he has prayed that record be transmitted to District Judge, Allahabad.

16. Learned counsel for plaintiff-respondent, on the contrary, submitted that plaintiff-respondent is now 96 years of age; matter was substantially heard on several dates by Court, therefore, it is in the interest of justice that this appeal be heard by this Court instead of transmitting record to Court of District Judge, Allahabad. It was objected by appellant and it filed an application bearing no.143408 of 2016 with request to transmit record to Court of District Judge. Plaintiff-respondent, on the contrary, filed a Transfer Application, under Section 24 C.P.C. on 1.3.2016 and both these applications now have been heard by us.

17. Sri Manish Goyal, learned counsel for appellant contended that provision pertaining to pecuniary jurisdiction under Section 21 of Act, 1887, is mandatory and no discretion has been left to High Court to retain any matter but to transfer record of appeal where pecuniary jurisdiction has been vested in District Judge. When appeal was filed in this Court, it was within jurisdiction but with subsequent amendment, pecuniary jurisdiction of District Judge has been enhanced, hence pending appeal, by operation of law, would stand transferred to Court of District Judge. He relied on a Full Bench judgment of this Court in ***Kanyal Das and others vs. Har Prasad and others, AIR 1972 Alld 249***. He submitted that mere fact that paper-books have been filed by parties, record is bulky or other similar grounds are not sufficient, not to transfer record of this appeal to Court, competent to hear appeal, in the light of amendment under Section 21 of Act, 1887 and there is no valid reason to transfer appeal to this Court. He further submitted that in fact, record is yet to be transmitted, hence, application under Section 24 C.P.C. does not lie and in any case, Court has no authority to retain appeal ignoring the fact that pecuniary jurisdiction, due to amendment in legislation, is, now vested in Court of District Judge. He lastly submitted that in case, this Court retain appeal, appellant shall loose right of second appeal, which it may exercise, in case, record of this appeal is transmitted to District Judge and matter is decided against appellant. This is also a reason for not retaining this appeal and instead it should be transmitted to District Judge.

18. Sri Shashi Nandan, Senior Advocate, appearing for plaintiff-respondent, on the contrary, contended that transfer of record is automatic, once pecuniary jurisdiction has been enlarged under law. Vide Section 21 (1A) it is deemed transferred to Court of District Judge and, thereafter, if any case can be retained by higher court, it is only when an application for transfer is allowed and particular case is then transferred from lower Court to higher Court.

19. Relevant authority relied by respective parties, we shall discuss while discussing matter on merit.

20. To put the record straight, we may also mention that after amendment of Act, 1887 and notifications were issued by Hon'ble Chief Justice on 9.2.2016, this appeal was listed before us on 29.2.2016 when we passed order directing for transmission of record to District Judge having jurisdiction in the matter. Thereafter, on 1.3.2016, plaintiff-respondent filed application under Section 24 C.P.C. and, as noted above, this application as well as appellant's application requesting for transmission of record of District Judge, both have been assigned to this Bench for disposal on merit.

21. It is not in dispute, when appeal was filed, pecuniary jurisdiction lay in this Court. Therefore, appeal was maintainable in this Court. Had there been no amendment in Act, 1887 in respect of pecuniary jurisdiction, under Section 21, it is not disputed, in that case also, appellant would have no right of second appeal under Section 100 C.P.C. but against judgment of this Court, only remedy available would have been, to file appeal before Supreme Court.

22. Under Section 21 (1) (b) of Act, 1887 against judgment and decree of a Civil Judge, appeal was admissible before District Judge where valuation did not exceed Rs.1 lacs. By 'Amendment Act, 2015', Section 21 of Act, 1887 has been amended and Rs.1 lacs has been substituted by 5 lacs and 5 lacs has been substituted by 25 lacs.

23. Sub-section 1-A provides, where appeal was initially filed in High Court but during pendency, stand transferred to District Judge, it shall be decided by him or by any Judge subordinate to him to whom matter has been assigned by District Judge. There is a validation clause by way of Proviso declaring that any judgment and decree of this Court, passed in appeal after relevant date, shall be valid as if High Court has withdrawn appeal under Section 24 C.P.C.

24. A cumulative reading of Section 21 (1) and (1-A) and proviso, it is evident that once there is an amendment and enhancement of valuation with regard to appeal, matters pending in High Court shall stand transferred after such enhancement of valuation to District Judge, but in some matters, if cases are decided by High Court, judgment would not be nullity but it would be deemed that appeal stood transferred under Section 24 C.P.C. to this Court. Thus, High Court may in certain cases retain First Appeal and decide, which after enhancement of valuation would have otherwise been within the jurisdiction of District Judge.

25. Section 21 of Act, 1887 which came to be considered before Full Bench in ***Kanyal Das case (supra)*** was different then what it is before us having been substituted by U.P. Act No.17 of 1991. Earlier Section 21 (1-A) states that all appeals within prescribed valuation shall stand transferred to District Judge, not being an appeal in which arguments have been concluded before relevant date and only judgment disposing of appeal remains to be pronounced. The legislature made its intention clearly as to what appeals shall not stand transferred. Full Bench considered legislation intend expressed in the light of Section 21 (1) (1-A) of Act, 1887 as it then was, read with Section 24 C.P.C.

26. Legislature subsequently substituted Sub Section 1-A in 1991 and limited exception earlier provided has been removed. Instead, a proviso has been inserted making scope of transfer under Section 24 C.P.C. much wider giving wider room to this Court to exercise its authority in appropriate cases and instead of transferring record of such cases, itself may proceed to decide. Sub Section 1-A, as it was under consideration before Full Bench and as it stand substituted by U.P. Act.17 of 1991 and available today, are compared in the form of chart, which reads as under:

Section 1-A (before amendment)	**Section 1-A (amended)**
An appeal from decree or order of a Civil Judge where the value of the original suit in which, or in any proceeding arising out of which, the decree or order was made exceeded ten thousand rupees but was less than twenty thousand rupees instituted in the High Court before the date of commencement of the Uttar Pradesh Civil Laws Amendment Act, 1970, and pending in the High Court, immediately before the said date, not being an appeal in which arguments have been	(1-A) An appeal, from a decree or order of a Civil Judge where the value of the original suit in which, or in any proceeding arising out of which the decree or order was made was not more than the amount fixed by or under clause (b) of sub-section (1) instituted in the High Court and pending in the High Court immediately before the relevant date, shall stand transferred to the District Judge having jurisdiction who may either decide it himself or assign it to any additional judge subordinate to

concluded before the said date and only judgment disposing of the appeal remains to be pronounced, shall stand transferred to the District Judge having jurisdiction who may either decide it himself or assign it to any Additional Judge subordinate to him.	him; Provided that any judgment, decree or order passed in such an appeal by the High Court after the relevant date shall be valid as if the High Court had withdrawn the appeal under Section 24 of the Code of Civil Procedure, 1908.

27. Despite restricted language of Sub Section 1-A of Section 21 as it then was, Full Bench said that power of this Court with regard to transfer under Section 24 C.P.C. is not impinged upon and does not stand repealed. Instead, in an appropriate case, Court can pass order of transfer a case under Section 24 C.P.C. This is very clear from paragraph 6 of Full Bench judgment in Kanyal Das (supra), which reads as under:

"6. Though Sub-section (1-A) of the Amending Act entrenches upon the discretion conferred on the High Court to transfer an individual case, in the sense that it takes away the discretion in regard to the category of cases mentioned in it, yet, in our opinion, Sub-section (1-A) does not in law impinge upon the operation of Clause (b) of Section 24 (1), Civil Procedure Code. Technically, the power of withdrawal vested in the High Court under Clause (b) does not stand repealed by Sub-section (1-A) of the Amending Act (sic). The High Court can on appropriate grounds withdraw an individual appeal for trial or disposal by itself, even though that appeal may have stood transferred from the High Court to the District Judge under Sub-section (1-A). In that sense, the power of withdrawal under Sub-clause (b) still continues to vest in the High Court."

(emphasis added)

28. Further argument that transfer of appeal from District Judge to High Court, if allowed, then a right of second appeal will be lost, has been negatived by this Court in ***State of U.P. and others vs. Sunni Central Board of Waqf and others, 1989 (15) ALR 696***. It is an order passed on an application under Section 24 C.P.C. whereby suits pending in Court of Civil Judge/Munsif were transferred to this Court at Lucknow. A similar argument of loss of right of appeal was negated by observing as under:

"Powers of the Court under Section 24 of the C.P.C. are not to be rendered negatory because right of one or two appeals is lost. In suitable cases and situations like the present are the same has rather become necessary for advancing the cause of justice and putting an end to the litigation rotating round the same controversy."

29. So far as circumstances when this Court would be justified in transferring a case pending in subordinate Court to High Court is concerned, in ***Baselius Mar Thoma Mathews I and others vs. Paulose Mar Asthanasius and others, AIR 1979 SC 1909***, it has been held, where dispute may affect lot of people, who are excitedly affected by ultimate decision, and exercise of transfer would save some years and duplication of hearing, which is likely to take ample time, transfer of matter to High Court is a wise measure.

30. Here we do not propose to multiply this judgment by referring to catena of authorities on the question when exercise of jurisdiction under Section 24 C.P.C. would be justified and suffice it to mention, where a matter is of importance of general public and parties also agree for early disposal, and more so that early disposal of matter has been found expedient even by highest court of law, an attempt should be made so that dispute is adjudicated at the earliest so as not to consume much more time and leave scope of dispute to prolong and take long time.

31. It cannot be doubted that office of Jagat Guru Shankaracharya at Jyotirmath Badrikashram is of high importance to majority of people and lakhs of people visit the Holy Math. Dispute of holder of Office of such place, is a matter of wide importance and ought to be adjudicated at the earliest.

32. It is appellant himself, who initially agreed for early disposal of appeal on the very first day when appeal was filed in this Court. Thereafter, for the reasons best known to him, appellant himself started delay. However, when interim injunction application was rejected and appellant went to Supreme Court, it is on request of his own counsel Sri Harish N. Salve, Senior Advocate, the Highest Court of Lord directed this Court to continue hearing of case and decide appeal expeditiously, preferably by 31st December, 2015.

33. Under said direction, we endeavoured our best to continue with hearing but again appellant created obstructions and sought amendment in memo of appeal for adding 97 grounds, enhancing initial 50 grounds to 147. Plaintiff-respondent cooperated so that appeal may be heard expeditiously and did not object to such amendment. It was allowed on 4th November, 2015 but again, thereafter, hearing could not mature for one or the other reason.

34. Considering entirety of circumstances, as discussed above, we have no hesitation in holding that here is a fit case requiring exercise of our power under Section 24 C.P.C. for transferring record of this appeal to this Court so that, as desired by Supreme Court also, it can be decided expeditiously.

35. Civil Misc. Application No.69142 of 2016 filed by plaintiff-respondent is, accordingly, allowed. Civil Misc. Application No.143408 of 2016 filed by appellant is hereby rejected.

36. The record of appeal shall stand transferred to this Court for hearing and Office is directed to list this matter before Court for hearing. Office shall list this matter for final hearing on 17th October, 2016, after lunch.

37. We also direct that hearing in this matter shall continue on day-to-day basis.

(2016) 9 ILRA 355
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Revision No.- 357 Of 2009

Mahesh @ Mahesh Chand ...Revisionist
Versus
State Of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Piyush Narain Dubey

Counsel for the Opposite Parties:
Govt. Advocate, Pankaj Dwivedi

Criminal Procedure Code, 1973 — S. 125 — Maintenance to wife and minor child — Scope and object — Wife alleged cruelty, neglect and expulsion from matrimonial home by husband addicted to drinking and gambling — Family Court granted maintenance of Rs 2,000/- per month to wife and Rs 700/- per month to minor daughter — Held, S. 125 CrPC is a measure of social justice enacted to prevent destitution and vagrancy of wife and children — Husband having sufficient means cannot evade liability to maintain wife and child.

Criminal Procedure Code, 1973 — S. 125 — Divorce — Effect on right to maintenance — Contention that wife ceased to be entitled to maintenance after decree of divorce — Rejected — By virtue of Explanation (b) to S. 125 CrPC, divorced woman who has not remarried continues to fall within expression "wife" for limited purpose of claiming maintenance.

Criminal Procedure Code, 1973 — S. 125(4) — "Living in adultery" — Meaning and proof — Husband alleged wife was living in adultery and minor daughter was not his child — Held, mere allegation or isolated conduct insufficient — "Living in adultery" denotes continuous adulterous conduct in quasi-permanent union with another man — Burden lies on husband to establish such allegation satisfactorily — Failure to prove allegation disentitles husband from resisting maintenance claim.

Maintenance — Capacity to earn — Legal obligation of husband — Plea of insufficient income not acceptable where husband is healthy and able-bodied — Law imposes obligation on husband to maintain wife and children according to his status and means.

Maintenance — Quantum — Dignified living — Maintenance awarded should enable wife to live with dignity in a manner similar to her matrimonial home and should not reduce her to destitution or beggary.

In Result: Criminal revision dismissed; maintenance awarded by Family Court to wife and minor daughter upheld; interim order vacated.

Cases cited:
1. Chaturbhuj Vs. Sita Bai(2008) 2 SCC 316
2. Captain Ramesh Chander Kaushal v. Veena Kaushal(1978) 4 SCC 70
3. Savitaben Somabhai Bhatiya v. State of Gujarat(2005) 3 SCC 636
4. Durga Singh Lodhi Vs. Prembai and others1990 Cr.L.J. 2065
5. Rohtash Singh Vs. Smt. Ramendra and others2000 (2) SCR 58

6. Smt. Poonam Gupta Vs. Ghanshyam GuptaAIR 2003 All 51
7. K. Veeriah Vs. Muthulakshmi and others1999 Cr.L.J. 624

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. This criminal revision has been filed against the judgement and order dated 09.1.2009 passed by Principal Judge, Family Court, Agra in Case No. 42 of 2006 (Smt. Veerwati and another Vs. Mahesh alias Mahesh Chand) whereby the application of the applicant-opposite party No. 2, filed under section 125 Cr.P.C. was allowed and maintenance at the rate of Rs. 2000/- per month has been granted to the wife and Rs. 700 per month to the minor daughter from the date of application.

2. The facts which are requisite to be stated for adjudication of this revision are that an application under section 125 Code of Criminal Procedure was moved by Smt. Veerwati stating therein that her marriage took place about 16 years back with Mahesh and they lived together as husband and wife. From their wedlock two children were born, out of whom son Vishan Singh is living with Mahesh and daughter Soniya is living with her. After the marriage revisionist Mahesh, who was drunkard, used to abuse, beat and torture her. He also used to bring men of bad character for the purpose of gambling and also the women in his house. He also keeps one Manju as his wife and on being objected by the applicant, she was subjected to beating. In a planned manner the applicant-opposite No. 2 was kicked out from the house in the clothes which she was wearing at that time. Stridhan of the applicant-opposite party No. 2 was retained by the revisionist. Thereafter revisionist never came to take her as well as her daughter and also filed a suit for divorce. It is further stated in the application that the revisionist Mahesh works in a hospital and earns Rs. 10,000-12,000/- per month, which he spent on drink, gambling and enjoyment with women.

3. The revisionist-Mahesh filed his reply in which he has stated that his marriage took place on 27.4.1978 and from their wedlock one child namely Vishan Singh was born, who is now aged about 18 years and living with the revisionist. The applicant-opposite party is living in adultery and earning Rs. 3000/- per month from the doing the work of labourer. It is also submitted that the revisionist is employed in a nursing home and only earns Rs. 1500/-.

4. The learned Principal Judge, Family Court, Agra after evaluating the evidence adduced by the parties, granted maintenance to the wife, opposite party No. 2 at the rate of Rs. 2000/- (rupees two thousand) per month and Rs. 700/- (rupees even hundred) to opposite party No. 3 minor child.

5. Heard learned counsel for the revisionist, learned counsel for opposite party Nos. 2 and 3 and learned Additional Government Advocate and perused the record of the case.

6. Learned counsel for the revisionist submits that once the divorce petition filed by the revisionist was allowed, the maintenance granted by the learned Principal Judge, Family Court, Agra is bad in eye of law.

7. Learned counsel for the revisionist further submitted that admittedly opposite party No. 2 is living in adultery since 1997, hence opposite party No. 3 is not his daughter and learned Principal Judge, Family Court, Agra erred in granting maintenance to opposite party No. 3 also.

8. On the other hand, learned counsel for opposite party Nos. 2 and 3 and learned AGA supported the judgement of the learned Family Judge.

9. Before adverting to the claim of the parties, it would be useful to quote section 125 Cr.P.C.:

Order for maintenance of wives, children and parents.

10. 125. (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) His legitimate or illegitimate minor child, whether married or not unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

11. There can be no shadow of doubt that an order under section 125 Cr.P.C. can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay as he does not have a job or his business. These are only bald excuses and in fact they have no acceptability in laws. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife.

12. Hon'ble Supreme Court in ***Chaturbhuj Vs. Sita Bai, (2008) 2 SCC 316*** has held the grant of maintenance to wife is a measure of social justice. The court held as under:

" Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in captain Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39

of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in ***Savitaben Somabhai Bhatiya v. State of Gujarat (2005) 3 SCC 636.***

13. A Division Bench of Madhya Pradesh High Court in the case of **Durga Singh Lodhi Vs. Prembai and others, 1990 Cr.L.J. 2065** has held that mere absence of visible means or real estate will not entitle such a person to escape the liability to pay maintenance awarded under Section 125(1), as even at the stage of enforcement of the order under Section125(1), an able bodied healthy person capable of earning, must be subjected to pay maintenance allowance. If, with this visible capacity to earn, he avoids payments, it has to be held that he has so done for no sufficient cause. If such a person avoids to discharge that obligations despite issuance of a distress warrant, he can be sentenced to imprisonment for a term specified in sub-section (3) of Section 125 Cr.P.C..

14. The contention of the learned counsel for the revisionist that once the divorce petition filed by the revisionist was allowed, the maintenance granted by the learned Principal Judge, Family Court, Agra is bad in the eye of law has no leg to stand in view of Explanation (b) of Section 125 Cr.P.C.

15. Hon'ble Supreme Court in **Rohtash Singh Vs. Smt. Ramendra and others, 2000 (2) SCR 58** has held as under:

" Admittedly, in the instant case, the respondent is a divorced wife. The marriage ties between the parties do not subsist. The decree for divorce was passed on 15th of July, 1995 and since then, she is under no obligation to live with the petitioner. But though the marital relations came to an end by the divorce granted by the Family Court under Section 13 of the Hidu Marriaage Act, the respondent continues to be "wife" within the meaning of Section 125 Cr.P.C. on account of Explanation (b) to Sub-section (1) which provides as under:

"Explanation-For the purposes of this Chapter

(a) .....

(b) " wife" includes woman who has been divorced by,or has obtained a divorce from her husband and has not remarried. "

16. On account of the Explanation quoted above, a woman who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act, continues to enjoy the status of a wife for the limited purpose of claiming maintenance allowance from her ex-husband.

17. So far as the decree of divorce is concerned, learned Principal Judge, Family Court neither granted any permanent alimony to the wife of the revisionist nor given any reasoned findings that how the wife of the revisionist does not want to live with husband, whereas out of their wedlock two children were born. A Division Bench of this Court in **Smt. Poonam Gupta Vs. Ghanshyam Gupta, AIR 2003 All 51**, which was filed against the order of learned Family Judge Kanpur Nagar allowing the suit for divorce under section 13 of the Hindu Marriage Act filed by the husband on the condition that he will pay a sum of Rs. 5,00,000/- (rupees five lac) to the wife and daughter. The division Bench modified the order of learned Family Judge, Kanpur Nagar and directed the husband to pay a sum of Rs. 8,00,000/- (rupees eight lac) to the wife, out of which Rs. 2,00,000/- (rupees two lac) shall be transmitted to the District Judge, who shall get the said amount deposited in the name of the child and interest accruing on such deposit would be payable to the wife every six months which would be spent by her for the maintenance of the child. The amount kept in fixed deposit shall be made available to the child on her majority. It was further observed that it was not practically possible for the plaintiff and opposite party to live together as husband and wife, even though the Court granted permanent alimony to the wife, the only object behind this is that there should be no vagrancy.

18. Contention of the learned counsel for the revisionist that opposite party No. 2 is living in adultery since 1997, hence opposite party No. 3 is not his daughter has no substance in view of Section 125 (1)(b) Cr.P.C. Further revisionist could not prove his case before the learned Family Judge that his wife opposite party No. 2 is living in adultery.

19. A Division Bench of Madras High Court in the case of **K. Veeriah Vs. Muthulakshmi and others, 1999 Cr.L.J. 624**, while dealing with the ground of living in adultery has held as under:

"The term "adultery" is to be understood in the light of the social ideas of the community as being a serious breach of the matrimonial tie. "Living in adultery"- mere friendship with a man does not amount to adultery within the meaning of Section 125 (4) Cr.P.C.. "Living in adultery" means the following of a course of continuous adulterous conduct. While determining the factum of "Living in adultery" the Court must consider evidence on living in quasi-permanent union with man with whom she was allegedly committing adultery. It is for the husband to prove that the wife is continuously committing violation of the marriage bed, indulging in adulterous life, by living in quasi-permanent union with her paramour. In other words, "living in adultery" means an outright adulterous conduct where the wife lives in a quasi permanent union with a man with whom she is committing adultery, shortly before or after the petition for maintenance. It is only when the husband proves satisfactorily beyond reasonable doubt that his wife was living in adultery, she will not be entitled to maintenance and not otherwise. When an allegation of adultery is made against the wife, the Court is bound to enquire into her conduct. In the said enquiry, the husband has to begin his case and the wife must be given an opportunity for adducing evidence to rebut the allegation of "living in adultery." The words "living in adultery" are merely indicative of the principle that a single or occasional lapse from virtue is not a sufficient reason for refusing maintenance. To reiterate the continued adulterous conduct is what is meant by "living in adultery."

20. In a recent decision of Hon'ble Supreme Court in the case of **Shamima Farooqui Vs. Shahid Khan, Criminal Appeal Nos. 564-565 of 2015**, decided on 06.4.2015, Hon'ble Supreme Court has held as under:

"A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 Cr.P.C., it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar."

21. In this case the revisionist has failed to prove that his wife Smt. Veerwati, without any sufficient reason, refused to live with him and that she is able to maintain herself.

22. In view of what has been indicated herein above, I find that the impugned order does not suffer from any illegality or impropriety. The revision lacks merits. It is accordingly dismissed.

23. Interim order dated 05.2.2009 stands vacated.

(2016) 9 ILRA 361
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/s 482 No. - 753 Of 2015
&
Application U/s 482 No. - 15142 Of 2015

Barnali Baishya **...Petitioner**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:
Shri Ram Rawat

Counsel for the Respondents:
Govt. Advocate, Swetashwa Agarwal

Municipal Law — Property tax — Determination of annual value — Compliance with statutory procedure — Challenge to rent list and determination of annual value under S. 174, U.P. Municipal Corporation Act, 1959 read with Rules, 2000 — Held, fixation of annual value and rental rates must strictly follow procedure prescribed under and Rules including preparation, publication, invitation and disposal of objections — Non-compliance vitiates entire exercise. (Paras 13 to 22)

Municipal Law — Assessment list — Illegality — Violation of Rules 4-A & 4-B — Final rent list published prior to proper disposal of objections and without adherence to prescribed procedure — Exercise conducted by officers without due authority and without following statutory requirements — Held, impugned determination illegal and unsustainable. (Paras 18 to 22)

Statutory Interpretation — Mandatory procedure — Doctrine of "manner prescribed" — Where statute requires an act to be done in a particular manner, it must be done in that manner alone or not at all — Any deviation renders action void — Principle reiterated. (Paras 23 to 29)

Writ Jurisdiction — Interference — Remand for fresh action — Where statutory procedure admittedly not followed, High Court justified in quashing impugned action — Liberty granted to authority to undertake fresh exercise in accordance with law. (Paras 30 & 31)

In Result: Writ petitions allowed; impugned rent list and annual value determination set aside; liberty granted to Nagar Nigam to proceed afresh in accordance with statutory provisions. (Para 31)

Cases cited:
Nazir Ahmad Vs. King-EmperorAIR 1936 PC 253

Dhananjaya Reddy Vs. State of Karnataka2001 (4) SCC 9

Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala2002 (1) SCC 633

Captain Sube Singh & others Vs. Lt. Governor of Delhi & others2004 (6) SCC 440

Competent Authority Vs. Barangore Jute Factory & others2005 (13) SCC 477

State of Jharkhand & others Vs. Ambay Cements & another2005 (1) SCC 368

Daya Shankar Singh Vs. State of U.P. and others2008(2) ESC 1220

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Both these applications, filed by the same applicant against the same opposite parties and arising out of the same trial, were connected vide order dated 28.5.2015 passed by this court and are being disposed of by this common order.

2. The applicant, by means of the first application under Section 482 Cr.P.C. No. 753 of 2015, has invoked the inherent jurisdiction of this Court with prayer to set aside the order dated 18.7.2014 passed by II Additional Sessions Judge, Gautam Budh Nagar, on Application dated 14.11.2013 filed in S.T. No. 580 of 2011, State Vs. Shivalik Ghosh and another, u/s 376, 323, 328 I.P.C., P.S. Mahila Thana, Noida, District Gautam Budh Nagar, whereby the learned Additional Sessions Judge has rejected the application moved by the applicant under section 311 Cr.P.C.

3. By means of second application under Section 482 Cr.P.C. No. 15142 of 2015, the applicant has prayed to direct the trial court i.e. Additional Sessions Judge/F.T.C., Gautam Budh Nagar, not to proceed with the trial of S.T. No. 580 of 2011, State Vs. Shivalik Ghosh and another, u/s 376, 323, 328 I.P.C., P.S. Mahila Thana, Noida, District Gautam Budh Nagar, till the pendency of Criminal Misc. Application u/s 482 No. 753 of 2015.

4. Heard the applicant Barnali Baishya, appearing in person, learned A.G.A. for the State and Mr. Swetashwa Agarwal, learned counsel for O.P. No. 2. Perused the records.

5. The brief facts of the case are that an FIR was lodged by the applicant on 3.12.2010 at Police Station Mahila Thana Noida, District Gautam Budh Nagar, against O.P. No. 2 to the effect that on fateful date i.e. 18.8.2010, the applicant/ victim, who was working in a software Company at Noida, was picked up from her office by O.P. No. 2, Shiwalik Ghosh, who took her to Gurgaon, where he mixed some intoxicating substance in her cold drink, due to which she lost her senses. Thereafter O.P. No. 2 committed rape with her. On regaining consciousness, when the applicant resisted and complaint about it, she was pacified by the O.P. No. 2 giving her a false assurance of solemnizing marriage with her. Thereafter the O.P. No. 2 started visiting the flat of applicant situated at NOIDA and made physical relations with her several times, every time giving her assurance to marry her very soon. The applicant talked to his mother, who also assured her that their marriage will be performed after two years. It was

alleged that on false assurance of marriage the accused/O.P. No. 2 continued to establish physical relations with her. He also took Rs. 50,000/- from the applicant and did not return. On 14.9.2010, the mother of O.P. No. 2 refused to perform the marriage of her son with the applicant and instead, she committed maarpeet with her. Feeling herself cheated and deceived, the applicant lodged the FIR, which was registered as Case Crime No. 32 of 2010, u/s 323, 328, 376 I.P.C. The I.O. recorded the statements of the complainant/ victim and her mother u/s 161 Cr.P.C. and after concluding the investigation submitted charge sheet against O.P. No. 2 and his mother, Smt. Chaitali Ghosh, on 11.1.2011 under the aforesaid sections.

6. Learned Magistrate took cognizance on the charge sheet and since the case was triable by the Sessions Court, it was committed to the Court of Sessions, where it was registered as S.T. No. 580 of 2011, State Vs. Shivalik Ghosh and another. During trial an application under section 311 Cr.P.C. was filed by the applicant before the trial court on 14.11.2013 with prayer to accept certain documents and to recall some witnesses to prove the documents so that those documents could be marked as exhibits, which according to applicant was very necessary for just and proper decision of the case.

7. However, the aforesaid application was rejected by the trial court vide impugned order dated 18.7.2014, which was challenged by the applicant by means of Criminal Misc. Application u/s 482 No. 753 of 2015, wherein this court issued notices to the opposite parties on 19.1.2015. Thereafter the applicant filed an application before the trial court on 13.3.2015 along with a copy of the aforesaid order of this court dated 19.1.2015 passed in Application u/s 482 No. 753 of 2015, praying to adjourn the further proceeding of the trial during pendency of Criminal Misc. Application u/s 482 No. 753 of 2015, but the learned trial court did not entertain the application and proceeded with the trial fixing the date 26.3.2015 in the case. On 26.3.2015, the case was adjourned on the request of learned counsel for the accused and 16.4.2015 was fixed. On 16.4.2015 the court was vacant and the case was fixed for 28.4.2015. Again on 28.4.2015 the P.O. was on leave and the case was fixed for 14.5.2015. On 14.5.2015, the court passed the order rejecting the prayer of the applicant to fix some long date in the case and to wait till the decision of Application u/s 482 No. 753 of 2015, pending in this court.

8. Apprehending that the trial will be concluded and decided, without giving her an opportunity to bring on record certain important documents, the applicant, again knocked the doors of this Court by means of Application under Section 482 Cr.P.C. No. 15142 of 2015, praying to keep in abeyance, the further proceedings of the trial, till the disposal of her application.

9. In the counter affidavit filed by O.P. No. 2, a preliminary objection has been raised that the applicant had earlier approached this court by means of Criminal Misc. Application No. 45754 of 2014 challenging the order dated 18.7.2014, which was dismissed by this court as not pressed vide order dated 13.11.2014 of this court without any order granting liberty to the applicant to file another application, hence the instant application is not maintainable. Learned counsel for O.P. No. 2 has contended that the applicant has maliciously filed this application

misleading the court by deposing incorrect and false facts. The trial is now pending at the stage of hearing final arguments, however, the applicant is moving multiple applications in order to cause delay in its disposal. Learned counsel has submitted that no valid reasons have been assigned by the applicant as to why the documents intended to be marked as exhibits were not marked earlier? Learned counsel has contended that the power under section 311 of Cr.P.C. is a discretionary power, given to the court and the same has to be exercised for strong and valid reasons, and with great caution and circumspection. It is also contended that the present application is not maintainable as the same does not entail any reason as to how the witnesses mentioned in the application, are necessary to be examined for the just and proper adjudication of the present matter. Learned counsel for O.P. No. 2 has vehemently argued that the application u/s 311 Cr.P.C. moved by the applicant, at such belated stage, is liable to be dismissed as the prosecution has closed its evidence, moreover, when the documents intended to be marked as exhibits, were not even the part of the investigation. The applicant has not expressed willingness to summon any witness at the earlier stage and the present application is nothing but an afterthought and has been filed with oblique motive and purpose to fill up the lacuna and the same was liable to be dismissed and was rightly dismissed by the learned trial court. Learned counsel has submitted that in view of aforesaid facts, no interference is required in the order impugned and the instant applications be dismissed.

10. Considered the submissions.

11. The record shows that vide order dated 28.5.2015, passed in Application u/s 482 Cr.P.C. No. 15142 of 2015, this court had granted interim relief to the applicant by staying the further proceedings of the Sessions Trial.

12. A perusal of the order dated 18.7.2014, which has been impugned in the first Application u/s 482 No. 753 of 2015) shows that an application "93 Kha" was moved by the applicant u/s 311 Cr.P.C. with prayer to permit her to bring on record some medical papers so that she may justify the delay caused in lodging the FIR by her. Prayer was also made to summon some person from the concerned hospital to prove those medical papers. Apart from that, she had also prayed to bring on record the print outs of some emails, chatting, SMS and face book messages, exchanged between her and the accused, but the Court below rejected her application on the ground that as the prosecution has concluded its evidence, hence it was not justifiable to entertain the application moved by the victim at such belated stage.

13. It also transpires that on the same day, the learned trial court also rejected another application "94-Kha" moved by the accused to bring on record the call history and SMS etc. exchanged between him and the prosecutrix, its being premature.

14. In a criminal trial, the delay in lodging the FIR, some time proves fatal to prosecution. Therefore, if the prosecutrix, in order to explain the delay, was trying to bring on record the medical papers of some hospitals, for the purpose of explaining the delay in lodging the FIR, the opportunity should not have been denied to her.

15. So far as the ground taken by the O.P. No. 2, that the application u/s 311 Cr.P.C. was moved at a belated stage, is concerned, I do not find much force in the aforesaid argument. The words used in Section 311 Cr.P.C., are "at any stage of any enquiry, trial or other proceedings" which clearly shows that an application u/s 311 Cr.P.C. can be filed at any stage of the trial, if the evidence appears to be essential for the just decision of the case. It is also to be kept in mind that in the typical adversary system of administration of criminal justice, the victim takes a back seat behind the stage due to the reason that prosecution is conducted by the State, it being custodian of public safety and public order. The status of victim or complainant is that of a witness only, the possibility can not be ruled out that the Public Prosecutor, inadvertently conducting the trial, failed to produce relevant documents or witnesses. This state of affairs was considered by Committee for reform in Criminal Justice **(Malimath Committee)** at length and it made a series of recommendations to put the victim of crime back at the centre of Criminal proceedings and to participate in the trial including the right to provide evidence, to put questions to witnesses with the leave of the court, to be informed of the status of investigation, to move court to ensure proper investigation, to be heard on issues relating to bail and withdrawal of prosecution, to advance argument after the prosecutor has submitted his arguments, and to participate in settlements of compoundable offences. Although many of the aforesaid recommendations are yet to be clothed with legislative mandate, yet it indicates a tendency of our legal system to accord the victim or aggrieved a dominant role to play in a criminal trial, particularly in grave offences, who were hitherto placed at back foot.

16. The trial courts should always adhere to the dictates of Supreme Court laid down in a catena of decisions that judges should not sit like a mute and silent spectator and should play a proactive role in the process of recording of evidence and should make use of the provisions of section 311 Cr.P.C. and section 165 Evidence Act, 1872, as and when needed, with a view to give a just decision in the case so that justice triumphs.

17. In so far as the argument led by O.P. No. 2 with regard to filling up the lacuna of prosecution case, is concerned, in the case of ***Rajendra Prasad Vs. Narcotic Cell, (1999)6 SCC 110***, the Apex Court pointed out the distinction between lacuna in the prosecution and a mistake or error inadvertently committed by the prosecution, which can always be allowed to be set right by permitting parties concerned by the Criminal Courts in exercise of its powers conferred under Section 311 Cr.P.C or under Section 165 of the Evidence Act.

18. According to Hon'ble Supreme Court:-

"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to

count errors committed by the parties or to find out and declare who among the parties performed better."

19. In ***Zahira Habibullah H. Sheikh and another Vs. State of Gujarat and others, (2004) 4 SCC 158***, the Apex Court held that

"a Criminal Court cannot remain a silent spectator. It has got a participatory role to play and having been invested with enormous powers under Section 311 of Cr.P.C, as well as Section 165 of the Evidence Act, a trial Court in a situation like the present one, ought to have risen to the occasion in public interest and remedied the situation by invoking Section 311 of Cr.P.C, by recalling the said witness with the further direction to the public prosecutor for putting across the appropriate question or court question to the said witness and thereby set right the glaring error accordingly. It is unfortunate to state that the trial Court miserably failed to come alive to the realities as to the nature of evidence that was being recorded and miserably failed in its duty to note the serious flaw and error in the recording of evidence of PW-18. In this context, it must be stated that the prosecutor also unfortunately failed in his duty in not noting the deficiency in the evidence. The observation of the High Court while disposing of the revision by making a casual statement that the appellant can always file the written argument, equally in our considered opinion, was not the proper approach to a situation like the present one. What this court wishes to ultimately convey to the courts below, is that while dealing with a litigation, in particular while conducting a criminal proceeding, maintain a belligerent approach instead of a wooden one.

20. In a decision rendered by the Apex Court in ***Rajaram Prasad Yadav vs. State of Bihar and another - AIR 2013 SC 3081***, in paragraph 14, the law has been stated as under:

14. A conspicuous reading of Section 311, Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

21. In ***Mohanlal Shamji Soni v. Union of India & Anr., AIR 1991 SC 1346***, the Apex Court examined the scope of Section 311 Cr.P.C., and held that

"it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr.P.C., wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summoned as a witness, who are expected to be able to throw light upon the matter in dispute, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

22. Having regard to the facts of the present case in wake of the law as laid down by the Apex Court, the Application u/s 482 Cr.P.C. No. 753 of 2015 deserves to be allowed and is hereby **allowed**. The impugned order dated 18.7.2014 passed by the court below is set aside and the trial court is directed to call the witnesses and admit the documents, which the applicant intends to file as evidence. The trial court may also consider to take secondary evidence in case primary evidence is either not available or cannot be produced in the court without causing undue delay in final disposal of the case due to unavoidable circumstances.

23. Since the proceedings of the trial have been stayed vide interim order dated 28.5.2015 passed in Application u/s 482 Cr.P.C. No. 15142 of 2015 and the main objection raised by O.P. No. 2 against the application u/s 311 Cr.P.C., if it is being allowed, is that it will cause delay in disposal of trial, which is at concluding stage, the trial court is further directed to conclude the trial in accordance with law expeditiously preferably within a period of six months from the date of production of a certified copy of this order.

24. The second Application u/s 482 Cr.P.C. No. 15142 of 2015 has now become infructuous due to the reason that the only prayer made in this application was to keep the proceedings of the sessions trial in abeyance till pendency of Application u/s 482 Cr.P.C. No. 753 of 2015. The Application u/s 482 Cr.P.C. No. 753 of 2015 has been allowed today, therefore, the Application u/s 482 No. 15142 of 2015 has now become infructuous and is accordingly **dismissed** as infructuous.

(2016) 9 ILRA 368
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE VINOD KUMAR MISRA, J.

Second Appeal No.- 797 Of 2014

Ratan Kumar Sharma ...Appellant
Versus
Smt. Premwati Sharma ...Respondent

Counsel for the Appellant:
Anoop Trivedi

Counsel for the Respondent:
Pramod Jain

Benami Transactions (Prohibition) Act, 1988 – Ss. 3(2) and 4 – Property purchased in name of woman – Plea of benami transaction – Statutory presumption – Rebuttal – Burden of proof – Plaintiff claimed possession over disputed house on strength of registered sale deeds executed in her favour. Defendant pleaded that consideration had actually been paid by his father and transaction was benami. Held, where sale deeds stand in plaintiff's name and defence of benami is raised, statutory bar under S. 4 operates. Further, under S. 3(2), purchase in name of wife carries a statutory presumption that property was purchased for her benefit unless rebutted by convincing evidence. Defendant failed to rebut such presumption by any cogent evidence. Mere assertion that consideration was supplied by another person was insufficient. Ownership of plaintiff rightly upheld.

Adverse possession – Essential pleadings and proof – Permissive possession cannot become adverse possession in absence of specific hostile assertion – Defendant set up inconsistent pleas of inheritance and adverse possession. Held, adverse possession requires clear pleadings and proof of hostile, open and continuous possession. Entry into property having been permissive, defendant could not claim title by adverse possession. Necessary ingredients neither pleaded nor proved.

Licence – Occupation by family member – Permissive possession – Licensee liable to vacate – Defendant had entered into occupation with consent of plaintiff and predecessor-in-interest. Since possession originated permissively, first appellate court rightly treated defendant as mere licensee and directed delivery of possession.

Second Appeal – Scope of interference under S.100 CPC – Reversal by first appellate court – Validity – First appellate court assigned cogent reasons while reversing findings of trial court. Reappreciation of evidence and direction for delivery of possession held within jurisdiction and not liable to interference in second appeal.

In Result-Substantial questions of law answered in favour of respondent and against appellant. Judgment of first appellate court upheld. Second Appeal dismissed and direction for delivery of possession affirmed

Cases cited
Nand Kishore Mehra v. Sushila Mehra AIR 1995 SC 2145
Rebti Devi (Smt.) v. Ram Dutt and another (1997) 11 SCC 714

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

1. This second appeal has been filed by Ratan Kumar Sharma against Smt. Premwati Sharma against the judgment and decree dated 9.5.2014 passed by Additional District Judge, Court no. 9, Meerut in Civil Appeal No. 75 of 2008 by which the learned first appellate court has set aside the judgment and decree dated 12.5.2008 passed in Original Suit No. 243 of 2002 and directed the defendant/appellant to vacate the suit property within one month.

2. The appellant made a prayer that the judgment and decree dated 9.5.2014 passed by Additional District Judge Court No. 9 in Civil Appeal No. 75 of 2008 be set aside.

3. This appeal was admitted on 31.7.2014 on the substantial question of law as framed by the appellant namely A, B and C, which are as under:

(A) Whether the findings recorded by and all the conclusions arrived at by the learned first appellate court are wholly baseless and perverse?

(B) Whether without upsetting the finding recorded by the trial court, the learned first appellate court could have set aside the judgment and decree of the learned trial court?

(C) Whether the direction issued by the learned first appellate court to vacate the suit property within one month is wholly misconceived is without jurisdiction and illegal?

4. I have heard learned counsel for the appellant and learned counsel for the respondent at length and have perused the record of learned trial court and have also perused the judgment of learned trial court as well as learned first appellate court and have also gone through the material available on record.

5. Original Suit No. 243 of 2002 was filed by Premwati Sharma, plaintiff against Sri Ratan Kumar Sharma, defendant for delivery of possession through mandatory injunction. Learned trial court vide judgment dated 12.5.2008 dismissed the plaintiff's suit. Plaintiff assailed the judgment of the learned trial court by preferring appeal no. 75 of 2008 before District Judge, Meerut. The appeal was transferred to the Additional District Judge, Court No. 9, Meerut. Learned first appellate court vide judgment dated 9.5.2014 allowed the appeal and set aside the judgment of trial court and partly decreed the original suit no. 243 of 2002 and directed the defendant to hand over the vacant possession to the plaintiff of house nos. 54 and 58 situated at Ganjbazar, Meerut Cantt.

6. Since substantial questions of law mentioned above as A,B and C are inter-connected, so I am taking all the above framed substantial questions of law together for deciding this second appeal.

7. Learned counsel for the appellant submitted that learned first appellate court has set aside the judgment of the learned trial court by holding that plaintiff was owner of the disputed house on the basis of sale deed dated 14.5.1980 and 21.5.1986, which is paper nos. 7 Ka and 22 Ka. Learned trial court found that these sale deeds i.e. paper nos. 7 Ka and 22 Ka have not been proved by plaintiff by calling the scribe or its marginal witnesses in evidence and trial court did not accept the plaintiff as owner of house nos. 54 and 58, which were purchased through sale deeds dated 14.5.1980 and 21.5.1986. Learned first appellate court did not agree with the reasons of the trial court in holding that these sale deeds i.e. paper nos. 7 Ka and 22 Ka are not proved and held that since execution of these sale deeds have not been denied by the defendant but it has been alleged by the defendant that these sale deeds were purchased in the name of plaintiff by the father of the defendant, Ram Narayan Sharma as benami and sale consideration was given by the father of defendant, Ram Narayan. In the trial court issue no 9 was frame like as follows:

8. Issue no. 9: Whether the statement of para 36 of the written statement regarding banami transaction is barred by Section 4?

9. Learned trial court did not decide this issue on merit but decided it on the basis of not pressing the issue by the plaintiff's counsel.

10. Learned first appellate court has held that pertaining to the Section 4 of the Benami Transaction (Prohibition) Act, 1988 (herein after referred to as the Act) was legal issue. It was duty of the trial court to decide it on merit even if, it was not pressed by the counsel for the parties. Learned first appellate court has found that defendant has failed to prove the transaction as benami and plaintiff is owner of the disputed house on the basis of sale deeds executed in her favour. Regarding Section 4 and Section 3 of the Act case laws of **AIR 1995 Supreme Court 2145 (Nand Kishore Mehra Vs. Shushila Mehra)** and **(1997) 11 Supreme Court Cases 714 (Rebti Devi (Smt.) Vs. Ram Dutt and another)** have been cited before me. In the first case law of Nand Kishore it has been held by the Hon'ble Supreme Court that neither the filing of suit nor taking of a defence in respect of either the present or past benami transaction involving the purchase of property by a person in the name of his wife or unmarried daughter as prohibited under subsection 1 and subsection 2 of Section 4 of the Act.

11. Section 3 of the Act is reproduced as under:

Section-3 "3. **Prohibition of benami transactions**.—

(1) No person shall enter into any benami transaction.

(2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

Section-5

"5. Property held benami liable to acquisition.--(1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed. (2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section."

12. In the first case law of Nand Kishre it has also been held by the Hon'ble Supreme Court in paragraph 6 that:

Sub-section (1) of Section 3 , as seen, prohibits a person from entering into any benami transaction. Sub- section (3) of Section 3 , as seen, makes a person who enters into a benami transaction liable for punishment. Section 5 makes properties held benami liable for acquisition without payment of any amount. But, when sub-section (2) of Section 3 permits a person to enter into a benami transaction of purchase of property in the name of his wife or unmarried daughter by declaring that the prohibition contained against a person in entering into a benami transaction in sub- section (1) of Section 3, does not apply to him, question of punishing the person concerned in the transaction under sub- section (3) thereof or the question of acquiring the property concerned in the transaction under Section 5, can never arise, as otherwise the exemption granted under Section 3 (2) would become redundant. What we have said of the person and the property concerned in sub-section (2) of Section 3 in relation to non-applicability of the provisions of Section 3 (3) and Section 5 shall equally hold good for non applicability of the provisions of sub-sections (1) and (2) of Section 4 in the matter of filing of the suit or taking up the defence for the self same reason. Further, we find it difficult to hold that a person permitted to purchase a property in the name of his wife or unmarried daughter under sub-section (2) of Section 3 notwithstanding the prohibition to enter into a benami transaction contained in sub-section (1) of Section 3 cannot enforce his rights arising therefrom, for to hold so would amount to holding that the Statute which allows creation of rights by a benami transaction also prohibits the enforcement of such rights, a contradiction which can never be attributed to a Statute. If that be so, there can be no valid reason to deny to a person, enforcement of his rights validly acquired even in the past by purchase of property in the name of his wife or unmarried daughter, by making applicable the prohibition contained in respect of filing of suits or taking up of defences imposed in respect of benami

transactions in general by sub-sections (1) and (2) of Section 4 of the Act. But, it has to be made clear that when a suit is filed or defence is taken in respect of such benami transaction involving purchase of property by any person in the name of his wife or unmarried daughter, he cannot succeed in such suit or defence unless he proves that the property although purchased in the name of his wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be, because of the statutory presumption contained in sub-section (2) of Section 3 that unless a contrary is proved that the purchase of property by the person in the name of his wife or his unmarried daughter, as the case may be, was for her benefit.

13. In the second case law of Rebti Devi the arguments was advanced that law laid down by a three-Judge Bench of Supreme Court in Rajagopal Reddy case, prohibiting raising of defence of benami in such circumstances, had been doubted by another three-judge Bench of Supreme Court in Nand Kishore Mehra case. It has been held by the Hon'ble Apex Court that the decision in Rajagopal Reddy case is not in any manner shaken by anything said in Nand Kishore Mehra case and that both the cases deal with different aspects of the Act and each of the cases continues to govern different provisions of the Act.

14. In the present case the arguments of the learned counsel for the appellant emphasized that learned first appellate court gave the finding only on the basis of Section 4 of the Act and did not take into consideration Section 3 (2). In which it has specifically been mentioned that nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

15. According to the appellant in the present case, plaintiff was living with defendant's father in the house no. 53 and she helped defendant's father in up-bringing the children of defendant's father, Ram Narayan Sharma with his wife Shakuntala Sharma and also looking after Shakuntala Sharma, who was bed ridden. Ultimately, Premwati made physical relations with defendant's father and was in dominating position to control him. Disciplinary proceedings were also drawn against defendant's father on the complaint of Premwati's ex-husband from whom she obtained divorce regarding the illicit relationship of Premwati with defendant's father. Ultimately, those disciplinary proceedings were ended in favour of defendant's father but Premwati used to coerce defendant's father that if he dis-obeyed the command of Premwati, she would again complain in his department regarding illicit relationship with her. So, in these circumstances defendant's father purchased the disputed house in name of Premwati and Premwati was not in a position to purchase the house nos. 54 and 58 independently from her meager income of teaching.

16. But since transaction was benami and Section 4 prohibits filing of suit or defence, learned first appellate court on the basis of Section 4 found ownership in the disputed house with plaintiff, Premwati. No doubt in Section 3 (2) presumption is in favour of plaintiff that house was purchased for her benefit being wife of Ram Narayan Sharma but Ram Narayan Sharma was entitled to rebut this presumption if we give wider interpretation to word 'wife' in Section 3 (2) of the Act.

17. There is no evidence by defendant to rebut the presumption of Section 3 (2) of the Act as Premwati rendered her services in defendant's family and his father treated her as wife and got executed sale deeds for her benefit. From another angle if we confine to the provisions of Section 3(2) of the Act to legally wedded wife only, then the defence of the defendant regarding the benami transaction will be hit by **Section 4 (2) of the Act**. So in both the eventualities scale is tilting in favour of plaintiff /respondent, as sale deeds are in her favour and the defence of benami transaction is hit by Section 4 (2) of the Act as held by learned first appellate court, is correct conclusion in the facts of the present case. So far as the status of the defendant in the disputed house as owner is concerned defendant has taken two pleas regarding ownership one by inheritance being son of Ram Narayan Sharma and other by adverse possession. So far as first plea of inheritance of house being son of Ram Narayan Sharma is concerned since Ram Narayan Sharma has not been found owner of the disputed house and so far as plea of adverse possession is concerned necessary ingredients of adverse possession has not neither been pleaded and nor been proved in accordance with law. Earlier entry of defendant in the house is being permissive with defendant's consent, so question of adverse possession does not arise, as defendant was inducted and permitted to live in house after his marriage with the consent of plaintiff being the son of Ram Narayan Sharma with whom plaintiff was living as a keep or so called wife.

18. So first appellate court's finding regarding treating the defendant as occupant in the house as licencee is according to law. So far as the contention of the learned counsel for the appellant that learned first appellate court has not reversed the reasons of the trial court is concerned, it is observed that learned first appellate court has given cogent reason in his judgment regarding reversing the findings of the learned trail court on issues framed in the suit.

19. In the above facts and circumstances, the findings recorded by the first appellate court are according to law and learned first appellate court has given the finding in the appeal upon the points involved in the case and upset the finding of the learned trial court. Learned first appellate court was competent and had jurisdiction to direct the appellant/defendant to vacate the disputed house and hand over its possession to plaintiff within one month since the date of passing of the judgment.

20. So in these circumstances, all the above substantial questions of law, namely, A, B and C are answered in favour of respondent and against the appellant. Thus, the appeal is liable to be dismissed.

21. The appeal is, accordingly, dismissed.

22. Copy of the judgment and record of the courts below be also transmitted to the courts below concerned.

(2016) 9 ILRA 374
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 1845 Of 1982

Mahendra & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellants:
Mohan Chandra, Ravi Prakash Singh

Counsel for the Respondent:
A.G.A

Penal Code, 1860 — Ss. 394 & 397 — Robbery causing hurt — Conviction — Accused persons armed with guns and lathi entered *baithak* where hawkers were sleeping, looted goods and fired upon injured witness while committing robbery — Injured witness sustained firearm injury on hip and other victims received injuries by blunt objects — Held, prosecution successfully established charges under Ss. 394 and 397 IPC beyond reasonable doubt through trustworthy ocular and medical evidence.
Evidence — Injured witness — Evidentiary value — Injured witness having sustained firearm injury during occurrence held natural and reliable witness — Absence of enmity with accused and consistency of testimony with medical evidence lent strong assurance to prosecution case — Testimony of injured witness entitled to greater evidentiary weight.
Evidence — Identification in lantern light — Non-production of lantern — Effect — Occurrence took place at midnight and witnesses identified accused in light of lantern burning at spot — Mere non-production of lantern during trial not fatal where FIR promptly mentioned source of light and witness satisfactorily explained that lantern had broken prior to trial.
Criminal Trial — Lapses in investigation — Effect on prosecution case — Failure of Investigating Officer to seize bloodstained clothes of injured witness not sufficient to discard otherwise credible testimony of eyewitnesses — Accused cannot derive benefit from mere omission or negligence on part of investigating agency.
Criminal Appeal against conviction — Duty of appellate court — Appellate court while hearing appeal against conviction under S. 374 CrPC obliged to independently reassess and reappreciate evidence and deal with submissions raised by accused — Conviction affirmed after fresh appraisal of oral and documentary evidence.
Penal Code, 1860 — S. 397 — Minimum sentence — Reduction on ground of old age — Impermissibility — Surviving appellants sought reduction of sentence on account of advanced age — Rejected — Since offence under S. 397 IPC proved, statutory minimum sentence of seven years' rigorous imprisonment could not be reduced.
In Result: Appeal dismissed; conviction and sentence of surviving appellants under Ss. 394/397 IPC affirmed.

Cases cited:

1. Ishvarbhai Fuljibhai Patni Vs. State of Gujarat1995 Supreme Court Cases (Crl) 222
2. Lal Mandi v. State of West Bengal1995 Cri.L.J. 2659 (SC)
3. State of Punjab Vs. Hakam Singh(2005) 7 SCC 40
4. Jarnail Singh Vs. State of Punjab2009 (6) Supreme 526

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

1. The instant appeal filed on behalf of the accused appellants under section 374 Cr.P.C. is directed against judgment and orders dated 17th/19th July, 1982 passed by Sri B.N. Mohilay, the then Second Additional Sessions Judge, Moradabad in ST No. 328 of 1980 whereby, the appellants were convicted under sections 394/397 IPC and sentenced to undergo rigorous imprisonment of seven years.

2. During the pendency of the appeal, appellant no.1 Mahendra and appellant no.4 Natthan had died and their appeals stood abated.

3. Heard Sri Ravi Prakash Singh, Advocate, learned counsel for the appellant no.s 2 and 3, Sri B.P. Kashyap, learned AGA for the State-respondent and have gone through the records of the sessions trial and appeals.

4. The facts giving rising to the present appeal may be summarized as under:

5. On 3rd January, 1979 at 5.40 Dataram gave a written report at P.S. Bachhraun stating therein that in the previous night he along with Shankar, Mahendra, Surajpal, Maum Singh, Roop Ram and Dharm Pal residents of village Arjunpur Nagariya were sleeping in his *baithak*. These named persons were hawkers who used to sell goods at various places. Whenever they visited his village they used to stay with him. Lantern was burning at the door, where door leaves were not affixed. At about mid night Mahendra and Chandu Badhawan armed with guns, Khuda Bux armed with lathi and one Natthan resident of village Rasulpur armed with gun came to his *baithak* and Mahendra had inquired who were sleeping there. When he and other persons remained silent all the four miscreants started to rob goods of the said hawkers. Meantime Shankar tried to run away and raised alarm. Mahendra shot him from his gun which struck on the hip of Shankar, who fell down. At that they raised alarm. Miscreants had also beaten with *danda* Roopram and Dharmpal. Before villagers could come miscreants made their good escape. He and the said hawkers had identified the miscreants in the light of lantern. They had looted clothes, cosmetic articles, scales and weights and one wrist watch.

6. At this check FIR was scribed, case crime no. 2/1979 under section 394, 397 IPC was registered, investigation was entrusted to S.I. Sri R.S. Tomar who immediately started the investigation and examined the first informant Dataram, injured Shankar and Dharmpal. Thereafter reached the spot, took samples of blood stained and plain earth, found lantern at the appointed place in working condition. After conclusion of investigation he submitted the charge sheet against all the four named accused persons. All the four accused stood for trial before the Court of Session, where they were charged under section 394 read with section 397 IPC. They denied the charge and

claimed to be tried. On the conclusion of trial they were found guilty. Consequently convicted and sentenced as above.

7. Sri Ravi Prakash Singh, Advocate learned counsel appearing for the surviving appellants has submitted that it is a night occurrence. The sole source of light the alleged lantern was not produced in the court. Therefore, existence of lantern is doubtful. He further submits that enmity of Dataram with the appellants is admitted and it was Dataram who with the help of roaming hawkers had concocted a false case against the present appellant. He further submits that it is fake case. This fact can be gathered from the fact that no goods or articles belonging to Dataram were looted. He further submits that though three out of four alleged miscreants were claimed to be of the same village but they did not take precaution to cover their faces. This fact belies the veracity of prosecution version. In the last he has submitted that at present age of appellant no.2 Chandu is 78 years and age of appellant no.3 Khuda Bux is 77 years. On the basis of their advanced age he prays for reduction in sentence.

8. On behalf of the State-respondent these arguments have been repelled and it has been submitted that regarding non production of lantern Data Ram P.W.1 has specifically stated that before one year of his examination in court it had broken down. For this reason the learned AGA submits that there is justification for non production. In reference to second argument he submits that injured witnesses had no enmity with the appellant. They belonged to another village and another district. There is no reason that they would falsely depose against four innocent persons.

9. In reference to third argument, the learned AGA submits that the robbery took place in the *baithak* where hawkers were sitting and their goods were kept. It is natural that owner of the house would not keep his household goods in the *baithak*, therefore, there is no improbability that no good/article belonging to Dataram was looted.

10. In reference to 4th argument he submits that when the appellants had planned to loot strangers before going to commit robbery they might not have felt any need to cover their faces. In the last he has submitted that findings recorded by the learned trial Judge are well substantiated from the record. Cogent reasons have been given in support thereof. The appeal has no substance and deserves to be dismissed.

11. 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."

12. 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."

13. Before entering into the merits of the argument I think it is expedient to place on record broad features of the evidence adduced on behalf of the parties. In documentary evidence on behalf of the prosecution besides of her police paper written report Ext. Ka-1, FIR Ext-Ka6, Copy of the report of the general diary Ext. Ka-7, Recovery memo of blood stained and plain earth Ext. Ka-2, Injury report of Shanker Pal Ext. Ka-3, Injury report of Roop Ram Banjare Ext. Ka-4, Injury report Dharm Pal Ext. Ka-5, Site plan with index Ext. Ka-8, charge-sheets Ext. Ka-9 and Ext. Ka-10 were filed.

14. In oral evidence 7 witnesses were examined. Summary of their testimonies is as under:

15. Dataram P.W.1 is the first informant. He has proved the written report Ext. Ka-1 and memo of taking samples of blood stained and plain earth Ext. Ka-2. He has reiterated the facts stated in the first information report.

16. Shankar P.W.2 is one of the hawker. He is an injured witness. He has supported the prosecution version as contained in the FIR.

17. Dharmpal P.W.3 is the injured witness. He has reiterated the version as stated by Shankar P.W.2.

18. Dr. Satish Kumar Badal, P.W.4 is the medical officer. He on 3rd January, 1979 at PHC, Dhanaura has medically examined Shankar, Roop Ram and Dharmpal. He has prepared their injury reports and proved them as Ext. Ka-3 and Ka-4. He medically examined Shankar on that day at 7.45 A.M. In the injury report he recorded the following injuries:

(1) One lacerated wound on right hip, 6 cm x 4 cm x 2 cm obliquely measured, skin edges ragged. Blackening and Scorching were present. Tissues were divided unevenly. Shape of the wound was uneven. No wound of exit was found.

(2) One abrasion on lateral aspect of right elbow joint, 0.5 cm x 0.5 cm.

(3) Multiple contusions from left side of back in an area of 8 cm x 4 cm, 8 cm. below tip of shoulder.

19. For injury no.1 x-ray was advised. According to the witness injury no.2 and 3 were simple. Their duration was upto 12 hours. Injury no.1 was caused by bullet. Injury nos. 2 and 3 were caused by hard object. These injuries could have been sustained in the mid night of 2/3-1-1979.

20. He medically examined Roop Ram at 7.55 A.M. on that day and recorded the following injuries in Ext. Ka-4.

(1) One lacerated wound on scalp 2 cm x 0.5 cm x scalp deep, 14 cm. above from the left ear.

(2) One abrasion on left elbow joint posteriorly, 1 cm. x .5 cm.

21. According to him both the injuries were simple, caused by hard and blunt object. Injury no.2 could have been caused by friction. Duration was between 0 to 12 hours. They could have been caused in the mid night of 2nd/3rd January, 1979 on the same day at 8.10 A.M.

22. On the examination on the person of Dharmpal he could not find any external mark of injury. The injured complaint pain in left arm.

23. Constable Ram Kumar Sharma P.W.5 on 3.1.1979 took these injured to PHC Dhanaura for medical examination.

24. Constable Girdhari Singh P.W.6 is the scribe of check FIR. He has proved check FIR Ext. Ka-3. Copy of the report of the general diary Ext. Ka-7.

25. S.I. R.S. Tomar P.W.7 is the Investigating Officer. He has given details of steps taken during the course of investigation. He has proved the site plan Ext. Ka-8, memo of taking of samples of blood stained and plain earth Ext. Ka-2, charge-sheet Ext. Ka-9 and Ka-10.

26. Before the trial court defence was of simple denial and false prosecution on account of enmity. After prosecution evidence statements of accused persons were recorded under section 313 Cr.P.C. wherein the accused persons denied the facts stated by the prosecution witnesses. According to deceased appellant Mahendra he had enmity with Dataram. Witnesses were of the patti of Dataram. Rest of the accused persons also reiterated the said facts.

27. In the defence no evidence was given.

28. Barring last argument the arguments advanced on behalf of the surviving appellants relate to appreciation of evidence by the learned trial Judge, therefore, proper course to examine the merits of these arguments is to re-examine and re-assess the evidence of prosecution, specially in the light of the grounds taken in the memo of appeals and arguments advanced in support thereof.

29. Dataram, P.W.1 had sustained no injury but he is the first informant and considering the distance of 8 km from his village to the police station, he had lodged the FIR promptly and took the injured for treatment, therefore, his presence at the time of occurrence appears to be natural. The occurrence took place in his *baithak* in the mid night. For this reason his presence is also probable. I have no hesitation in holding him to be natural and probable witness. The next question is whether he had an opportunity to see the occurrence. The only objection raised on behalf of the appellant is that there was no light at the time of occurrence because the lantern was not produced, in the light of which the witnesses claim to have seen occurrence and identified the miscreants. Since he had given reason for non production of lantern and source of light was mentioned in the promptly lodged FIR, I am of the opinion that at the time of occurrence lantern was burning and in its light the witnesses had opportunity to see the occurrence and identify the miscreants.

30. During cross examination his testimony remained unshaken. One objection against his truthfulness has been taken on behalf of the appellants is that he claims that clothes of injured Shanker were stained with blood and this witness claims to have taken those clothes to police station and produced them before the investigating officer but those clothes were not taken into possession by the investigating officer. Whether on the basis of lapse on the investigating officer testimony of the witnesses can be discarded. To this question my answer is that the witness had done all, which could have been done by any law abiding person. He could not be blamed for omission of the investigating officer, therefore, on the lapse of investigating officer I am not

inclined to reject his testimony. My opinion is fortified by the observation of the Hon'ble Apex Court made in the case of **State of Punjab Vs. Hakam Singh (2005)7 SCC 40**.

31. Now the question remains whether on account of previous litigation with Dataram evidence of this witness can be disbelieved. The witness has admitted that his motor of tube-well was stolen. He had lodged FIR against Ram Kumar, brother of deceased appellant-Mahendra. His frank admission of this fact persuades me that on account of that theft had the witness was deposing falsely, he would not have given a straight answer to this question. I think he is a truthful witness.

32. Shanker P.W.2 is an injured witness. He received bullet injury on his hip. This fact even has not disputed by the defence. He is also one of the hawkers whose goods were looted. He is a natural and probable witness. In the light of lantern he had opportunity to see the occurrence. He has no enmity with the appellants. He has withstood the test of cross examination successfully. I do not find any major contradiction in his testimony. In my opinion he is a trustworthy witness. My view is fortified by the observation of the Hon'ble Apex Court made in the case of **Jarnail Singh Vs. State of Punjab 2009 (6) Supreme 526**.

33. Dharmpal P.W.3 is also one of the hawkers who was sleeping in the *baithak* and his goods were looted though he sustained no visible injury but considering the fact that he was sleeping with his friends at the *baithak* of Dataram his presence at the spot at the relevant time is natural and probable. He had opportunity to see the occurrence and identify the miscreants. He withstood the test of cross examination successfully. He is an independent witness. His testimony inspires confidence of the Court.

34. Rest of the witnesses are formal in nature. While reassessing and re-examining the evidential value of the witnesses all the grounds raised in support of the appeal have been dealt with and found without substance.

35. The last argument that appellants are of advanced age would not help the surviving appellants because charge under section 394 IPC stood proved beyond reasonable doubt. Causing bullet injury during the commission of robbery also proves the charge under section 397 IPC beyond reasonable doubt. Under section 397 IPC seven years' rigorous imprisonment is minimum sentence. For this reason I do not think any interference can be made in the sentence awarded by the learned trial Judge.

36. In view of above, the appeal has no substance. Conviction and sentences of appellant nos. 2 and 3 are hereby affirmed and their appeal is dismissed.

37. Appellants are in jail. They shall serve out their sentences.

(2016) 9 ILRA 381
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE BHARAT BHUSHAN, J.

Criminal Appeal No.- 1883 Of 2013

Sher Singh @ Sheru **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Dharmendra Singhal, Babit Kumar, J.S. Audichya, Rajul Bhargava

Counsel for the Respondent:
Government Advocate

Juvenile Justice (Care and Protection of Children) Act, 2000 — Ss. 7-A, 20, 52 & 53 and Juvenile Justice Rules, 2007 — Rule 12 — Claim of juvenility after rejection by Juvenile Justice Board — Effect of finality of earlier orders — Appellant convicted for kidnapping for ransom raised plea of juvenility on basis of matriculation certificate showing date of birth as 15.10.1986 — Earlier claim of juvenility had been rejected by Juvenile Justice Board on medical opinion and subsequent appeals dismissed — Question referred whether plea could again be entertained in criminal appeal despite earlier orders attaining finality — Held, beneficial provisions of Juvenile Justice Act permit claim of juvenility to be raised at any stage, even after final disposal of proceedings, if determination was not made in accordance with procedure prescribed under Rule 12 of Rules, 2007.

Juvenile Justice — Determination of age — Primacy of matriculation certificate — Rule 12(3) mandates hierarchy of evidence for age determination — Matriculation or equivalent certificate to be treated as conclusive proof of age, and medical opinion can be sought only in absence of documentary evidence specified in Rule 12(3)(a) — Since matriculation certificate showing appellant's date of birth was produced and remained unrebutted, appellant held juvenile on date of occurrence.

Juvenile Justice — Claim of juvenility — Stage of raising plea — Proviso to S. 7-A expressly permits claim of juvenility to be raised before any court at any stage, including after final disposal of case — Object of legislation being welfare-oriented and reformative, technical rules of finality or limitation cannot defeat substantive statutory protection available to juvenile.

Juvenile Justice — Beneficial legislation — Liberal interpretation — Juvenile Justice Act, 2000 enacted to advance constitutional and international obligations for protection and rehabilitation of children in conflict with law — Courts required to adopt liberal approach in extending benefits of juvenility wherever statutory conditions are satisfied.

Juvenile Justice — Medical opinion vis-à-vis documentary evidence — Earlier determination of age solely on medical opinion without considering matriculation certificate not in conformity with Rule 12 of Rules, 2007 — Such determination not conclusive and liable to be reconsidered.

Juvenile Justice — Pending proceedings including appeal — Applicability of amended provisions — Explanation to S. 20 and Rule 97 of Rules, 2007 make provisions applicable to all pending trials, appeals, revisions and criminal proceedings irrespective of whether accused had ceased to be juvenile by time claim was raised.

Reference Answered: Full Bench held that claim of juvenility can be raised and reconsidered even after earlier rejection if determination was not in accordance with Rule 12 of Rules, 2007; doctrine of finality cannot override statutory mandate under Ss. 7-A and 20 of Juvenile Justice Act, 2000.

Cases cited:

1. Pratap Singh v. State of Jharkhand(2005) 3 SCC 551
2. Hari Ram v. State of Rajasthan(2009) 13 SCC 211
3. Abuzar Hossain @ Gulam Hossain v. State of West Bengal(2012) 10 SCC 489
4. Abdul Razzaq Vs. State of U.P.(2015) 15 SCC 637
5. Munney @ Rahat Jan Khan Vs. State of U.P.(2006) 12 SCC 697
6. Jameel Vs. State of Maharashtra(2007) 11 SCC 420
7. Vimal Chadha Vs. Vikas Chaudhary(2008) 8 SCALE 608
8. Babloo Pasi Vs. State of Jharkhand(2008) 13 SCALE 137
9. Ranjit Singh Vs. State of Haryana(2008) 9 SCC 453
10. Chief Forest Conservator (Wildlife) v. Nisar Khan(2003) 4 SCC 595
11. National Insurance Co. Ltd. v. Swaran Singh(2004) 3 SCC 297
12. Jalan Trading Co. (P) Ltd. v. Mill Mazdoor UnionAIR 1967 SC 691
13. Union of India v. Naveen Jindal(2004) 2 SCC 510
14. State of U.P. v. Johri Mal(2004) 4 SCC 714
15. Birad Mal Singhvi v. Anand PurohitAIR 1988 SC 1796
16. Sushil Kumar v. Rakesh Kumar(2003) 8 SCC 673
17. Union of India v. Sugauli Sugar Works (P) Ltd.(1976) 3 SCC 32
18. Cox and Kings (Agents) Ltd. v. WorkmenAIR 1977 SC 1666

(Delivered by Hon'ble V.K. Shukla, J.)

1. Kidnapping for ransom of a 3 year old child and his recovery in a police raid led to a trial by the Sessions Court in which the appellant has been convicted by the judgement dated 15.4.2013.

2. In this appeal, an issue of juvenility has been raised in the background that the incident in which the appellant is involved is of 15th/16th May 2003. The appellant claims that his date of birth recorded in the High School Examination (Matriculation) record is 15th October 1986 and as such on the date of the incident, he had not attained the age of 18 years, consequently, he was entitled to the benefit of being a juvenile as contemplated under the Juvenile Justice (Care and Protection of Children) Act, 2000 read with the the Juvenile Justice (Care and Protection of Children) Rules 2007 framed thereunder.

3. What appears from the record is that the appellant had moved an application for declaring him to be juvenile before the concerned Court in Session Trial No. 188 of 2004. The prosecution had moved an application for conducting a joint trial of this case along with the Session Trial No. 56-A of 2004 and 188-A of 2004.

4. The application moved for declaring the appellant a juvenile in Session Trial No. 188 of 2004 was sent to the Juvenile Justice Board and in that file, vide order dated 5.9.2005, the claim of the appellant to declare him a juvenile in Case Crime No. 147 of 2004 and Case Crime No. 148 of 2004, the Juvenile Justice Board rejected the plea of the appellant after getting a medical report from the Chief Medical Officer, Mathura dated 4.7.2005. The order dated 5.9.2005 categorically records that since no other evidence was adduced the parties agreed for the disposal of the application and it was held that the applicant was aged about 19 years on the date of the incident in the aforesaid case crime numbers.

5. After almost four years thereafter, a prayer appears to have been made in Session Trial No. 188-A of 2004 connected with the same incident praying for declaration of the appellant in the said Session Trial as a juvenile. The matter was examined by the Juvenile Justice Board and on 19.11.2009, the prayer for declaring him a juvenile was rejected by the Juvenile Justice Board against which the appellant filed an appeal on 19.9.2011 in terms of Section 52 of the 2000 Act after a period of almost two years. It appears that at the stage of appeal the matriculation certificate was adduced and pressed for the first time as it conformed to the 2007 Rules. In these proceedings, a reference was made of the application moved for declaring the appellant to be juvenile bearing no. 35-Kha. This was the application, which was moved for sending the file to the Juvenile Justice Board, but prior to that, after the order dated 5.9.2005 referred to hereinabove, a request had been made to send the file to the learned Sessions Court.

6. Thus two sets of orders came into existence in relation to the claim of juvenility of the appellant, one dated 5.9.2005 and the other dated 19.11.2009.

7. The appeal, which was against the order dated 19.11.2009 was dismissed on 29.9.2011 and the appellate court recorded all the above noted facts in the said order. What appears from the order dated 29.9.2011 is that this contention of the appellant about declaring him to be a juvenile was dismissed on the observations that were noted including the observation that no appeal had been filed against the order dated 5.9.2005 passed earlier in relation to S.T. No. 188 of 2004.

8. Faced with this at this stage, the appellant filed an Appeal No. 153 of 2012 against the order dated 5.9.2005, which was dismissed on 4.2.2013 firstly, on the ground that the appeal had been presented after almost seven years and there was no reason to condone the delay and secondly, the appellant had full knowledge of the order dated 5.9.2005, that was subject matter of consideration by the Juvenile Justice Board in the subsequent order dated 19.11.2009 and dismissal of the appeal on 29.9.2011.

9. These facts have been mentioned clearly in the appellate order dated 4.2.2013.

10. The appellant, thereafter probably realising the legal obstruction on account of the order dated 5.9.2005 having become final, preferred Writ Petition No. 3438 of 2013 which was dismissed as withdrawn treating it to be infructuous vide order dated 13.10.2014 but with an observation that the right of the petitioner to raise the issue of juvenility shall not be affected in the present appeal.

11. The judgment in the writ petition dated 13th October 2014 is extracted hereunder :

"Learned counsel for the petitioner submitted that during the course of trial, the petitioner moved an application under Section 7 (a) of the Juvenile Justice Act, 2000 to declare him as juvenile. However, that application was rejected by the court concerned and accordingly, the petitioner was prosecuted under the general criminal law and was convicted by the trial court. Against the said judgment and order of conviction, the petitioner has already preferred criminal appeal in this Court.

Thus, this writ petition has now become infructuous. Learned counsel for the petitioner prays to withdraw this writ petition.

Accordingly, this writ petition is dismissed as withdrawn.

However, it may not affect the right of the petitioner to raise the issue of juvenility in the appeal pending in this Court. "

12. These peculiar facts, about the subsequent claim of juvenility emanating from the order dated 19.11.2009 rejecting the claim on the ground of excessive delay, and earlier rejection dated 5.9.2005 that was challenged subsequently in appeal, after rejection of the appeal against the order dated 19.11.2009 on 29.9.2011, gave rise to the writ petition that was dismissed on 13.10.2014 with observations noted therein.

13. A Division Bench that heard the appeal earlier passed the following order on 28.5.2015:-

"Hon'ble Bala Krishna Narayana, J.

Hon'ble Mohd. Tahir, J.

Heard learned counsel for the applicant-appellant, learned A.G.A for the State and perused the record.

Learned counsel for the applicant-appellant submitted that the applicant-appellant was juvenile at the time of occurrence in question, so this matter be referred to the Juvenile Justice Board, Mathura for ascertaining the age of the applicant-appellant at the time of occurrence in question.

In view of the submission of the applicant-appellant's counsel, this matter is referred to the Juvenile Justice Board, Mathura which shall after giving opportunity to the complainant / first informant and the State ascertain the age of the applicant-appellant at the time of the incident in question.

Let a copy of the F.I.R. and charge sheet submitted by the police along with the copy of the order be transmitted to the Juvenile Justice Board, Mathura through District Judge, Mathura for holding an inquiry for the aforesaid purpose. This Court expects that the inquiry shall be completed within a period of one month from the date of receipt of the copy of this order, where after the report shall be submitted by the Board. As soon as the report is received, the Registry shall list this appeal on 20.07.2015 before the appropriate Bench for passing appropriate order.

Order Date :- 28.5.2015"

14. Subsequently another Bench passed the following order on 20.7.2015:-

"Hon'ble Amreshwar Pratap Sahi,J.

Hon'ble Pramod Kumar Srivastava,J.

Heard Sri Dharmendra Singhal, learned counsel for the appellant.

A plea of juvenility was taken before the Juvenile Justice Board, which was rejected during the course of the trial itself. The appellant filed an appeal against the same which is stated to have been rejected on the ground of limitation. Against the said appellate order, a writ petition no. 3438 of 2013 was filed, but by the time the writ petition came to be decided, the trial court had already convicted the appellant.

The writ petition was, therefore, allowed to be withdrawn with liberty to take this plea of juvenility in this appeal itself.

Consequently, a supplementary affidavit dated 16.10.2014 alongwith an application was filed on which this court passed an order on 28.5.2015 referring the matter to the Juvenile Justice Board once again. What we find is that the issue of juvenility had become final but the writ petition was dismissed as withdrawn with the presumption that the issue has become infructuous. However, while permitting the withdrawal, the court observed that it shall not affect the right of the petitioner to raise issue of juvenility in this appeal. We find from the judgment of the trial court taking notice of this plea of juvenlity in paragraph-4 of the judgment and then after having found that the appellant was not a juvenile, it assumed jurisdiction of trial and has now finally convicted the appellant. In such a situation, Sri Singhal may explain as to how without setting aside or overcoming the order of juvenility that has already been passed, this Court can now proceed once the said issue has been noticed by the trial court while assuming jurisdiction to try the appellant and then proceeded to convict to him. Even otherwise the report of the Juvenile Justice Board has not yet arrived.

Let the matter come up with a fresh report from the court below on Monday i.e. 27.7.2015.

Order Date :- 20.7.2015"

15. The report and the order dated 17.7.2015 as desired has been furnished in a sealed envelop sent by the Juvenile Justice Board, Mathura. The same is extracted hereinunder:

"पत्रावली आज पेश हुई। प्रश्नगत पत्रावली माननीय उच्च न्यायालय इलाहाबाद, द्वारा कि0 अपील संख्या 1883/2013 शेरसिंह उर्फ शेरू बनाम उ0प्र0 राज्य में इस निर्देश के साथ किशोर न्याय परिषद मथुरा को प्राप्त हुई थी कि किशोन न्याय परिषद् मथुरा माननीय उच्च न्यायालय के आदेश की प्रति प्राप्त होने के एक माह के अन्दर प्रार्थी शेरसिह उर्फ शेरू की प्रश्नगत घटना के समय आयु निर्धारण जॉच करें। उक्त आदेश के अनुपालन में परिषद द्वारा शेरसिंह उर्फ शेरू तथा वादी मुकदमा को नोटिस निर्गत किये गये। उभयपक्ष न्यायालय के समक्ष उपस्थित आये। उनकी बहस सुनी गयी।

वादी मुकदमा द्वारा किशोर न्याय परिषद मथुरा को यह अवगत कराया गया कि प्रश्नगत किशोर के सम्बन्ध में पूर्व में ही किशोर न्याय परिषद मथुरा द्वारा आयु निर्धारण जॉच की गयी है जिसमें अपने आदेश दिनांक 05–09–2005 को शेरसिंह उर्फ शेरू द्वारा कोई भी प्रपत्र नही प्रस्तुत किया गया है। तब तत्कालीन किशोर न्याय परिषद मथुरा शैक्षिक अभिलेखों के अभाव में मैडीकल कराया गया। उक्त मैडीकल आख्या में उसकी आयु 21 वर्ष पायी गयी। जिसके आधार पर तत्कीलन किशोर न्याय परिषद मथुरा के प्रधान मजिस्ट्रेट एवं सदस्य द्वारा उसे घटना की तिथ्थ पर 19 वर्ष का पाते हुये उसे वयस्क घोषित किया गया। वादी मुकदमा द्वारा उक्त आदेश की छायाप्रति पत्रावली पर दाखिल की गयी है एवं इसके अतिरिक्त उनके द्वारा किशोर न्याय परिषद मथुरा के आदेश दिनॉक 05–09–2005 के विरूद्ध प्रस्तुंत अपील संख्य 113/2012 के आदेश की सत्यापित प्रति भी प्रस्तुत की गयी है। जिसके अवलोकन से विदित होता है कि दिनॉक 4–2–2013 को अपीलीय न्यायालय द्वारा उक्त अपील निरस्त कर दी गयी। पत्रावली पर वादी द्वारा एक अन्य आदेश जवैनाइल प्रकीर्ण वाद संख्या 34/2010 दिनांकित 29–09–2011 भी प्रस्तुत किया है जिसके अवलोकन से ज्ञात होता है कि प्रार्थी शेरसिंह उर्फ शेरू का उक्त प्रार्थना पत्र श्रीमान अपर जिला एवं सत्र न्यायाधीश न्यायालय संख्या–1 मथुरा द्वारा दिनॉक 29–9–2011 को निरस्त किया जा चुका है।

उक्त समस्त प्रपत्रों के अवलोकन से स्पष्ट है कि किशोर के सम्बन्ध में पूर्व में उसको पर्याप्त मौका दिये जाने के उपरान्त किशोर न्याय परिषद मथुरा द्वारा दिनांक 05–09–2005 को घटना की तिथि को उसे वयस्क पाते हुये उसे किशोर नहीं माना गया।

परन्तु चूँकि माननीय उच्च न्यायालय द्वारा किशोर न्याय परिषद मथुरा को घटना के समय उसकी आयु निर्धारण जॉच का आदेश दिया गया है। अतः यह परिषद माननीय उच्च न्यायालय के आदेश से बाध्य है। माननीय उच्च न्यायालय के उक्त आदेश के परिप्रेक्ष्य में किशोर न्याय परिषद मथुरा द्वारा प्रार्थी शेरसिह के पिता रामवीर सिंह को परीक्षित कराया गया। जिन्होंने अपनी मुख्य–परीक्षा में यह कथन किया है कि शेरसिंह उर्फ शेरू की जन्मतिथि 15–10–1986 है। सन 2003 में बृज आदर्श इण्टर कालेज मांट से हाईस्कूल की परीक्षा प्राईवेट दी थी। उसके पूर्व शेरसिंह उर्फ शेरू कक्षा 6 से 10 तक राष्ट्रीय इण्टर कालेज राया में पढ़ा था परन्तु 10 वीं में वहां फेल हो गया था। अन्य विद्यालयों में भी उसकी जन्मतिथि 15–10–1986 ही है। विद्वान सहायक अभियोजन अधिकारी द्वारा की गयी जिरह में उसने यह कहा है कि उसे अपने हर बच्चे की जन्मतिथि क्या है नही बता सकता। इसके अतिरिक्त इस साक्षी द्वारा अन्य कोई महत्वपूर्ण कथन नहीं किया है। किशोर न्याय परिषद मथुरा द्वारा बृज आदर्श इण्टर कालेज मांट के प्रधानाचार्य को शेरसिह से सम्बन्धित शैक्षिक अभिलेखों के साथ आहूत किया गया। उन्होंने अपनी मुख्य–परीक्षा में बताया है कि शेरसिह ने वर्ष 2005 में हाईस्कूल की परीक्षा उत्तीण की है जिसमें उसकी जन्मतिथि 15–10–1986 अंकित है। उनके द्वारा माध्यमिक शिक्षा परिषद द्वारा जारी कॉस लिस्ट की छाया प्रति स्वप्रमाणित करके दाखिल की गयी है, जिस पर प्रदर्श ख–1 अंकित किया गया। जिसके अवलोकन से विदित होता है कि शेरसिह पुत्र रामवीर की जन्मतिथि 15–10–1986 अंकित है। इसके अतिरिक्त इस साक्षी द्वारा प्रार्थी शेरसिह के हाईस्कूल अंकपत्र एवं प्रमाण पत्र को देखकर यह बताया गया कि यह उसके विद्यालय की है। जिसकी प्रति पर कमशः प्रदर्श ख–2 व प्रदर्श ख–3 डाले गये। विद्वान सहायक अभियोजन अधिकारी द्वारा की गयी जिरह में साक्षी ने बताया है कि छात्र की जन्मतिथि केसे अंकित की गयी है इसका उनके पास कोई साक्ष्य नही है। उसने कक्षा 9 तक की शिक्षा कहां से प्राप्त की। इसका भी कोई प्रमाण उनके पास नहीं है। वादी मुकदमा द्वारा अन्य कोई साक्ष्य प्रस्तुत नहीं किया गया।

यहॉ किशोर न्याय नियमावली 2007 का नियम 12 (3) का अवलोकन उचित प्रतीत होता है जिसमें यह धारित है कि किसी किशोर की आयु निर्धारण के समय वरीयताक्रम में साक्ष्य इस प्रकार लिये जावेंगे।

1– मैट्रिकुलेशन प्रमाण पत्र, यदि यह न हो तो,

2– प्रथम प्रवेश स्कूल का जन्म प्रमाण पत्र, यदि यह भी न हो तो,

3– नगर पालिका या पंचायत द्वारा जारी जन्म प्रमाण पत्र।

उक्त तीनों की अनुपस्थिति में चकित्सीय द्वारा निर्धारित आयु।

उक्त नियम के प्रावधानों के अनुसार प्रार्थी द्वारा मैट्रिकुलेशन प्रमाण पत्र, दाखिल किये गये है, जिनकी सम्पुष्टि उक्त विद्यालय के प्रधानाचार्य की साक्ष्य से भी हो रही है तथा पत्रावली पर अभियोजन या वादी मुकदमा की ओर से ऐसा कोई साक्ष्य दाखिल नहीं किया गया है जिससे इस शैक्षिक अभिलेखों की सत्यता संदिग्ध होती हो।

इस प्रकार उपरोक्त समस्त विवेचना एवं पत्रावली पर प्रस्तुत साक्ष्य के एकरूपेण परिशीलन के उपरान्त किशोर न्याय परिषद मथुरा का सर्वसम्मत मत है कि प्रश्नगत घटना दिनॉक 16–5–2003 की है जबकि शैक्षिक अभिलेखों के अनुसार प्रार्थी शेरसिह उर्फ शेरा की जन्मतिथि 15–10–1986 है। इस प्रकार घटना की तिथि पर उसकी आयु 16 वर्ष 7 माह 1 दिन आ रही है। अतः घटना की तिथि पर 18 वर्ष से कम आयु का पाये जाने पर वह विधि का उल्लंघन करने वाला किशोर घोषित किये जाने योग्य है।

आदेश

तदनुसार शेरसिंह उर्फ शेरा पुत्र रामवीर सिंह निवासी गली मवेशियान थाना राया जिला मथुरा को घटना की तिथि 16–05–2003 पर 18 वर्ष से कम आयु का पाये जाने के कारण विधि का उल्लंघन करने वाला किशोर घोषित किया जाता है।

आदेश नियमानुसार सील बन्द लिफाफे में माननीय जनपद न्यायाधीश महोगदय मथुरा के माध्यम से माननीय इलाहाबाद उच्च न्यायालय अविलम्ब प्रेषित हो।"

16. The appellant has been held to be aged less than 18 years on the date of the incident.

17. Faced with this situation, the Division Bench has framed following questions to be considered to lay down the law correctly:

(i) Whether the right of a juvenile to raise the issue of juvenility can be denied, by dismissing a writ petition as infructuous and then permitting him to raise the issue in a criminal appeal when the same issue had been raised before the Juvenile Justice Board and an appeal had been decided in accordance with Section 52 of the 2000 Act as in the present case, on applying the doctrine of finality?

(ii) Whether the law laid down by prescribing a procedure of allowing the question to be raised in a criminal appeal as an alternate substitute through a miscellaneous application under the judgment dated 13.10.2014 by the learned Single Judge is correct or not?

(iii) Whether in view of the law laid down by the Apex Court particularly in the case of Abuzar Hossain @ Gulam Hossain (supra) and Abdul Razzaq Vs. State of U.P. (supra), the

issue presently raised, would also stand covered by the ratio and the observations made therein or not ?

18. Shri Dharmendra Singhal, Advocate submits that the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2000 is a beneficial piece of legislation for the benefit of the juvenile and the scheme of Act would go to show that once it is substantiated from the record in question that the incumbent was juvenile on the relevant date i.e. commission of the offence, then he/she cannot be sentenced and for this purpose he has proceeded to point out that all such cases are liable to be reopened at any stage and even those matters that have attached finality are also liable to be reopened and in view of this, liberal view should be taken in the matter that would achieve the object of the Act and substantial justice should not be shackled by procedures as justice is not at all handmade of procedures and in view of this, once there is no order of determining age in consonance with sub-rule 3 of Rule 12 of The Juvenile Justice (Care and Protection of Children) Rules, 2007, the reference should be answered accordingly.

19. Shri Imran Ullah, learned Additional Advocate General, on the other hand, contended that closed chapter should not be permitted to be reopened and in view of this, the reference in question should be answered accordingly.

20. Shri Vimlendu Tripathi, Advocate appearing for the State also supplanted the argument advanced on behalf of the State by submitting that once a competent authority had proceeded to take a decision and full fledged remedial mechanism has been provided for to avail the said benefit and the same has been availed, then collateral challenge is not at all permissible in law and as such, the reference be answered accordingly.

21. In order to answer the issues that have been so raised, the legislative background as well as relevant statutory provisions holding the field will have to be looked into.

22. The Parliament felt it necessary that uniform juvenile justice system should be available throughout the country which should make adequate provision for dealing with all aspects in the changing social, cultural and economic situation in the country and there was also need for larger involvement of informal systems and community based welfare agencies in the care, protection, treatment, development and rehabilitation of such juveniles and with these objectives in mind, it enacted Juvenile Justice Act, 1986 (for short, "1986 Act').

23. Looking to the working of Juvenile Justice Act, 1986 review of its working was carried out, and '1986 Act' was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, "2000 Act'). 2000 Act to carry forward the constitutional philosophy engrafted in Articles 15(3), 39(e) and (f), 45 and 47 of the Constitution and same also incorporates the standards prescribed in the Convention on the Rights of the Child, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and all other relevant international instruments. Clause (k) of Section 2 defines "juvenile" or "child" to mean a person who has not completed eighteenth

year of age. Clause (l) of Section 2 defines "juvenile in conflict with law" to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age on the date of commission of such offence. Chapter II of Juvenile Justice Act, 2000 deals exclusively with juveniles in conflict with law who are alleged to have committed offence which are otherwise punishable under the general law of crimes.

24. Section 3 of 2000 Act provides for continuation of inquiry in respect of juvenile who has ceased to be a juvenile. It reads as under:

"S.3 . Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.--Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."

25. Chapter II of 2000 Act deals with juvenile in conflict with law. This Chapter comprises of Sections 4 to 28. Section 4 provides for constitution of juvenile justice board and its composition. Section 5 provides for procedure, etc. in relation to juvenile justice board. Section 6 deals with the powers of juvenile justice board. Section 7 provides for the procedure to be followed by Magistrate not empowered under the Act. Section 18 of the Act prohibits joint proceedings and trial of juvenile and a person who is not a juvenile and the punishment that can be awarded to a juvenile has been provided for in Section 15 of the Act provides for the order that can be passed regarding juvenile. Relevant provisions i.e. Sections 6 is being quoted as under:

"S.6 . Powers of Juvenile Justice Board.--(1) Where a Board has been constituted for any district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

26. Section 49 of 2000 Act deals with presumption and determination of age. This Section reads as under:

"49 . Presumption and determination of age.--(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit)and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

27. Sections 52 and 53 deal with appeals and revision. Section 54 provides for procedure in inquiries, appeals and revision proceedings, which reads as follows:

52. Appeals.—

Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Session: Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from—

(a) any order of acquittal made by the Board in respect of a juvenile alleged to have committed an offence; or

(b) any order made by a Committee in respect of a finding that a person is not a neglected juvenile.

(3) No second appeal shall lie from any order of the Court of Session passed in appeal under this section.

53. Revision.--The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit: Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

"S.54 . Procedure in inquiries, appeals and revision proceedings.--(1)Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973(2 of 1974)."

28. In the State of U.P., in exercise of power conferred under Section 68 of the Juvenile Justice Care and Protection 2000 Act (Act No.56 of 2000), Rules have been framed known as, the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 (herein-after to be referred to as the 'U.P. Rules'). The relevant Rule for the purpose of consideration of issue raised before us is Rule 22. Rule 22 reads as follows:

"22. Procedure to be followed by a Board in holding inquiries and the determination of age.-

(1) In all cases under the Act the proceedings shall be conducted in as simple a manner as possible and care shall be taken to ensure that the juvenile or child against whom the proceedings have been instituted is given home like atmosphere during the proceedings.

(2) When witnesses are produced for examination, the Board shall be free to use the power under Section 165 of the Indian Evidence At, 1872, (Act No.1 of 1872), to question them so as to bring out any point that may go in favour of the juvenile or the child.

(3) While examining a juvenile or child and recording his statement, the competent authority shall be free to address the juvenile or child in any manner that may seem suitable, in order to put the juvenile or child at ease and to elicit the true facts, not only in respect of the offence of which the juvenile or child is accused, but also in respect of the home and social surroundings and the influence to which the juvenile or child might have been subjected.

(4) The record of the examination shall be in such form as the Board may consider suitable having record to the contents of the statement and circumstances in which it was made.

(5) In every case concerning a juvenile or child, the Board shall either obtain-

(i) a birth certificate given by a corporation or a municipal authority;

or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age.

(6) The State Government shall recognize voluntary organizations, which have 10 years experience of child welfare to supervise and submit periodical reports, as directed by the

Board regarding the orders passed under Clauses (b) and (c) of sub-section (1) of Section 15 of the Act.

(7) The Board shall, in Form-I, order a Probation Officer, or otherwise to conduct a special investigation, reporting on the character and antecedents of the juvenile or child with a view to assess the best possible mode for placement, such as, with the family, an institution or otherwise permissible under the Act.

(8_ When a juvenile or child is placed under the care of a parent or a guardian and the Board considers it expedient to place the juvenile or child under the supervision of a probation officer, it shall issue a supervision order in Form-II.

(9) The competent authority may, while making an order placing a juvenile under the care of a parent, guardian or fit person, as the case may be, direct such parent, guardian or fit person to enter into a bond in Form IV with or without sureties.

(10) Whenever the Board orders a juvenile or child to be kept in an institution, it shall forward to the Superintendent of such institution a copy of its order, in Form III with particulars of the home and parents or guardian and previous record.

(11) The juvenile or child shall be lodged in a home closest to place where he belongs.

(12) The Superintendent of an institution, certified as special home under sub-section (2) of Section 9 of the Act, shall be informed in advance by the Board before any juvenile or child is committed to it.

(13) The Superintendent of the said institution may, on receipt of the information, intimation in writing objections, if any, to the committal of the juvenile or child and the objections shall be taken into consideration by the Board before the juvenile or child is committed to the said institution.

(14) In case the Board orders the parent of the juvenile or child, or the juvenile or child to pay a fine, the amount realized shall be deposited in Government Treasury."

29. By Act 33 of 2006, the Parliament brought significant changes in 2000 Act. Section 7A provides for procedure to be followed when claim of juvenility is raised before any court. Section 20 dealt with pending cases. It reads as follows:

"S.7A. Procedure to be followed when claim of juvenility is raised before any court.--(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of

such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.

20. Special provision in respect of pending cases.--Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.--In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.] "

30. The provisions of Act No.33 of 2006 also introduces Section 20 in reference to pending cases by providing a clear cut provision that notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court or in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. A proviso has also been added that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile. The explanation provided to the same clearly proceeds to make a mention that in all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in

any Court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

31. From the perusal of the provisions that have been quoted above, it is clearly reflected that under '2000 Act', the inquiry in respect of the claim of juvenility was required to be conducted by the Competent Authority having jurisdiction over the proceedings and by means of Act No.33 of 2006 Section 7-A has been introduced in the '2000 Act', wherein for the first time in reference of claim of juvenility, which has been permitted to be raised before any Court or where is the Court is of the opinion that an accused person was juvenile on the date of commission of the offence, the Court is entitled to make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be. A proviso has been added to the same clearly providing that the claim of juvenility may be raised before any Court and it is to be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of the Act. Sub-Section 2 of Section 7-A clearly mentions that if the Court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders, and the sentence, if any, passed by a court shall be deemed to have no effect.

32. Thus this particular provision clearly entitles the Court to answer the issue of juvenility on being raised before the Court or even otherwise when Court is of the opinion that an accused person was juvenile on the date of commission of the offence, the Court shall make an enquiry and proceed accordingly.

33. By insertion of section 7-A, the legislative intent was clear inasmuch as the claim of juvenility could be raised before any Court at any stage, and the Court was conferred power to make an enquiry by taking such evidence as may be necessary to determine the age of such person with a rider that such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder. Legislative intent was also made clear by means of Section 64 of J.J. Act to extend benefit of the provisions of the said Act qua juvenile in conflict with law who were undergoing sentence for reviewing their respective case on the parameters of clause (l) of Section 2 and other provisions contained in the Act and the Rules and then taking consequential action. To confer power to the Central Govt. to frame model rules to carry out the purposes of the Act, a proviso to sub section (1) of section 68 was inserted by Act No.33 of 2006. The amended sub section (1) to section 68 along with its proviso reads as under:

"68. Power to make rules.--(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of the matter is made by the State Government and while making such rules, so far as practicable, they conform to such model rules."

34. Prior to the insertion of the proviso to sub section (1) of section 68 as well as sub section (3) of section 68 by Act No.33 of 2006, there was no provision enabling the Central Govt. to frame model rules in respect of all or any of the matters with respect to which the State Govt. could make rules under the said section. As a result by taking the aid of section 70, which enabled the Central Govt. to remove difficulties, Model Rules were framed in the year 2000, the validity of the same came for consideration before a 5 judges Bench of the Apex Court in the case of **Pratap Singh v. State of Jharkhand: (2005) 3 SCC 551. Hon'ble S. B. Sinha, J.,** one of the members of that Bench, in a separate judgment, partly dissenting from the majority view, discarded the Model Rules by holding that it had no statutory backing and held that the court thus would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of section 35 of the Indian Evidence Act. The relevant observations are contained in paragraphs 107 to 112 of the report, which reads as under:

"107. We, however, do not agree that the Model Rules have been framed in terms of the provisions of the Act so as to attract the principles that rules validly framed are to be treated as part of the Act. It is one thing that the rules validly framed are to be treated as part of the Act as has been held in Chief Forest Conservator (Wildlife) v. Nisar Khan and National Insurance Co. Ltd. v. Swaran Singh but the said principle has no application herein as in terms of the provisions of the said Act, the Central Government does not have any authority to make any rules. In the absence of any rule-making power it cannot refer to the omnibus clause of power to remove difficulty inasmuch as it has not been stated that framing of any model rule is permissible if a difficulty arises in giving effect to the provision of the Act. The Central Government is a statutory functionary. Its functions are circumscribed by Section 70 of the Act only. It has not been authorised to make any rule. Such rule-making power has been entrusted only to the State. The Central Government has, thus, no say in the matter nor can it exercise such power by resorting to its power "to remove difficulties". Rule-making power is a separate power which has got nothing to do with the power to remove difficulty. By reason of the power to remove difficulty or doubt, the Central Government has not been conferred with any legislative power. The power to remove doubt or difficulty although is a statutory power but the same is not akin to a legislative power and, thus, thereby the provisions of the Act cannot be altered. [See Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union]

108. The age of the delinquent juvenile, therefore, cannot be determined in terms of Model Rule 62. Any law mandating the court to take into consideration certain documents over others in determining an issue, must be provided for only by law. Only a validly made law can take away the power of the court to appreciate evidence for the purpose of determination of such a question in the light of Section 35 of the Indian Evidence Act. It cannot be done by the Central

Government in exercise of the executive power (See Union of India v. Naveen Jindal and State of U.P. v. Johri Mal.)

109. In Birad Mal Singhvi v. Anand Purohit this Court held:

"To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

(emphasis supplied)

110. In Sushil Kumar v. Rakesh Kumar this Court as regards determination of age of a candidate in terms of Section 36(2) of the Representation of the People Act, 1951 observed:

"32. The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of the onus of proof becomes academic [see Union of India v. Sugauli Sugar Works (P) Ltd. and Cox and Kings (Agents) Ltd. v. Workmen]. Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established."

This Court therein followed, inter alia, Birad Mal Singhvi v. Anand Purohit and several other decisions.

111. The Court, therefore, must determine the age of the appellant herein keeping in view our aforementioned findings that the relevant date for reckoning the age of the juvenile would be the date of occurrence and not the date on which he was produced before the Board.

112. The upshot of the aforementioned discussions is:

(i) In terms of the 1986 Act, the age of the offender must be reckoned from the date when the alleged offence was committed.

(ii) The 2000 Act will have a limited application in the cases pending under the 1986 Act.

(iii) The Model Rules framed by the Central Government having no legal force cannot be given effect to.

(iv) The court, thus, would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of Section 35 of the Indian Evidence Act."

35. It appears that the amendment brought by Act No.33 of 2006 was to obviate the outcome of the decision of the Apex Court in the case of Pratap Singh (supra), as has been observed in various decisions of the Apex Court in the case of Hari Ram v. State of Rajasthan:(2009) 13 SCC 211 has held as follows:

Section 7-A makes provision for a claim of juvenility to be raised before any Court at any stage, even after final disposal of a case and sets out the procedure which the Court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not. The aforesaid provisions were, however, confined to Courts, and proved inadequate as far as the Boards were concerned. Subsequently, in the Juvenile Justice (Care and Protection of Children) Rules, 2007, which is a comprehensive guide as to how the provisions of the Juvenile Justice Act, 2000, are to be implemented, Rule 12 was introduced providing the procedure to be followed by the Courts, the Boards and the Child Welfare Committees for the purpose of determination of age in every case concerning a child or juvenile or a juvenile in conflict with law. Since the aforesaid provisions are interconnected and lay down the procedures for determination of age, the said Rule is reproduced hereinbelow:

"12. Procedure to be followed in determination of Age.- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either

(i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) if the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

Sub-Rules (4) and (5) of Rule 12 are of special significance in that they provide that once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub- rule (3) the Court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a

written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the Court or Board after examining and obtaining any other documentary proof referred to in Sub-rule (3) of Rule 12. Rule 12, therefore, indicates the procedure to be followed to give effect to the provisions of Section 7A when a claim of juvenility is raised.

One of the problems which has frequently arisen after the enactment of the Juvenile Justice Act, 2000, is with regard to the application of the definition of "juvenile" under Section 2(k) and (l) in respect of offences alleged to have been committed prior to 1st April, 2001 when the Juvenile Justice Act, 2000 came into force, since under the 1986 Act, the upper age limit for male children to be considered as juveniles was 16 years. The question which has been frequently raised is, whether a male person who was above 16 years on the date of commission of the offence prior to 1st April, 2001, would be entitled to be considered as a juvenile for the said offence if he had not completed the age of 18 years on the said date. In other words, could a person who was not a juvenile within the meaning of the 1986 Act when the offence was committed, but had not completed 18 years, be governed by the provisions of the Juvenile Justice Act, 2000, and be declared as a juvenile in relation to the offence alleged to have been committed by him?

Read with Sections 2(k), 2(l), 7A and Rule 12, Section 20 of the Juvenile Justice Act, 2000, as amended in 2006, is probably the Section most relevant in setting at rest the question raised in this appeal, as it deals with cases which were pending on 1st April, 2001, when the Juvenile Justice Act, 2000, came into force. The same is, accordingly, reproduced hereinbelow :

"20. Special provision in respect of pending cases.-Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

[Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.]"

The Proviso and the Explanation to Section 20 were added by Amendment Act 33 of 2006, to set at rest any doubts that may have arisen with regard to the applicability of the Juvenile Justice Act, 2000, to cases pending on 1st April, 2001, where a juvenile, who was below 18 years at the time of commission of the offence, was involved. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1st April, 2001, when the Juvenile Justice Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000.

At this point it may be noted that the decision of the Constitution Bench in Pratap Singh's case (supra) was rendered at a point of time when the amendments to Sections 2(l) and 20 and the introduction of Section 7-A had not yet been effected, nor was Rule 12 of the 2007 Rules available. Several decisions on the applicability of the 2000 Act to children who were above 16 but below 18 years on the date of commission of the offence have been rendered after the Juvenile Justice Act, 2000, came into force and several others were rendered after the amendments were introduced in the said Act by Amendment Act 33 of 2006 and the introduction of the 2007 Rules. The decisions rendered by this Court and the High Courts prior to 1st April, 2001, when the Juvenile Justice Act, 2000, came into force and thereafter can, therefore, be divided into two groups. The decision in Pratap Singh's case (supra) and in the case of Munney @ Rahat Jan Khan vs. State of U.P. [(2006) 12 SCC 697] fall into the first category, whereas the decisions in Jameel vs. State of Maharashtra [(2007) 11 SCC 420], Vimal Chadha vs. Vikas Chaudhary [(2008) 8 SCALE 608], Babloo Pasi vs. State of Jharkhand [(2008) 13 SCALE 137] and Ranjit Singh vs. State of Haryana [(2008) 9 SCC 453] fall into the second category. Although, the Constitution Bench decision in Pratap Singh's case (supra) and Munney's case (supra) are not really relevant since they have been rendered prior to 22nd August, 2006, when the Amending Act 33 of 2006 came into force, they assume a modicum of significance since they have been referred to and relied upon even after the Amending Act and the 2007 Rules came into force on 22.8.2006 and 26.10.2007, respectively.

28. Of the decisions rendered after the amendments effected in 2006 to the Juvenile Justice Act, 2000, the first decision of note is that of Jameel's case (supra) rendered on 16.1.2007 wherein the amendments to the Act effected by the Amendment Act 33 of 2006, which came into effect on 22.8.2006, were not even noticed. The next decision rendered on 27.5.2008 is in the case of Vimal Chadha's case (supra), wherein, although, the amendment of the Act and the introduction of the Juvenile Justice Rules, 2007, were brought to the notice of the Court, the same were not considered and the decision was rendered in the light of the decision rendered in Pratap Singh's case (supra) and other cases decided prior to 1.4.2001.

The next decision rendered on the same point on 11.9.2008 was the decision in Ranjit Singh's case (supra) wherein also the amendments to Section 2(l) and 20 and the introduction of Section 7-A in the Juvenile Justice Act, 2000, and the introduction of the 2007 Rules had not been considered and the decision passed sub silentio.

35A. In fact, after the amendment, the Central Govt. made and notified the Rules, 2007, vide notification dated 26.10.2007, and those Rules came into effect from the date of the publication of notification in the Gazette of India, (Extra.), Part II, Section 3(i), dt. 26.10.2007.

36. The relevant provisions governing the procedure to be followed in determination of age of a juvenile in conflict with law is contained in Rule 12, which provides as follows:

"12. Procedure to be followed in determination of Age.--(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

37. Rule 96 of the Central Rules provides that until the new rules conforming to these rules are framed by the State Govt. concerned under Section 68 of the 2000 Act, the Central Rules shall mutatis mutandis apply in that State.

38. Rule 97 of the Central Rules provides that all pending cases, which have not received finality, shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder. For convenience Rule 97 of the Central Rules is being extracted herein below:

"97. Pending Cases.--(1) No juvenile in conflict with law or a child shall be denied the benefits of the Act and the rules made thereunder.

(2) All pending cases which have not received a finality shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder.

(3) Any juvenile in conflict with law, or a child shall be given the benefits under sub-rule (1) of this rule, and it is hereby clarified that such benefits shall be made available to all those accused who were juvenile or a child at the time of commission of an offence, even if they cease to be a juvenile or a child during the pendency of any inquiry or trial.

(4) While computing the period of detention or stay or sentence of a juvenile in conflict with law or of a child, all such period which the juvenile or the child has already spent in

custody, detention, stay or sentence of imprisonment shall be counted as a part of the period of stay or detention or sentence of imprisonment contained in the final order of the court or the Board."

39. In this regard it would be useful to refer to the decision of the Apex Court in the case of ***Ashwani Kumar Saxena vs. State of M.P. 2012 Law Suit(SC) 607***. In this case, the Apex Court, after considering various judgments as well as the provisions of the Act, 2000 as also the Rules, 2007, in paragraphs 30 to 32 of the report, observed as follows:

"30. Consequently, the procedure to be followed under the JJ Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under Section 7-A of the Act. In many of the cases, we have come across, it is seen that the criminal courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the penal laws forgetting the fact that the specific procedure has been laid down in Section 7-A read with Rule 12.

31. We also remind all courts/Juvenile Justice Boards and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate, etc. mentioned in Rules 12(3)(a)(i) to (iii). The courts in such situations act as a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.(Emphasis Supplied)

40. After observing as above, the Apex Court deprecated the practice of the courts in making a roving enquiry with regards to the correctness of the date of birth entered in matriculation or equivalent certificates or other documents unless those documents or certificates were fabricated or manipulated. The relevant observations of the apex court are contained in paragraphs 34 and 35 of the report, which are being reproduced herein below:

"34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

35. We have come across several cases in which the trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted." (Emphasis Supplied)

41. Apex Court in the case of ***Abuzar Hossain @ Gautam Hussain vs. State of West Bengal in Criminal Appeal No.1193 of 2006 decided on 10.10.2012*** has held as follows:

"Now, we summarise the position which is as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

(ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh2 and Pawan8 these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry

and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

(vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised."

42. The judgment in Ashwani Kumar Saxena's case (supra) has been consistently followed by the apex court in ***Jodhbir Singh v. State of Punjab: (2012) 13 SCC 591; Ranjeet Goswami v. State Of Jharkhand: (2014) 1 SCC 588; and Kulai Ibrahim @ Ibrahim v. State*** represented by the Inspector of Police, B-I, Bazar Police Station, Coimbatore: (2014) 12 SCC 332.

43. The scope of Section 7A of the Act and Rule 12 of the 2007 Rules again came up for consideration before Apex Court in ***Dharambir v. State (NCT of Delhi) and Another [(2010) 5 SCC 344***], wherein the appellant was convicted for offences under section 302/34 and 307/34 IPC for committing murder of one of his close relatives and for attempting to murder his brother. The appellant was not a juvenile within the meaning of 1986 Act, when the offences were committed but had not completed 18 years of age on that date.

44. Apex Court keeping in view the language of the Explanation to Section 20 that in all pending cases, which would include not only trial but even subsequent proceedings by way of revision or appeal etc., the determination of juvenility of a juvenile has to be in terms of clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April 2001, when the Act of 2000 came into force, and the provisions of the Act would have applied as if the said provision had been in full force for all purposes and for all material times when the alleged offence was committed. Apex Court held clause (l) of Section 2 of the Act 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of the commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction

by the regular court and also empowers the Court, while maintaining the conviction to set aside the sentence imposed and forward the case to the J.J. Board concerned for passing sentence in accordance with the provisions of the 2000 Act.

45. Apex Court in ***Mohan Mali and Another v. State of Madhya Pradesh [(2010) 6 SCC 669***] has again considered the scope of Section 7A of the Act, wherein plea of juvenility was raised before Apex Court by the convict undergoing sentence. The appellant therein was convicted under sections 302/34, 326/34 and 324/34 IPC and was sentenced to life imprisonment and had already undergone 9 years of imprisonment. In that case a copy of the birth certificate issued by the Chief Registrar (Birth and Death) Municipal Corporation, Dhar u/s 12 of the Birth and Death Registration Act 1969 maintained by the Corporation was produced. Apex Court noticed that as per that certificate the date of birth of the accused was 12.11.1976. After due verification, it was confirmed by the State of Madhya Pradesh that he was a juvenile on the date of commission of the offence and had already undergone more than the maximum sentence provided under Section 15 of the 2000 Act by applying Rule 98 of the 2007 Rules read with Section 15 and 64 of the 2000 Act. The accused was ordered to be released forthwith.

46. In ***Jabar Singh v Dinesh and Another [(2010) 3 SCC 757],*** Apex Court while examining the scope of Section 7A of the Act and Rule 12 of the 2007 Rules and Section 35 of the Indian Evidence Act took the view that the trial court had the authority to make an enquiry and take necessary evidence to determine the age. Holding that the High Court was not justified in exercise of its revisional jurisdiction to upset the finding of the trial court, remitted the matter to the trial court for trial of the accused in accordance with law treating him to be not a juvenile at the time of commission of the alleged offence. Apex Court noticed that the trial court had passed the order rejecting the claim of juvenility of respondent No.1 therein on 14.02.2006, the Rules, including Rule 12 laying down the procedure to be followed in determination of the age of a juvenile in conflict with law, had not come into force. Apex Court opined that the trial court was not required to follow the procedure laid down in Section 7A of the Act or Rule 12 of the Rules and therefore in the absence of any statutory provision laying down the procedure to be followed in determining a claim of juvenility raised before it, the Court had to decide the claim of juvenility on the materials or evidence brought on record by the parties and section 35 of the Evidence Act.

47. In ***Anil Agarwal and Another v. State of West Bengal [(2011) 2 SCALE 429],*** Apex Court while examining the claim of juvenility made at a belated stage took the view that the appellants were minor at the time of the alleged offence and hence should not be tried along with the adult co-accused. The trial court dismissed the appellant's application as not maintainable as it had been filed at a belated stage. The High Court, in revision, while holding that the application had been made belatedly, granted liberty to appellants to raise their plea of juvenility and to establish the same before the Sessions Judge at the stage of the examination under section 313 Cr.P.C.

48. Reversing the finding recorded by the High Court, Apex Court took the view that Section 7A of the Act, as it now reads, gives right to any accused to raise the question of juvenility at any point of time and if such an issue is raised, the Court is under an obligation to make an inquiry and deal with that claim. The court held Section 7A has to be read along with Rule 12 of the 2007 Rules. Apex Court, therefore, set aside the order of the High Court and directed the trial court to first examine the question of juvenility and in the

event, the trial court comes to a finding that the appellants were minor at the time of commission of the offence, they be produced before the J.J. Board for considering their cases in accordance with the provisions of the 2000 Act.

49. We may in the light of the judgments referred to herein before and the principles laid down therein while examining the scope of Section 7 A of the Act, Rule 12 of the 2007 Rules and Section 49 of the Act examine the scope and ambit of inquiry expected of a court, the J.J. Board and the Committee while dealing with a claim of juvenility.

50. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Statute requires the Court or the Board only to make an "inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules, 2007. The expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

51. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also to be borne in mind at the point of time when enquiry of juvenility is underway. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-assert the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry.

52. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word "inquiry' has not been defined under the J.J. Act, but Section 2(y) of the J.J. Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

53. "Inquiry" as defined in Section 2(g), Cr.P.C. reads as follows:

54. "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

55. The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

56. "Investigation" as defined in section 2(h), Cr.P.C. reads as follows:

57. "Investigation" includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

58. The expressions "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure."

59. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating some offences committed. We find in very many cases that the Court /the J.J. Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the J.J. Act, following the procedure laid under Rule 12 and not following the procedure laid down under the Code.

60. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules, when the claim of juvenility is raised before the court exercising powers under section 7A of the Act.

61. "Age determination inquiry" contemplated under section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

62. Once the court, following the above mentioned procedure, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the Juvenility on its determination.

63. On these parameters the issue that has been raised is to be looked into.

64. Under the The Juvenile Justice (Care and Protection of Children) Act, 2000, prior to insertion of Section 7-A, claim of juvenility was required to be decided on the parameters of the provisions as are contained under The Juvenile Justice (Care and Protection of Children) Act, 2000 read with The Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 and on the adjudication being made

on the aforementioned parameters, if decision was done by the Board, then appeal was to be filed under Section 52 of The Juvenile Justice (Care and Protection of Children) Act, 2000 that gives right to any person aggrieved against the order made by Competent Authority under the said Act to prefer an appeal to the Court of Sessions. The High Court has been conferred with revisional power under Section 53 by providing that the High Court may at any point of time either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit.

65. Thus in proceedings so undertaken under The Juvenile Justice (Care and Protection of Children) Act, 2000, where the issue of juvenility is required to be answered after introduction of Section 7-A of J.J. Act such an issue of juvenility has to be answered strictly in consonance with the provisions as contained under Rule 12 of 2007 Rules.

66. Sub-rule (5) of Rules 12 talks of cases where further enquiry or otherwise is required, therein the Court or the Board, after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of Rule 12, is not empowered to make any further enquiry. Sub-rule 6 of Rule 12 clearly provides that the provision contained in this Rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

67. The scheme of the Act would thus clearly reflect that once Section 7-A has been introduced under The Juvenile Justice (Care and Protection of Children) Act, 2000, thereafter in all the matter that come up before the Court therein either on application moved by the delinquent or on suo moto basis, the Courts are obligated to make an inquiry under the provisions that are provided under Rule 12 of 2007 Rules. All matters that have been decided not on the parameters of the The Juvenile Justice (Care and Protection of Children) Act, 2000 and The Juvenile Justice (Care and Protection of Children) Rules, 2007 are open to further inquiry to be conducted by the Court or the Board after examining and obtaining certificate referred to sub-rule 3 of Rule 12.

68. An adjudication of juvenility cannot be permitted to be accepted as final until and unless it is demonstrated before the Court that the juvenility in question has been determined on the parameters as are provided for in sub-rule 3 of Rule 12 of The Juvenile Justice (Care and Protection of Children) Rules, 2007.

69. The inevitable conclusion would be that where proceedings have been undertaken to make declaration of juvenile before the Board/Court in consonance with the provisions as contained under 2007 Rules and against the said decision, appeal and revision has been preferred and same has attained finality, then the said proceeding has to be accepted as final but in all other cases wherein the procedure that is prescribed for determination of age under 2007 Rules has not been undertaken, then the orders passed, determining the juvenility on the parameters of the earlier provisions, are not binding and will not have any binding effect and such an issue can be taken up in appeal at the point of time when such an issue is raised and in case, the Appellate Court finds that the determination in question is not at all in accordance with the

provisions under Sub-Rule 3 of Rule 12 of the Act, then the said finding has to be ignored and the Appellate Forum is fully competent to either get further inquiry conducted on its own level on the parameters as are provided in sub-rule 3 of Rule 12. This particular opinion would subserve the cause of justice, inasmuch as, the aim and object of The Juvenile Justice (Care and Protection of Children) Act, 2000 is to extend the benefit to a juvenile.

70. Accordingly, the reference in question is answered as follows:

Issue no.I

"Whether the right of a juvenile to raise the issue of juvenility can be denied, by dismissing a writ petition as infructuous and then permitting him to raise the issue in a criminal appeal when the same issue had been raised before the Juvenile Justice Board and an appeal had been decided in accordance with Section 52 of the 2000 Act as in the present case, on applying the doctrine of finality?"

71. The right of a juvenile to raise the issue of juvenility cannot be denied by dismissing the Writ Petition as infructuous and in case Writ Petition in question has been filed though wrongly, the issue can be raised in Criminal Appeal even though the same has been raised before the Juvenile Justice Board and appeal has been decided under Section 52 of the 2000 Act once it is demonstrated before the Court that the issue of juvenility has not been answered on the parameters of Sub-Rule 3 of Rule 12 of the 2007 Rules.

Issue no.II

"Whether the law laid down by prescribing a procedure of allowing the question to be raised in a criminal appeal as an alternate substitute through a miscellaneous application under the judgment dated 13.10.2014 by the learned Single Judge is correct or not?"

72. Once the issue of juvenility has not been decided on the parameters of provisions as are contained under Sub-Rule 3 of Rule 12 of 2007 Rules, then such an issue can be examined by the Competent Criminal Court either on its own and even on a miscellaneous application being moved.

Issue no.III

"Whether in view of the law laid down by the Apex Court particularly in the case of Abuzar Hossain @ Gulam Hossain (supra) and Abdul Razzaq Vs. State of U.P. (supra), the issue presently raised, would also stand covered by the ratio and the observations made therein or not ?"

73. The law laid down by the Apex Court in the case of Abuzar Hossain @ Gulam Hossain (supra) and Abdul Razzaq Vs. State of U.P. (supra) would also cover the issue presently raised.

74. The reference is accordingly answered. The Appeal shall now be placed before the appropriate Bench according to roster for disposal in light of this judgement.

(2016) 9 ILRA 411
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Revision No.- 2425 Of 2009
&
Criminal Revision No.- 2789 Of 2009

Sudhir Garg ...Revisionist
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Brahm Singh, Susheel Kumar Tewari

Counsel for the Opposite Parties:
Govt. Advocate, Subodh Kumar

Negotiable Instruments Act, 1881 — S. 138 — Dishonour of cheque — Conviction — Admission of liability — Accused borrowed Rs 2,16,000/- from complainant and issued post-dated cheques towards repayment — Cheques dishonoured for insufficiency of funds — In statement under S. 251 CrPC, accused admitted loan transaction, issuance of cheques, dishonour thereof and non-payment of amount — Held, ingredients of offence under S. 138 NI Act fully established — Conviction and sentence justified.
Criminal Procedure Code, 1973 — S. 357(3) — Compensation — Scope and power of Magistrate — Trial court awarded compensation of Rs 2,50,000/- to complainant in addition to sentence under S. 138 NI Act — Appellate court set aside compensation holding Magistrate lacked jurisdiction — Held, S. 357(3) CrPC confers ample power upon criminal courts to award compensation to victim independent of fine — Power to grant compensation is substantive and intended to reassure victims within criminal justice system.
Criminal Procedure Code, 1973 — S. 375 — Appeal after plea of guilt — Maintainability — Accused expressly admitted all allegations including loan, issuance and dishonour of cheques — Held, where conviction is based on plea of guilt, appeal against conviction barred except regarding extent or legality of sentence.
Criminal Law — Victim compensation — Liberal exercise of power — Courts encouraged to exercise powers under S. 357 CrPC liberally to meet ends of justice and provide meaningful relief to victims suffering financial loss due to criminal acts.
In Result: Criminal Revision filed by accused dismissed; Criminal Revision filed by complainant allowed; appellate order setting aside compensation quashed; trial court judgment including award of compensation restored.
Cases cited:
1. K.A. Abbas H.S.A. Vs. Sabu Joseph2010 (6) SCC 230
2. Balraj Vs. State of UP1994 (2) R.C.R. (Criminal) 558
3. Hari Kishan Vs. Sukhbir Singh and others1988(2) R.C.R (Criminal) 394

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. Since in both the aforecaptioned criminal revisions question of facts and law involved are common, they were heard together and are being disposed of by means of this common order.

2. The facts which are necessary for adjudication of these revisions are that Parmatma Saran Gupta, the revisionist in criminal revision No. 2789 of 2009 (hereinafter referred to as the complainant-revisionist) made a complaint before the Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 2, Moradabad alleging therein that one Sudhir Garg, the revisionist in criminal revision No. 2425 of 2009 (hereinafter referred to as accused-revisionist) took a loan of Rs. 2,16,000/- (two lac sixteen thousand only) from him on different dates and for repayment of the said loan, he has issued five post-dated cheques to the revisionist Parmatma Saran Gupta of his bank account No. 15939 of Union Bank of India, Moradabad and also executed an agreement in writing in this regard. The complainant-revisionist deposited the said cheques in his bank account No. 952 of Punjab National Bank Kanth Road, Moradabad thrice, but the aforesaid cheques were dishonoured due to insufficient fund. The complainant-revisionist thereafter sent a notice dated 23.3.2005 to the accused-revisionist asking him to repay the said loan of Rs. 2,16,000/- within 15 days of the receipt of the notice, but in collusion with the postman, accused-revisionist returned the said notice with the remark that the addressee not met in spite of repeated visits. On 3.4.2005, the complainant-revisionist received back unserved notice. Thereafter the complainant-revisionist sent a demand notice on 21.4.2005, which was received by accused-revisionist on 25.4.2005, who replied to the notice on 6.5.2005, but the loan amount was not paid.

3. The learned trial court after recording the statement of the complainant Parmatma Saran Gupta under section 200 Cr.P.C., the evidence under section 202 Cr.P.C., the written agreement dated 21.9.2004 executed by the Sudhir Garg and all other materials, on being satisfied that prima facie case is made out, summoned the accused Sudhir Garg and recorded his statement under section 251 Cr.P.C. The accused in this statement admitted that he took loan of Rs. 2,16,000/- in cash from the complainant. He also admitted that he issued all the five cheques to the complainant, the aforesaid cheques were dishonoured owing to insufficient funds in his account. Further, he confessed that he has not repaid the loan amount and admitted all allegations of the complaint. Having considred the argument of the parties, learned trial court convicted Sudhir Garg under section 138 Negotiable Instruments Act and sentenced him six months' simple imprisonment and a fine of Rs. 2000/-. The learned trial judge had also awarded compensation of Rs. 2,50,000/- against Sudhir Garg.

4. Being aggrieved and dissatisfied by the order of learned trial court, Sudhir Garg filed an appeal. The learned Additional District Judge, Court No. 6, Moradabad while partly allowing the appeal, affirmed the judgement of the learned trial court sentencing the appellant to six months' simple imprisonment and a fine of Rs. 2,000/-, but set aside the part of the order awarding compensation of Rs. 2,50,000/- against the accused-revisionist.

5. Challenge in Criminal Revision No. 2425 of 2009 is to the orders dated 21.11.2008 passed by the learned Additional Civil Judge (JD)/Judicial Magistrate, Court No. 2, Moradabad and 8.6.2009 passed by the Additional Sessions Judge, Court No. 6, Moradabad in Criminal Appeal No.

96 of 2008. Whereas Criminal Revision No. 2789 of 2009 has been filed questioning the order dated 08.6.2009 passed by the Additional Sessions Judge, Court No. 6, Moradabad only to the extent whereby compensation awarded by the learned Magistrate was set aside.

6. Heard learned counsel for the revisionists, learned counsel for opposite party No. 2 and learned Additional Government Advocate in both the revisions and perused the record of the case.

7. Learned counsel for the accused-revisionist in criminal revision No. 2425 of 2009 submits that the learned Magistrate has exceeded his jurisdiction in granting damages and learned Additional Sessions Judge has erred in convicting and sentencing him.

8. On the other hand learned counsel for the complainant-revisionist in criminal revision No. 2789 of 2009 has contended that under section 357 Cr.P.C., Magistrate has ample power to impose damages or to give compensation to the aggrieved person and learned Additional Sessions Judge has committed error of law in setting aside compensation.

9. Before adverting to the claim of the parties, it is useful to quote section 357 of the Criminal Procedure Code:

"(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment order the whole or any part of the fine recovered to be applied-

(a) In defraying the expenses properly incurred in the prosecution,

(b) In the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion, of the court, recoverable by such person in a Civil Court;

(c) When, any person is convicted of any offence for having caused the death of another person or of having abetted the commission of shelf all offence, in paying in, compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855) entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) When any person is convicted of any offence which includes theft, criminal, misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal his elapsed, or if an, appeal be presented, before the decision of the appeal.

(3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person his been so sentenced.

(4) An order under this section may also be made by all Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."

10. Learned counsel for the complainant-revisionist in criminal revision No. 2789 of 2009 has placed reliance upon the judgement of Hon'ble Apex Court in **K.A. Abbas H.S.A. Vs. Sabu Joseph, 2010 (6) SCC 230**, wherein the Hon'ble Apex Court has held as under:

"Essentially the section empowers the courts, not to just impose a fine alone or fine along with the sentence of imprisonment, but also when the situation arises, direct the accused to pay compensation to the person who has suffrred any loss or injury by reason of the act for which the accused person has been sentneced."

11. In **Balraj Vs. State of UP, 1994 (2) R.C.R. (Criminal) 558**, Hon'ble Supreme Court held that Section 357(3) of Criminal Procedure Code provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision and it must also be noted that power to award compensation is not anciliary to other sentences but is is in addition thereto.

12. In **Hari Kishan Vs. Sukhbir Singh and others, 1988(2) R.C.R (Criminal) 394**, Hon'ble Supreme Court while suggesting all courts in India to impose a sentence on default of payment of compensation under sub-section (3) of Section 357, held as under:

" This court has observed that, Sub-section (1) of Section 357 provides power to award compensation to victim of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with Sub-section (1). We are concerned only with Sub-section (3). It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgement of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has sufferred by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconcilng the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercixe this power liberally so as to meet the ends of justice in a better way."

13. Learned counsel for the complainant-revisionist in Criminal Revision No. 2789 of 2009 further submitted that appeal filed by the revisionist-Sudhir Garg is barred by Section 375 Criminal Procedure Code as in his statement recorded under section 251 Cr.P.C., he has admitted all allegations enshrined in the complaint along with receiving of loan of Rs. 2,16,000/-

14. Section 375 of the Code reads as under:

375. *Notwithstanding anything contained in section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal:-*

(a) if the conviction is by a High Court, or

(b) if the conviction is by a Court of Session, Metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence.

15. Perusal of the aforesaid provisions as well as case law, it is apparent that the learned Magistrate has ample power to grant compensation.

16. In view of the above, the order of the learned Additional Sessions Judge dated 8.6.2009 is set aside. The order of the learned Additional Civil Judge (JD)/Judicial Magistrate, Court No. 2 Moradabad dated 21.11.2008 is affirmed.

17. Resultantly Criminal Revision No. 2425 of 2009 preferred by Sudhir Garg is dismissed and Criminal Revision No. 2789 of 2009 preferred by the Parmatma Saran Gupta is allowed.

18. Interim order dated 19.6.2009 granted in Criminal Revision No. 2425 of 2009 stands discharged.

(2016) 9 ILRA 416
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 2717 Of 1982

Basdeo & Ors. **...Appellants**
Versus
State **...Respondent**

Counsel for the Appellants:
V.B. Singh, Dharmendra Singh, Raj Singh, S.P. Giri

Counsel for the Respondent:
A.G.A

Penal Code, 1860 — Ss. 147, 148, 323/149 & 324/149 — Free fight and right of private defence — Benefit of doubt — Prosecution alleged that accused persons armed with *lathi*, *farsa* and *ballam* assaulted injured witnesses due to partition dispute — Evidence disclosed existence of cross-case and admitted injuries on accused side — Place of occurrence shown in front of accused's house indicating complainant party had gone there — Held, preponderance of probabilities suggested complainant side may have been aggressor and injuries caused by accused could be in exercise of right of private defence — Prosecution failed to establish charges beyond reasonable doubt.

Criminal Trial — Cross cases — Appreciation of evidence — Mere acquittal in cross-case not determinative of innocence or guilt in present case — Court required to independently examine who was aggressor, whether injuries on accused were explained and whether defence version appeared probable on preponderance of probabilities.

Evidence — Non-explanation of injuries on accused — Effect — Prosecution witnesses admitted that accused side had also sustained injuries during occurrence — Failure of prosecution to satisfactorily explain injuries on accused side materially affected credibility of prosecution version and strengthened plea of self-defence.

Right of Private Defence — Standard of proof — Accused pleading self-defence not required to prove plea beyond reasonable doubt — It is sufficient if defence succeeds in creating probability in favour of existence of circumstances bringing case within right of private defence.

Evidence — Interested and inimical witness — Reliability — Independent witness found inimical towards accused and evasive regarding injuries sustained by accused side — Testimony not wholly reliable — Statements of injured witnesses also required cautious scrutiny in light of admitted cross-case and mutual assault.

Criminal Appeal against conviction — Reappraisal of evidence by appellate court — High Court, upon independent reassessment of oral and documentary evidence, found trial court misdirected itself in appreciating defence plea and circumstances relating to occurrence — Conviction set aside by extending benefit of doubt.

In Result: Appeal allowed; conviction and sentence of surviving appellants under Ss. 147, 323/149 and 324/149 IPC set aside; appellants acquitted by benefit of doubt.

Cases cited:
1. State of Punjab Vs. Gurbux Singh and others1996 SCC (Crl) 88
2. Sewal Das Vs. State of BiharAIR 1974 SC 778

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

1. The instant appeal filed on behalf of the accused appellants is directed against judgment and orders dated 21st October, 1982 passed by Sri S.K. Agnihotri, the then 4th Additional Sessions Judge, Aligarh in S.T. No. 64 of 1982 (State Vs. Basdev and four others) whereby the appellant nos. 1 and 2 were convicted under sections 148, 323/149 and 324/149 IPC and appellant nos. 3 to 5 were convicted under sections 147, 323/149 and 324/149 IPC. First two appellants were sentenced to undergo rigorous imprisonment for two years, one year and two years, respectively. Rest of the appellants were sentenced to undergo rigorous imprisonment of one year, one year and two years respectively.

2. Heard Sri S.P. Giri learned counsel for the appellants and Sri Sushil Kumar, learned A.G.A. For the State-respondent.

3. The facts giving rise to the present appeal may be summarized as under:

4. That on 16th September, 1979 at 6.30 p.m. Hari Krishna gave a written report at P.S. Iglas stating therein that on that day at 4.30 p.m. his cousin was going to bring *Jaggery (gur)*. He was ambushed by Kesri, Ghure Lal, Ram Charan, Basdeo and Dal Chandra, who were armed with *lathi, farsa* and *ballam*. He was abused and beaten. When he and his younger brother Ram Narayan intervened they were also beaten. The assailants bore enmity with him on account of partition. At the alarm raised by them, co-villagers Kalyan Singh, Fauran Singh and others reached there and saved them.

5. At this check FIR was scribed, case crime no. 237 of 1979 under sections 147, 148, 323 IPC was registered, investigated and charge sheet was submitted. All the five appellants stood for trial before the Court of Session, where they were charged, tried, convicted and sentenced as above.

6. Feeling aggrieved the instant appeal has been filed. During the pendency of the appeal appellants Basdev, Kesari and Ghure have died. Their appeals stood abated.

7. On behalf of surviving appellant no.4 Ram Chandra and appellant no.5 Dal Chandra learned counsel for the appellants submits that the impugned judgment and orders are against the weight of material on record and law. He further submits that there was a cross version of the occurrence and the learned trial Judge while ignoring the fact that occurrence took place in front of the house of the deceased appellant Basdeo has disbelieved the version advanced on behalf of the appellants and erroneously convicted the appellants. The prosecution failed to prove charges against the appellants beyond reasonable doubt. The evidence has not been properly appreciated. The impugned judgment and orders deserve to be set aside.

8. On behalf of the State these arguments have been repelled and it has been submitted that the learned trial Judge has rightly appreciated the evidence. It has been further submitted that finding recorded by the learned trial Judge are well substantiated from the record, cogent reasons have been given in support thereof. The appeal has no substance and it deserves to be dismissed.

9. Before entering into the merits the arguments advanced before me I would like to place on record the evidence adduced by the parties before the trial court.

10. On behalf of the prosecution in the documentary evidence besides other papers, written report Ext. Ka-1, check FIR Ext. Ka-5, recovery memo of clothes of Ram Narayan Ex.Ka-2, Injury report of Ramesh Chandra Ex. Ka-7, Injury report of Hari Kishan Ext. Ka-8, Injury report of Ram Narayan Ext.Ka-9, X-ray report of Ram Narayan, Site plan with index Ex. Ka-3 were filed and in the oral evidence seven witnesses were examined. Out of these four are witnesses of fact and rest are formal witnesses.

Ramesh P.W.1	He is the injured and gave eye witness account of the occurrence. He has fully supported the prosecution version.
Hari Krishna P.W.2	He is the first informant. He has proved written report Ext. Ka-1. He is also an injured. He has supported the prosecution version.
Ram Narayan P.W.3	He is also an injured witness. He has proved memo of taking blood stained clothes Ext. Ka-2 and supported the prosecution version.
Fauran Singh P.W.4	He is an independent witness. He has fully supported the prosecution version.

11. Before re-examining and reassessing the probative force of the testimonies of the eye witnesses it would be gainful to reproduce here the injuries sustained by the injured persons and proved by Dr. H.A. Khan P.W.7 who had medically examined the injured Ramesh Chandra and Hari Krishna. They were medically examined on 17th September, 1979 in the forenoon and on 16th September, 1979 at 6.30 p.m. injured Ram Narayan was medically examined. The doctor has proved the injury reports prepared by him at the time of medical examinations. These injury reports are Exts. Ka-7 to Ka-9. The details of the injuries sustained by the injured persons are giving as below:

12. Injuries on the person of Ramesh Chandra:

1. Abrasion 1 cm. x ½ cm. on the right side of the chest, 9 cm. below the right nipple vide Ext. Ka-7.

13. Injuries on the person of Hari Kishan:

1. Abrasion 5 cm. x 4 cm. on the left side of the back and chest above the right spine and 5 cm. below the collar bone.

2. Abrasion 1-1/2 cm. x ¾ cm at the root of the middle finger of the right hand on the back.

3. Abrasion 1 cm. x ¼ cm on the middle finger of the right hand.

4. Abrasion ¼ cm. x ¼ cm on the right finger of the left hand on the back of the first joint.

5. Contusion with traumatic swelling 5 cm x 2 cm on the fourth metacarpal bone of the left hand on the back the joint of finger abrasion 2 cm x cm. above ½ cm on the back of the left forearm, 2 cm. above the wrist joint vide Ext. Ka-8.

14. Injuries on the person of Ram Narain:

1. Incised wound 1 cm. x 1 cm. x muscle deep on the right side of the forehead, 2 cm above the right eyebrow.

2. Contusion with traumatic swelling on the eyelid of the right eye and also 2 cm below the lower eyelid.

3. Traumatic swelling 1 cm x 1 cm on the right side of the head and 10 cm above the right ear. No visible mark of injury was found at this place and hence x-ray was advised.

4. Abrasion 8 cm x 1 cm on the left hand on the outer aspect, 13 cm above the left elbow.

5. Traumatic swelling in an area of 13 cm x 13 cm at the joint of the left elbow above, on the lower portion of the left arm and on the upper side of the left forearm 5 cm above the left elbow. The swelling was accompanied by an abrasion 2 cm x 2 cm x-ray examination was advised.

6. Traumatic swelling 10 cm x 7 cm on the forearm on the back and lower aspect of it. The swelling had extended upto the wrist joint and was also accompanied by a contusion with abrasion 1 cm x 1 cm x-ray examination was advised.

7. Traumatic swelling 4 cm x 2 cm on the right shoulder 2 cm below the joint of the collar bone and on the back of it.

15. The case of the defence before the trial court was of denial. According to them injured Ramesh wanted to construct a *nali* in the land of Basdev and according to the appellants when protested he and his family men had beaten them. The appellants in their statements recorded under section 313 Cr.P.c. had denied the facts stated by the prosecution witnesses. Appellant Basdev since deceased had also stated that he had lodged an FIR against the complainant's party under section 307 IPC. In order to prepare false defence the present FIR was lodged against him and the other accused persons.

16. In the defence on behalf of the appellant statement of Fauran Singh recorded in S.T. No. 784/82 (Ram Prasad Vs. Basdev and others), copy of complaint case no. 1442 of 1979 Ram Prasad Vs. Basdev and others, certified copy of the judgment given in the said complaint case whereby Basdev and other persons were acquitted and, copy of will executed by Devi Singh were filed.

17. The learned trial Judge in absence of any evidence for defence has rejected the defence case that as *peshbandi* false case was lodged against the present appellants. He believed the eye witness account and held the appellants guilty.

18. Cross version of the occurrence has not been denied by the prosecution witnesses. The learned trial Judge in absence of any evidence adduced by the deceased appellant no.1 Basdeo did not extent benefit of doubt on the basis of plea that there was another version of the occurrence. Before proceeding further it has to be kept in mind that when there is other version of the occurrence two-three points are very material to decide whether prosecution could prove the charges beyond reasonable doubt. These material points may be indicated as below:-

(i) Obligation of the prosecution to explain the injuries of the accused.

(ii) Who is aggressor?

(iii) Standard of proof.

19. The Hon'ble Apex Court in the case of **State of Punjab v. Gurbux Singh and others, 1996 SCC (Crl) 88** has made very illuminating observation in reference to plea of self defence. Much assistance may be gained to decide the present controversy from the said observation of the Hon'ble Apex Court. For the sake of ready reference it is quoted as below:

"It is well settled that when the accused set up a plea of self-defence, they need not prove their case beyond all reasonable doubt and within the parameters under Section 103, if by preponderance of probabilities, the plea taken by them becomes plausible then the same should be accepted or at least, a benefit of doubt arises.

In the instant case, the prosecution failed to explain the injuries of the accused persons. It was held that the accused were entitled to the right of self defence."

20. The first point to be considered in this reference is that who is the aggressor. Place of occurrence has been shown in the site plan Ext. Ka-3. It is marked by letter 'E'. It is right in front of the house of deceased appellant Basdev. When the place of occurrence is in front of the house of the deceased appellant Basdev, naturally inference may be drawn that when the occurrence took place he was at the door of his house which makes it necessary that the injured had to come there. This prima facie is sufficient to show that it was the complainant's side who had gone in front of the door of the one of the appellant. Merely acquittal in the cross case is not determinative that the accused of the cross case were not aggressor because as the Supreme Court has observed that accused need not prove his case beyond all reasonable doubt. He had only to show by preponderance of probabilities that his plea of self defence is plausible.

21. It is well settled that burden is on the prosecution to prove its case and the law does not cast any burden on the accused except when the accused invokes any of the exceptions to criminal liability covered by section 105 of the Evidence Act. The defence is permitted to take up a plea during the cross examination or in the statement recorded under section 313 Cr.P.C. If the defence succeeds in creating a reasonable belief that circumstance absolving him from criminal liability may have existed. The accused becomes entitled to get benefit of doubt. The burden so placed on defence is lower then the burden placed on the prosecution. It is only when the prosecution has led evidence which, if believed, will sustain a conviction that the question of shifting the onus upon the defence will arise. I am fortified in my view by the observation of the Hon'ble Apex Court made in the case of **Sewal Das Vs. State of Bihar AIR 1974 SC 778**.

22. The learned trial Judge has misdirected himself on account of the acquittal in cross case because quantum of proof for prosecution and defence is different. I don't think that the learned trial Judge has rightly appreciated the evidence. It is an important fact that occurrence took place in front of the house of the co-accused which shows that the complainant's side could have been aggressor.

23. Now the second question to be considered is that whether on the appellants' side any one had received injuries. The prosecution has not cared to admit the fact that accused side also sustained injuries. In this reference I find that Ramesh P.W.1 in his examination in chief has categorically stated that marpeet took place on both the sides but he pleaded ignorance, on the point who on the other side who had sustained injuries, on the ground he became unconscious. He declined the suggestion that he and his companions had beaten Basdev and others.

24. Hari Krishna P.W.2 admitted the reason of dispute. According to him he and other persons reached at the spot unarmed but after snatching *lathi* from accused persons they defended themselves whereby accused persons sustained injuries. This is a clear admission that in the occurrence the appellants' side also sustained injuries. Only it is claimed to have been caused in self defence. Though he denied the suggestion they had caused injuries to Basdev, Kesri, Ghure Lal and Smt. Genda by *lathi*, *ballam*, *farsa* and *gandsa*. Ram Narayan P.W.3 admits that on the report of Basdev a cross case was pending against him Ramesh, Ram Narayan and four others. Though of course he denied the suggestion that they had beaten Basdev, Kesri, Ghure Lal and Smt. Genda.

25. Fauran Singh P.W.4 was not present when the incident started. He reached there after hearing the alarm. The learned trial Judge has held him to be an independent witness but from his replies and the certified copy of his earlier statement it transpires that he is inimical to the side of appellants. He is not speaking the truth this can be gathered from the fact that according to him he had not seen any injury on the person of the appellants.

26. In the light of the facts noticed above now I re-examine and re-assess the evidenciary value of the testimonies of eye witnesses. Since Hari Krishna P.W.2 has categorically admitted that appellants' side also sustained injuries, on account of enmity and evasive answers I am not inclined to place reliance on the statement of Fauran Singh P.W.4.

27. Now remain evidence of three injured persons who were accused in the cross case. *Marpeet* by both the sides is admitted. Place of occurrence indicates that it was the complainant's side who had gone to the place of occurrence which is in front of the house of Basdev, therefore, preponderance of probabilities is that the complainant's side was aggressor. The statements of the injured witnesses for this reason cannot be accepted that it was the appellants' side who started the quarrel and had beaten them. It is impossible that five armed persons would allow their prospective victims to snatch their *lathi* and permit them to beat them. Thus probability is that the complainant's side had gone in front of the house of Basdev well armed and injuries inflicted by the appellants' side may be result of self defence.

28. In view of above I do not think that the prosecution could prove charges against the present appellants beyond doubt. The appellants are entitled to be acquitted after giving them benefit of doubt.

29. Resultantly appeal is **allowed**. The impugned judgment and orders dated 21st October, 1982 as also conviction and sentences of the surviving appellants Ram Charan and Dal Chand are set aside. Both the appellants are acquitted from the charges under sections 147, 323/149, 324/149 IPC. They are on bail. They need not surrender. Their personal bonds and surety bonds are cancelled and the sureties are discharged.

30. Office is directed to certify this order to the court concerned forthwith for compliance and to send back the lower court record.

(2016) 9 ILRA 423
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3461 Of 2013

Mahipal ...Revisionist
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Kuldeep Kumar

Counsel for the Opposite Parties:
Govt. Advocate

Criminal Procedure Code, 1973 — Ss. 245(2) & 397 — Discharge in complaint case — Revisional interference — Scope — Revision preferred against order rejecting discharge application under S. 245(2) CrPC in complaint case alleging offences under Ss. 420, 467, 468 and 218/34 IPC — Held, revisional jurisdiction under S. 397 CrPC is limited to examining correctness, legality or propriety of order and does not permit re-appreciation of evidence as in appeal — Where Magistrate applied judicial mind and considered material on record, revisional interference unwarranted.

Criminal Procedure Code, 1973 — S. 245(2) — Discharge — Consideration by Magistrate — Accused sought discharge on ground that complainant suffered no loss and that police had submitted final report in connected proceedings — Magistrate, after considering oral and documentary evidence, rejected discharge application on merits — Held, no illegality, perversity or impropriety found in impugned order.

Criminal Procedure Code, 1973 — Ss. 156(3), 200 & 202 — Complaint proceedings — Parallel remedies — Complaint case proceeded notwithstanding submission of final report in police case arising out of same facts — Magistrate competent to treat application under S. 156(3) CrPC as complaint and proceed in accordance with law.

Criminal Procedure Code, 1973 — Revisional jurisdiction — Interlocutory matters — Limited scrutiny — Revisional court not expected to substitute its own view on factual appreciation at interlocutory stage unless impugned order suffers from manifest illegality or jurisdictional error.

In Result: Criminal revision dismissed; order rejecting discharge application under S. 245(2) CrPC affirmed.

Cases cited:
1. Islamuddin v. State1975 Cri LJ 841
2. G. Vasudevan v. K.M. Malabari1978 Mad LJ (Cri) 617
3. Bundoo v. Smt. Mahrul Nisa1978 All LJ 1002

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

1. Case called out. Sri Kuldeep Kumar, learned counsel for the revisionist and Sri L.D. Rajbhar, learned A.G.A. for the State of U.P. are present. None responds on behalf of the opposite party no.2.

2. Learned counsel for the revisionist has stated that in Application U/s 482 No.23466 of 2010 (Virendra Pal Sigh Vs. State of U.P. & another) Co-ordinate Bench of this Court by it's order dated 21.07.2010 has ordered as follows:

"Till the next date of listing, further proceedings of Complaint Case No.1719 of 2007 and Case No.152 of 2007, under Sections 420, 467, 568, 218/34 IPC, P.S. Kotwali Dehat, District Bulandshahar shall remain stayed against the applicant only."

3. It has been argued by the learned counsel for the revisionist that the present revision has been filed regarding the same set of incident and the similar order may also be passed by this Court.

4. Learned counsel for the revisionist has placed reliance upon the judgement of this Court in **Ramesh Chandra Bhatia Vs. State of U.P. [2012 (76) ACC 985].**

5. The facts and circumstances of the case in hand are totally different from the facts and circumstances cited in the above Ruling.

6. The present criminal revision has been preferred against the judgement and order dated 26.11.2013 passed by the learned Chief Judicial Magistrate, District Bulandshahr in complaint case no.1390 of 2013 (Gopi Vs. Govind Ram and others), under Sections 420, 467, 468, 218/34 I.P.C., Police Station Kotwali Dehat, District Bulandshahr, whereby learned Magistrate has rejected the discharge application under Section 245 (2) Cr.P.C.

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

8. Accused persons Govind Ram, Ram Singh and Mahipal have preferred Application under Section 245 (2) Cr.P.C. dated 06.01.2009 before the court of the learned II A.C.J.M., Bulandshahr in complaint case no.1719 of 2007 (Gopi Vs. Govind Ram etc.), under Sections 420, 467, 468, 218/34 I.P.C., Police Station Kotwali Dehat, District Bulandshahr with the prayer that since the case before the Consolidation Officer, Bulandshahr was fixed on 25.09.2004 but the complainant had no knowledge about that date so he could not attend the court and prayed to fix another date 05.10.2004. On 29.09.2004 the Consolidation Officer had passed a non-speaking order by writing 'Restored', although, no restoration application was presented to restore the order dated 25.09.2004.

9. The complainant has presented this application before the Consolidation Officer, Bulandshahr on 10.03.2006 to restore the ex-parte order dated 25.09.2004. In other words, the complainant has presented a false and vague complaint.

10. When the aforesaid ex-parte order dated 25.09.2004 was restored on 05.10.2004 and on merit it was finally decided in favour of accused Mahipal on 14.03.2008. In other words the complainant did not suffer any loss.

11. The complainant presented an application under Section 156(3) Cr.P.C. before the learned Chief Judicial Magistrate, Bulandshahr on date 17.04.2006 which was allowed and order for registration of F.I.R. against the accused persons was passed. Against this order of the learned Chief Judicial Magistrate, Bulandshahr dated 17.04.2006 Criminal Revision No.322 of 2006 was preferred which was allowed vide order dated 17.06.2008 with the direction of rehearing the application and thereafter the learned Chief Judicial Magistrate, Bulandshahr passed another order dated 16.07.2008 that the application should be treated as complaint case.

12. On the application under Section 156 (3) Cr.P.C. case was registered in case crime no.C18 of 2006 in Police Station Kotwali Dehat, District Bulandshahr which culminated into filing of final report by the Police concerned.

13. The complainant had filed a complaint case on the same facts in March, 2007 before the learned Chief Judicial Magistrate, Bulandshahr, on which the learned Chief Judicial Magistrate, Bulandshahr passed an order of summoning the accused persons on 11.09.2007. Against this order, the accused persons had preferred Application U/s 482 Cr.P.C. No.33978 of 2008 before this Court. This Court passed an order and directed the revisionist to move an application under Section 245 (2) Cr.P.C. before the learned Magistrate.

14. It was mentioned in the application dated 06.01.2009 presented before the learned court of the II Additional Chief Judicial Magistrate, Bulandshahr in complaint case no.1719 of 2007 that the records of the case no.5736 of 2008 (Gopi Vs. Govind Ram etc.), under Sections 420, 467, 468, 218 I.P.C. which was pending in the court of the learned Additional Civil Judge (Junior Division), Court No.2 and also the F.I.R. relating to Gopi Vs. Govind Ram etc. which was pending in the court of the learned Chief Judicial Magistrate, Bulandshahr, on the aforementioned reasons, the accused persons Ram Singh, Govind Ram and Mahi Pal prayed that there was no evidence against them under Sections 420, 467, 468, 218 I.P.C. and they may be discharged of the aforesaid offences. The said application came up for decision before the court of the learned Chief Judicial Magistrate, Bulandshahr in complaint case no.1390 of 2013 (Gopi Vs. Govind Ram and others) on 26.11.2013 and the learned Chief Judicial Magistrate, Bulandshahr after hearing both the parties and perusal of the records, passed the order on merit and thereby dismissed the aforesaid application under Section 245 (2) Cr.P.C. of the accused Ram Singh, Govind Ram and Mahi Pal.

15. In exercise of revisional jurisdiction of this Court under Section 397 Cr.P.C. there is very narrow compass to re-appreciate and re-evaluate the evidence either oral or documentary before it; which is available in the appellate jurisdiction. Section 397 of Code of Criminal Procedure, 1973 is quoted verbatim as follows:

"397.Calling for records to exercise of powers of revision.-(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.-All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If any application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

16. The revisional jurisdiction does not postulate re-appreciation of evidence, but that should be appreciated in the light of the limitation on the right to go in appeal, *Islamuddin v. State*, 1975 Cri LJ 841, 842 (Del HC). *G. Vasudevan v. K.M. Malabari*, 1978 Mad LJ (Cri) 617; *Bundoo v. Smt. Mahrul Nisa*, 1978 All LJ 1002 (All HC).

17. I have gone through the impugned order dated 26.11.2013 passed by the learned Chief Judicial Magistrate, Bulandshahr in complaint case no.1390 of 2013 (Gopi Vs. Govind Ram and others) in which learned Chief Judicial Magistrate has exercised it's judicial mind and passed the impugned order dated 26.11.2013 on the basis of the evidence either oral or documentary available before the court.

18. There is no occasion to interfere with the same. There is no illegality, impropriety or perversity to interfere at this stage. The revision sans merit and is liable to be dismissed.

19. Dismissed

(2016) 9 ILRA 427
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Revision No.- 4296 Of 2010

Ismile @ Shama ...Revisionist
Versus
State Of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
A.C. Srivastava, Ashwani Kumar Srivastava

Counsel for the Opposite Parties:
Govt. Advocate, Pankaj Dwivedi

Criminal Procedure Code, 1973 — S. 125 — Maintenance to minor child — Liability of father — Effect of divorce — Family Court rejected maintenance claim of wife but granted maintenance to minor son — Husband contended that after divorce he was not liable to maintain child — Held, right of minor child to claim maintenance from father under S. 125 CrPC survives irrespective of divorce between parents — Father under statutory obligation to maintain minor child unable to maintain himself.
Muslim Law — Maintenance of minor child — Scope of liability — Mere fact that mother had been divorced and paid certain amount at time of divorce does not extinguish right of minor Muslim child to seek maintenance under S. 125 CrPC — Beneficial provisions relating to welfare of child to receive liberal construction.
Criminal Procedure Code, 1973 — S. 125 — Object and purpose — Provision enacted as measure of social justice to prevent vagrancy and destitution of women and children — Husband/father having sufficient means cannot avoid obligation to maintain dependants by taking bald plea of lack of income.
Maintenance — Able-bodied person — Duty to maintain — An able-bodied and economically sound person is presumed capable of earning and maintaining wife and child — Failure to discharge such obligation without sufficient cause unjustified.
Maintenance — Welfare of child — Paramount consideration — Proper maintenance and welfare of child are of paramount importance — Law compelling father to maintain child to be construed liberally in favour of child irrespective of caste, creed or subsistence of marriage.
In Result: Criminal revision dismissed; maintenance granted by Family Court to minor child upheld; interim order vacated.

Cases cited:
1. Chaturbhuj Vs. Sita Bai(2008) 2 SCC 316
2. Captain Ramesh Chander Kaushal v. Veena Kaushal(1978) 4 SCC 70
3. Savitaben Somabhai Bhatiya v. State of Gujarat(2005) 3 SCC 636
4. Durga Singh Lodhi Vs. Prembai and others1990 Cr.L.J. 2065
5. Mst. Noor Jehan v. State of Maharashtra1995 CLJ 2154
6. Rahamatulla Vs. Piyare and others1996-1 LW (Crl) 206

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. This revision has been filed against the judgement and order dated 14.9.2010 passed by the Principal Judge, Family Court, Meerut in Case No. 598 of 2006 whereby the learned Judge allowed the application under section 125 of the Code of Criminal Procedure insofar as Suhail Khan, the minor child of the revisionist was concerned.

2. However, by the same order learned Judge rejected the claim of the applicant-opposite party No. 1 Smt. Shaida Khan, wife of the revisionist, which is not under challenge in this revision.

3. The facts which are requisite to be mentioned for adjudication of this revision are that an application under section 125 of Code of Criminal Procedure was moved by Smt. Shaida Khan on behalf of herself and her minor son Suhail Khan claiming maintenance on the ground that her marriage took place about nine years back with opposite party-Ismile alias Shama, the revisionist herein. Out of their wedlock a child namely Suhail Khan was born, who is with Smt Shaida Khan. It is mentioned in the application that revisionist-Ismile alias Shama demanded dowry and used to torture her on account of non-fulfillment of dowry demand. It is also mentioned in the application that revisionist also threatened the applicant that in case if she does not bring Rs. 50,000/- with her, he will marry another lady. The application further alleges that the revisionist is a *Kashtkar* and his income is about 20-25 thousand per month.

4. In his written objections the revisionist has denied the versions given in the application under section 125 Cr.P.C. and levelled allegations on the character of the applicant-opposite party No. 2. It is also mentioned in the written objections that he divorced the applicant Smt. Shaida Khan and had given her Rs. 50,000/- along with certain household articles on the conditions that she will maintain her son from this amount. The revisionist also alleges that opposite party-Smt. Shaida Khan earns Rs. 10,000/- per months.

5. The learned Principal Judge, Family Court, Meerut after evaluating the evidence adduced by the parties, rejected the claim of the applicant-Smt Shaida Khan on the ground that she is able to maintain herself as she is earning more than 2200/-per month. However, by the same order learned Judge granted maintenance to the minor child-Suhail Khan by holding that the revisionist has never given any money for the maintenance of his child.

6. Heard learned counsel for the revisionist and learned Additional Government Advocate and perused the record of the case.

7. Learned counsel for the revisionist submits that by the impugned order learned Family Judge while granting maintenance to the child, rejected the claim of maintenance of wife, which goes to suggest that income of opposite party No. 2 is sufficient to maintain herself as well as her child, opposite party No. 3.

8. Learned counsel for the revisionist has further submitted that the learned Judge has erred in granting maintenance to opposite party No. 3, Suhail Khan as the revisionist has divorced opposite party No. 2.

9. Per contra, learned Additional Government Advocate supported the judgement of the Family Court and argued the the judgement is reasoned one and does not require any interference by this Court.

10. Before adverting to the claim of the parties, it would be useful to quote section 125 Cr.P.C.:

Order for maintenance of wives, children and parents:-

125. (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) His legitimate or illegitimate minor child, whether married or not unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

11. There can be no shadow of doubt that an order under section 125 Cr.P.C. can be passed if a person despite having sufficient means neglects or refuses to maintain the wife or child. Sometimes, a plea is advanced by the husband that he does not have the means to pay as he does not have a job or his business. These are only bald excuses and in fact they have no acceptability in laws. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife and child.

12. Hon'ble Supreme Court in ***Chaturbhuj Vs. Sita Bai, (2008) 2 SCC 316*** has held the grant of maintenance to wife is a measure of social justice. The court held as under:

" Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in captain Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by

Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in ***Savitaben Somabhai Bhatiya v. State of Gujarat (2005) 3 SCC 636***.

13. A Division Bench of Madhya Pradesh High Court in the case of **Durga Singh Lodhi Vs. Prembai and others, 1990 Cr.L.J. 2065** has held that mere absence of visible means or real estate will not entitle such a person to escape the liability to pay maintenance awarded under Section 125(1), as even at the stage of enforcement of the order under Section 125(1), an able bodied healthy person capable of earning, must be subjected to pay maintenance allowance. If, with this visible capacity to earn, he avoids payments, it has to be held that he has so done for no sufficient cause. If such a person avoids to discharge that obligations despite issuance of a distress warrant, he can be sentenced to imprisonment for a term specified in sub-section (3) of Section 125 Cr.P.C..

14. So far as the contention of learned counsel for the revisionist that the learned Judge has erred in granting maintenance to opposite party No. 3, Suhail Khan as the revisionist has divorced opposite party No. 2 is concerned, Bombay High Court in **Mst. Noor Jehan v. State of Maharashtra 1995 CLJ 2154** held as hereunder:

"It does not take away the right of the minor child to claim maintenance from his or her father even after his or her mother has been divorced. The right which is conferred on the minor child of claiming maintenance under Section 125 of the Cr. P.C., cannot be said to have been taken away by the provision contained in Section 3(b) of the Act of 1986 ..... While Section 3(b) entitles the divorced Muslim Woman to claim maintenance for the children born to her before or after the divorce from her former husband for period of two years from the respective dates of birth of the children, the said section does not take away the right of the minor Muslim child or children to claim maintenance from his or her father even if the mother has been divorced and has attained the status of divorced Muslim woman."

15. Madras High Court in ***Rahamatulla Vs. Piyare and others, 1996-1 LW (Crl) 206*** has held as under:

"The proper maintenance of the child is imperative. In the paramount interest of the child, laws compelling the father to maintain his child, are to be construed liberally so as to embrace all beneficial legislation in favour of the child. The welfare of the child is a paramount consideration, the child may be of any class, caste or creed. Section 125 of the Cr.P.C., entitles even the illegitimate minor child to claim maintenance and it is the bounden duty of the father to maintain the child, whether the marriage is subsisting or not and whether the child was born from the wedlock or otherwise. The maintenance of the child being an imperative factor, the Legislature while enacting the Act of 1986, making provision for protection of rights of Muslim Women, has not taken away the right of the minor child to claimmaintenance even after divorce. Thus, the right of

the Muslim minor child under Section 125 of the Cr.P.C., is not taken away by Section 125 of the Act of 1986, or is not confined to claiming maintenance only up to the attainment to age of two years."

16. In the case in hand the learned Family Judge while allowing maintenance to opposite party No. 3, Suhail Khan, has held that at the time of filing the application under section 125(3) Cr.P.C., he was aged about seven years and that the revisionist- Ismile alias Shama has never paid any amount for his maintenance and it is the duty and responsibility of the revisionist to maintain his minor child. The learned Family Court further held that the revisionist after the marriage with opposite party No. 2, has again married for the fourth time to one Rafat, which goes to suggest that he is economically sound persons.

17. In view of what has been indicated herein above, I find that the impugned order does not suffer from any illegality or impropriety.

18. The revision lacks merits. It is accordingly dismissed.

19. Interim order dated 4.10.2010 is vacated.

(2016) 9 ILRA 432
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE BHARAT BHUSHAN, J.

Criminal Revision No.- 4694 Of 2011

Jai Prakash Tiwari **...Revisionist**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Revisionist:
Servesh Kumar Mishra

Counsel for the Opposite Parties:
Govt. Advocate, Birendra Singh, Mangala Prasad Rai

Juvenile Justice (Care and Protection of Children) Act, 2000 — Ss. 7-A, 20 & 68 — Determination of juvenility — Applicability of Central Rules, 2007 in Uttar Pradesh — Question referred to Full Bench whether U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 or Juvenile Justice (Care and Protection of Children) Rules, 2007 framed by Central Government would govern determination of juvenility in Uttar Pradesh after insertion of S. 7-A by Amendment Act 33 of 2006 — Held, till State Rules are recast in conformity with Central Rules, 2007, provisions of Central Rules would mutatis mutandis apply in State of Uttar Pradesh by virtue of Rule 96 of Central Rules.

Juvenile Justice — Determination of age — Procedure — Evidentiary hierarchy — Under Rule 12(3), age determination inquiry to be conducted by first obtaining matriculation/equivalent certificate; in absence thereof, certificate from school first attended; thereafter birth certificate issued by municipal authority/panchayat; medical opinion to be sought only in absence of such documents — Once such documentary proof available and not shown fabricated or manipulated, no roving inquiry permissible.

Juvenile Justice — Inquiry under S. 7-A — Nature and scope — Inquiry contemplated under S. 7-A is not a trial or investigation under CrPC but a summary inquiry governed exclusively by provisions of Juvenile Justice Act and Rules — Courts while deciding juvenility claims not required to conduct elaborate evidentiary trial.

Juvenile Justice — Claim of juvenility — Stage of raising plea — Claim of juvenility may be raised before any court at any stage, even after final disposal of criminal proceedings — Delay in raising claim not a ground for rejection if prima facie material exists.

Juvenile Justice — Rule-making power — Effect of Central Model Rules — After insertion of proviso to S. 68(1) by Amendment Act 33 of 2006, Central Government empowered to frame Model Rules — State Rules required to conform thereto as far as practicable — In absence of amended State Rules, Central Rules prevail on issue of determination of juvenility.

Reference Answered: U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 require recasting in light of insertion of S. 7-A and Central Rules, 2007; till such amendment, determination of juvenility in Uttar Pradesh to be governed by Juvenile Justice (Care and Protection of Children) Rules, 2007 framed by Central Government.

Cases cited:

1. Pratap Singh v. State of Jharkhand(2005) 3 SCC 551
2. Hari Ram v. State of Rajasthan(2009) 13 SCC 211
3. Ashwani Kumar Saxena vs. State of M.P.2012 Law Suit (SC) 607
4. Abuzar Hossain @ Gautam Hussain vs. State of West BengalCriminal Appeal No.1193 of 2006 decided on 10.10.2012
5. Jodhbir Singh v. State of Punjab(2012) 13 SCC 591
6. Ranjeet Goswami v. State of Jharkhand(2014) 1 SCC 588
7. Kulai Ibrahim @ Ibrahim v. State represented by the Inspector of Police, B-I, Bazar Police Station, Coimbatore(2014) 12 SCC 332
8. Munney @ Rahat Jan Khan vs. State of U.P.(2006) 12 SCC 697
9. Jameel vs. State of Maharashtra(2007) 11 SCC 420
10. Vimal Chadha vs. Vikas Chaudhary(2008) 8 SCALE 608
11. Babloo Pasi vs. State of Jharkhand(2008) 13 SCALE 137
12. Ranjit Singh vs. State of Haryana(2008) 9 SCC 453
13. Birad Mal Singhvi v. Anand PurohitAIR 1988 SC 1796
14. Sushil Kumar v. Rakesh Kumar(2003) 8 SCC 673
15. Chief Forest Conservator (Wildlife) v. Nisar Khan(2003) 4 SCC 595
16. National Insurance Co. Ltd. v. Swaran Singh(2004) 3 SCC 297
17. Jalan Trading Co. (P) Ltd. v. Mill Mazdoor UnionAIR 1967 SC 691
18. Union of India v. Naveen Jindal(2004) 2 SCC 510
19. State of U.P. v. Johri Mal(2004) 4 SCC 714
20. Union of India v. Sugauli Sugar Works (P) Ltd.(1976) 3 SCC 32
21. Cox and Kings (Agents) Ltd. v. WorkmenAIR 1977 SC 1666

(Delivered by Hon'ble V.K. Shukla, J.)

1. While Criminal Revision No.4694/2011 (*Jai Prakash Tiwari vs. State of U.P. and another*) was being heard, a Learned Single Judge of this Court keeping in view the fact that the accused claimed juvenility before the Trial Court in Case Crime No.122 of 2008 under Section 302 and 394 IPC, P.S. Dhata, District Fatehpur by filing in support of the same, a Junior High School certificate and a High School certificate, that carried date of birth as 09.08.1991 and as the incident has taken place on 14.09.2008, the accused was accepted as juvenile on the date of occurrence as he fell below 18 years on his age being counted from 9th August, 1991. The Additional Sessions Judge accordingly proceeded to pass order dated 29.10.2011 on the application of accused-Subhadra Pathak, under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (here-in-after referred to as the '2000 Act'). The Additional Sessions Judge while passing the order has taken note of the provisions as are contained under Rule 12(3) of the Central Rules and the

Revisionist before this Court is complaining that he ought to have followed the procedure envisaged under U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 and ought to have considered certificates beginning from Primary School till High School (failed), the accused would not have been adjudged as a juvenile.

2. Faced with this situation, as the issue in Revision was whether the procedure provided under The Juvenile Justice (Care and Protection of Children) Rules, 2007 (*herein-after to be referred to as the 'Central Rules'*) should apply to the facts of the case or the procedure provided under the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004, for determination of the age of the accused ought to have been adhered and in view of the fact that issue so raised was of general importance, following issues have been referred to be answered by the Larger Bench:

1.Whether the U.P. Juvenile Justice (Care & Protection of Children) Rules 2004 need be recast consequent upon addition of section 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000 (as amended by Act No. 33 of 2006).

2.And in case it is found that they need not be recast whether the U.P. Juvenile Justice (Care & Protection of Children)Rules 2004 framed by State Government or The Juvenile Justice (Care & Protection of Children) Rules 2007 framed by the Central Government shall apply to the matter, in Uttar Pradesh.

3. Shri Sarvesh Kumar Mishra, Advocate appearing on behalf of Revisionist submitted that procedure provided under U.P. Juvenile Justice (Care and Protection of Children) Rules 2004, ought to have been adhered to and Central Rules ought not have been pressed into service.

4. Shri Imran Ullah, learned Additional Advocate General, based on the statutory provisions holding the field, has submitted that procedure provided under Rule 12(5) of Central Rules will have to be adhered to as on date under the scheme of things provided for.

5. Shri Birendra Singh, Advocate and Shri M.P. Rai, Advocate representing the accused have also toed the same line of argument as has been toed by the State of U.P.

6. In order to answer the issues that have been so raised, the legislative background as well as relevant statutory provisions holding the field will have to be looked into.

7. The Parliament felt it necessary that uniform juvenile justice system should be available throughout the country which should make adequate provision for dealing with all aspects in the changing social, cultural and economic situation in the country and there was also need for larger involvement of informal systems and community based welfare agencies in the care, protection, treatment, development and rehabilitation of such juveniles and with these objectives in mind, it enacted Juvenile Justice Act, 1986 (for short, "1986 Act').

8. Looking to the working of Juvenile Justice Act, 1986 review of its working was carried out, and '1986 Act' was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, "2000 Act'). 2000 Act to carry forward the constitutional philosophy engrafted in Articles 15(3), 39(e) and (f), 45 and 47 of the Constitution and same also incorporates the standards prescribed in the Convention on the Rights of the Child, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and all other relevant international instruments. Clause (k) of Section 2 defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age. Clause (l) of Section 2 defines "juvenile in conflict with law" to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age on the date of commission of such offence. Chapter II of Juvenile Justice Act, 2000 deals exclusively with juveniles in conflict with law who are alleged to have committed offence which are otherwise punishable under the general law of crimes.

9. Section 3 of 2000 Act provides for continuation of inquiry in respect of juvenile who has ceased to be a juvenile. It reads as under:

"S.3 . Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.--Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."

10. Chapter II of 2000 Act deals with juvenile in conflict with law. This Chapter comprises of Sections 4 to 28. Section 4 provides for constitution of juvenile justice board and its composition. Section 5 provides for procedure, etc. in relation to juvenile justice board. Section 6 deals with the powers of juvenile justice board. Section 7 provides for the procedure to be followed by Magistrate not empowered under the Act. Section 18 of the Act prohibits joint proceedings and trial of juvenile and a person who is not a juvenile and the punishment that can be awarded to a juvenile has been provided for in Section 15 of the Act provides for the order that can be passed regarding juvenile. Relevant provisions i.e. Sections 6 is being quoted as under:

"S.6 . Powers of Juvenile Justice Board.--(1) Where a Board has been constituted for any district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.

(2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

11. Section 49 of 2000 Act deals with presumption and determination of age. This Section reads as under:

"49 . Presumption and determination of age.--(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit)and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

12. Sections 52 and 53 deal with appeals and revision. Section 54 provides for procedure in inquiries, appeals and revision proceedings, which reads as follows:

52. Appeals.--

Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Session: Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from--

(a) any order of acquittal made by the Board in respect of a juvenile alleged to have committed an offence; or

(

b) any order made by a Committee in respect of a finding that a person is not a neglected juvenile.

(3) No second appeal shall lie from any order of the Court of Session passed in appeal under this section.

53. Revision.--The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit: Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

"S.54 . Procedure in inquiries, appeals and revision proceedings.--(1)Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973(2 of 1974)."

13. In the State of U.P., in exercise of power conferred under Section 68 of the Juvenile Justice Care and Protection 2000 Act (Act No.56 of 2000), Rules have been framed known as, the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 (herein-after to be referred to as the 'U.P. Rules'). The relevant Rule for the purpose of consideration of issue raised before us is Rule 22. Rule 22 reads as follows:

"22. Procedure to be followed by a Board in holding inquiries and the determination of age.-

(1) In all cases under the Act the proceedings shall be conducted in as simple a manner as possible and care shall be taken to ensure that the juvenile or child against whom the proceedings have been instituted is given home like atmosphere during the proceedings.

(2) When witnesses are produced for examination, the Board shall be free to use the power under Section 165 of the Indian Evidence At, 1872, (Act No.1 of 1872), to question them so as to bring out any point that may go in favour of the juvenile or the child.

(3) While examining a juvenile or child and recording his statement, the competent authority shall be free to address the juvenile or child in any manner that may seem suitable, in order to put the juvenile or child at ease and to elicit the true facts, not only in respect of the offence of which the juvenile or child is accused, but also in respect of the home and social surroundings and the influence to which the juvenile or child might have been subjected.

(4) The record of the examination shall be in such form as the Board may consider suitable having record to the contents of the statement and circumstances in which it was made.

(5) In every case concerning a juvenile or child, the Board shall either obtain-

(i) a birth certificate given by a corporation or a municipal authority;

Or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age.

(6) The State Government shall recognize voluntary organizations, which have 10 years experience of child welfare to supervise and submit periodical reports, as directed by the Board regarding the orders passed under Clauses (b) and (c) of sub-section (1) of Section 15 of the Act.

(7) The Board shall, in Form-I, order a Probation Officer, or otherwise to conduct a special investigation, reporting on the character and antecedents of the juvenile or child with a view to assess the best possible mode for placement, such as, with the family, an institution or otherwise permissible under the Act.

(8_ When a juvenile or child is placed under the care of a parent or a guardian and the Board considers it expedient to place the juvenile or child under the supervision of a probation officer, it shall issue a supervision order in Form-II.

(9) The competent authority may, while making an order placing a juvenile under the care of a parent, guardian or fit person, as the case may be, direct such parent, guardian or fit person to enter into a bond in Form IV with or without sureties.

(10) Whenever the Board orders a juvenile or child to be kept in an institution, it shall forward to the Superintendent of such institution a copy of its order, in Form III with particulars of the home and parents or guardian and previous record.

(11) The juvenile or child shall be lodged in a home closest to place where he belongs.

(12) The Superintendent of an institution, certified as special home under sub-section (2) of Section 9 of the Act, shall be informed in advance by the Board before any juvenile or child is committed to it.

(13) The Superintendent of the said institution may, on receipt of the information, intimation in writing objections, if any, to the committal of the juvenile or child and the objections shall be taken into consideration by the Board before the juvenile or child is committed to the said institution.

(14) In case the Board orders the parent of the juvenile or child, or the juvenile or child to pay a fine, the amount realized shall be deposited in Government Treasury."

14. By Act 33 of 2006, the Parliament brought significant changes in 2000 Act. Section 7A provides for procedure to be followed when claim of juvenility is raised before any court. Section 20 dealt with pending cases. It reads as follows:

"S.7A. Procedure to be followed when claim of juvenility is raised before any court.--(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.

20. Special provision in respect of pending cases.--Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.--In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.] "

15. The provisions of Act No.33 of 2006 also introduces Section 20 in reference to pending cases by providing a clear cut provision that notwithstanding anything contained in this Act, all

proceedings in respect of a juvenile pending in any Court or in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. A proviso has also been added that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile. The explanation provided to the same clearly proceeds to make a mention that in all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any Court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

16. On the parameters of the provisions that have been quoted above, the issue in question is being answered.

17. From the perusal of the provisions that have been quoted above, it is clearly reflected that under '2000 Act', the inquiry in respect of the claim of juvenility was required to be conducted by the Competent Authority having jurisdiction over the proceedings and by means of Act No.33 of 2006 Section 7-A has been introduced in the '2000 Act', wherein for the first time in reference of claim of juvenility, which has been permitted to be raised before any Court or where is the Court is of the opinion that an accused person was juvenile on the date of commission of the offence, the Court is entitled to make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be. A proviso has been added to the same clearly providing that the claim of juvenility may be raised before any Court and it is to be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of the Act. Sub-Section 2 of Section 7-A clearly mentions that if the Court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders, and the sentence, if any, passed by a court shall be deemed to have no effect.

18. Thus this particular provision clearly entitles the Court to answer the issue of juvenility on being raised before the Court or even otherwise when Court is of the opinion that an accused person was juvenile on the date of commission of the offence, the Court shall make an enquiry and proceed accordingly.

19. By insertion of section 7-A, the legislative intent was clear inasmuch as the claim of juvenility could be raised before any Court and at any stage, and the Court was conferred power to make an enquiry by taking such evidence as may be necessary to determine the age of such person

with a rider that such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder. To confer power to the Central Govt. to frame model rules to carry out the purposes of the Act, a proviso to sub section (1) of section 68 was inserted by Act No.33 of 2006. The amended sub section (1) to section 68 along with its proviso reads as under:

"68. Power to make rules.--(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of the matter is made by the State Government and while making such rules, so far as practicable, they conform to such model rules."

20. Prior to the insertion of the proviso to sub section (1) of section 68 as well as sub section (3) of section 68 by Act No.33 of 2006, there was no provision enabling the Central Govt. to frame model rules in respect of all or any of the matters with respect to which the State Govt. could make rules under the said section. As a result by taking the aid of section 70, which enabled the Central Govt. to remove difficulties, Model Rules were framed in the year 2000, the validity of the same came for consideration before a 5 judges Bench of the Apex Court in the case of ***Pratap Singh v. State of Jharkhand: (2005) 3 SCC 551. Hon'ble S. B. Sinha, J.***, one of the members of that Bench, in a separate judgment, partly dissenting from the majority view, discarded the Model Rules by holding that it had no statutory backing and held that the court thus would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of section 35 of the Indian Evidence Act. The relevant observations are contained in paragraphs 107 to 112 of the report, which reads as under:

"107. We, however, do not agree that the Model Rules have been framed in terms of the provisions of the Act so as to attract the principles that rules validly framed are to be treated as part of the Act. It is one thing that the rules validly framed are to be treated as part of the Act as has been held in Chief Forest Conservator (Wildlife) v. Nisar Khan and National Insurance Co. Ltd. v. Swaran Singh but the said principle has no application herein as in terms of the provisions of the said Act, the Central Government does not have any authority to make any rules. In the absence of any rule-making power it cannot refer to the omnibus clause of power to remove difficulty inasmuch as it has not been stated that framing of any model rule is permissible if a difficulty arises in giving effect to the provision of the Act. The Central Government is a statutory functionary. Its functions are circumscribed by Section 70 of the Act only. It has not been authorised to make any rule. Such rule-making power has been entrusted only to the State. The Central Government has, thus, no say in the matter nor can it exercise such power by resorting to its power "to remove difficulties". Rule-making power is a separate power which has got nothing to do with the power to remove difficulty. By reason of the power to remove difficulty or doubt, the Central Government has not been conferred with any legislative power. The power to remove doubt or difficulty

although is a statutory power but the same is not akin to a legislative power and, thus, thereby the provisions of the Act cannot be altered. [See Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union]

108. The age of the delinquent juvenile, therefore, cannot be determined in terms of Model Rule 62. Any law mandating the court to take into consideration certain documents over others in determining an issue, must be provided for only by law. Only a validly made law can take away the power of the court to appreciate evidence for the purpose of determination of such a question in the light of Section 35 of the Indian Evidence Act. It cannot be done by the Central Government in exercise of the executive power (See Union of India v. Naveen Jindal and State of U.P. v. Johri Mal.)

109. In Birad Mal Singhvi v. Anand Purohit this Court held:

"To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

(emphasis supplied)

110. In Sushil Kumar v. Rakesh Kumar this Court as regards determination of age of a candidate in terms of Section 36(2) of the Representation of the People Act, 1951 observed:

"32. The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of the onus of proof becomes academic [see Union of India v. Sugauli Sugar Works (P) Ltd. and Cox and Kings (Agents) Ltd. v. Workmen]. Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established."

This Court therein followed, inter alia, Birad Mal Singhvi v. Anand Purohit and several other decisions.

111. The Court, therefore, must determine the age of the appellant herein keeping in view our aforementioned findings that the relevant date for reckoning the age of the juvenile would be the date of occurrence and not the date on which he was produced before the Board.

112. The upshot of the aforementioned discussions is:

(i) In terms of the 1986 Act, the age of the offender must be reckoned from the date when the alleged offence was committed.

(ii) The 2000 Act will have a limited application in the cases pending under the 1986 Act.

(iii) The Model Rules framed by the Central Government having no legal force cannot be given effect to.

(iv) The court, thus, would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of Section 35 of the Indian Evidence Act."

21. It appears that the amendment brought by Act No.33 of 2006 was to obviate the outcome of the decision of the Apex Court in the case of Pratap Singh (supra), as has been observed by the Apex Court in the case of ***Hari Ram v. State of Rajasthan:(2009) 13 SCC 211*** as follows:

Section 7-A makes provision for a claim of juvenility to be raised before any Court at any stage, even after final disposal of a case and sets out the procedure which the Court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not. The aforesaid provisions were, however, confined to Courts, and proved inadequate as far as the Boards were concerned. Subsequently, in the Juvenile Justice (Care and Protection of Children) Rules, 2007, which is a comprehensive guide as to how the provisions of the Juvenile Justice Act, 2000, are to be implemented, Rule 12 was introduced providing the procedure to be followed by the Courts, the Boards and the Child Welfare Committees for the purpose of determination of age in every case concerning a child or juvenile or a juvenile in conflict with law. Since the aforesaid provisions are interconnected and lay down the procedures for determination of age, the said Rule is reproduced hereinbelow:

"12. Procedure to be followed in determination of Age.- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either

(i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) if the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

Sub-Rules (4) and (5) of Rule 12 are of special significance in that they provide that once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub- rule (3) the Court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the Court or Board after examining and obtaining any other documentary proof referred to in Sub-rule (3) of Rule 12. Rule 12, therefore, indicates the procedure to be followed to give effect to the provisions of Section 7A when a claim of juvenility is raised.

One of the problems which has frequently arisen after the enactment of the Juvenile Justice Act, 2000, is with regard to the application of the definition of "juvenile" under Section 2(k) and (l) in respect of offences alleged to have been committed prior to 1st April, 2001 when the Juvenile Justice Act, 2000 came into force, since under the 1986 Act, the upper age limit for male children to be considered as juveniles was 16 years. The question which has been frequently raised is, whether a male person who was above 16 years on the date of commission of the offence prior to 1st April, 2001, would be entitled to be considered as a juvenile for the said offence if he had not completed the age of 18 years on the said date. In other words, could a person who was not a juvenile within the meaning of the 1986 Act when the offence was committed, but had not completed 18 years, be governed by the provisions of the Juvenile Justice Act, 2000, and be declared as a juvenile in relation to the offence alleged to have been committed by him?

Read with Sections 2(k), 2(l), 7A and Rule 12, Section 20 of the Juvenile Justice Act, 2000, as amended in 2006, is probably the Section most relevant in setting at rest the question raised in this appeal, as it deals with cases which were pending on 1st April, 2001, when the Juvenile Justice Act, 2000, came into force. The same is, accordingly, reproduced hereinbelow :

"20. Special provision in respect of pending cases.-Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

[Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.]"

The Proviso and the Explanation to Section 20 were added by Amendment Act 33 of 2006, to set at rest any doubts that may have arisen with regard to the applicability of the Juvenile Justice Act, 2000, to cases pending on 1st April, 2001, where a juvenile, who was below 18 years at the time of commission of the offence, was involved. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1st April, 2001, when the Juvenile Justice Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000.

At this point it may be noted that the decision of the Constitution Bench in Pratap Singh's case (supra) was rendered at a point of time when the amendments to Sections 2(l) and 20 and the introduction of Section 7-A had not yet been effected, nor was Rule 12 of the 2007 Rules available. Several decisions on the applicability of the 2000 Act to children who were above 16 but below 18 years on the date of commission of the offence have been rendered after the Juvenile Justice Act, 2000, came into force and several others were rendered after the amendments were introduced in the said Act by Amendment Act 33 of 2006 and the introduction of the 2007 Rules. The decisions rendered by this Court and the High Courts prior to 1st April, 2001, when the Juvenile Justice Act, 2000, came into force and thereafter can, therefore, be divided into two groups. The decision in Pratap Singh's case (supra) and in the case of Munney @ Rahat Jan Khan vs. State of U.P. [(2006) 12 SCC 697] fall into the first category, whereas the decisions in Jameel vs. State of Maharashtra [(2007) 11 SCC 420], Vimal Chadha vs. Vikas Chaudhary [(2008) 8 SCALE 608], Babloo Pasi vs. State of Jharkhand [(2008) 13 SCALE 137] and Ranjit Singh vs. State of Haryana [(2008) 9 SCC 453] fall into the second category. Although, the Constitution Bench decision in Pratap Singh's case (supra) and Munney's case (supra) are not really relevant since they have been rendered prior to 22nd August, 2006, when the Amending Act 33 of 2006 came into force, they assume a modicum of significance since they have been referred to and relied upon even after the Amending Act and the 2007 Rules came into force on 22.8.2006 and 26.10.2007, respectively.

28. Of the decisions rendered after the amendments effected in 2006 to the Juvenile Justice Act, 2000, the first decision of note is that of Jameel's case (supra) rendered on 16.1.2007 wherein the amendments to the Act effected by the Amendment Act 33 of 2006, which came into effect on 22.8.2006, were not even noticed. The next decision rendered on 27.5.2008 is in the case of Vimal Chadha's case (supra), wherein, although, the amendment of the Act and the introduction of the Juvenile Justice Rules, 2007, were brought to the notice of the Court, the same were not considered and the decision was rendered in the light of the decision rendered in Pratap Singh's case (supra) and other cases decided prior to 1.4.2001.

The next decision rendered on the same point on 11.9.2008 was the decision in Ranjit Singh's case (supra) wherein also the amendments to Section 2(l) and 20 and the introduction of Section 7-A in the Juvenile Justice Act, 2000, and the introduction of the 2007 Rules had not been considered and the decision passed sub silentio.

22. In fact, after the amendment, the Central Govt. made and notified the Rules, 2007, vide notification dated 26.10.2007, and those Rules came into effect from the date of the publication of notification in the Gazette of India, (Extra.), Part II, Section 3(i), dt. 26.10.2007.

23. The relevant provisions governing the procedure to be followed in determination of age of a juvenile in conflict with law is contained in Rule 12, which provides for as follows:

"12. Procedure to be followed in determination of Age.--(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

24. Rule 96 of the Central Rules provides that until the new rules conforming to these rules are framed by the State Govt. concerned under Section 68 of the 2000 Act, the Central Rules shall mutatis mutandis apply in that State.

25. Rule 97 of the Central Rules provides that all pending cases, which have not received finality, shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder. For convenience Rule 97 of the Central Rules is being extracted herein below:

"97. Pending Cases.--(1) No juvenile in conflict with law or a child shall be denied the benefits of the Act and the rules made thereunder.

(2) All pending cases which have not received a finality shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder.

(3) Any juvenile in conflict with law, or a child shall be given the benefits under sub-rule (1) of this rule, and it is hereby clarified that such benefits shall be made available to all those accused who were juvenile or a child at the time of commission of an offence, even if they cease to be a juvenile or a child during the pendency of any inquiry or trial.

(4) While computing the period of detention or stay or sentence of a juvenile in conflict with law or of a child, all such period which the juvenile or the child has already spent in custody, detention, stay or sentence of imprisonment shall be counted as a part of the period of stay or detention or sentence of imprisonment contained in the final order of the court or the Board."

26. The Apex Court in the case of ***Ashwani Kumar Saxena vs. State of M.P. 2012 Law Suit (SC) 607*** decided on 13.10.2012, after considering various judgements as well as the scope of Section 7-A of the Act, 2000 as also Rule 12 of the Rules, 2007, observed as follows:

"23. We may in the light of the judgments referred to hereinbefore and the principles laid down therein while examining the scope of Section 7-A of the Act, Rule 12 of the 2007 Rules and Section 49 of the Act examine the scope and ambit of inquiry expected of a court, the Juvenile Justice Board and the Committee while dealing with a claim of juvenility.

24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7-A of the Act and Rule 12 of the 2007 Rules:

"7-A. Procedure to be followed when claim of juvenility is raised before any court.--Already Quoted above

"12. Procedure to be followed in determination of age.--Already Quoted above"

25. Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an "inquiry" and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7-A has used the expressions "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence.

26. Rule 12 which has to be read along with Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasise the fact that what is contemplated in Section 7-A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word "inquiry" has not been defined under the JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

27. Let us now examine the meaning of the words "inquiry", "enquiry", "investigation" and "trial" as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions. "Inquiry" as defined in Section 2(g) CrPC reads as follows:

"2. (g) "inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

"Investigation" as defined in Section 2(h) CrPC reads as follows:

"2. (h) "investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

The expression "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in Sections 2(g) and 2(h) of the Code of Criminal Procedure.

28. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating to some offences committed. We find in very many cases that the court/the Juvenile Justice Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the JJ Act, following the procedure laid down under Rule 12 and not following the procedure laid down under the Code.

29. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Penal Code or under other penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries

into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7-A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold the inquiry.

30. Consequently, the procedure to be followed under the JJ Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under Section 7-A of the Act. In many of the cases, we have come across, it is seen that the criminal courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the penal laws forgetting the fact that the specific procedure has been laid down in Section 7-A read with Rule 12.

31. We also remind all courts/Juvenile Justice Boards and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate, etc. mentioned in Rules 12(3)(a)(i) to (iii). The courts in such situations act as a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.(Emphasis Supplied)

27. After observing as above, the Apex Court deprecated the practice of the courts in making a roving enquiry with regards to the correctness of the date of birth entered in matriculation or equivalent certificates or other documents unless those documents or certificates were fabricated or manipulated. The relevant observations of the apex court are contained below:

"Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a

corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

We have come across several cases in which the trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted." (Emphasis Supplied)

28. Apex Court in the case of ***Abuzar Hossain @ Gautam Hussain vs. State of West Bengal in Criminal Appeal No.1193 of 2006 decided on 10.10.2012*** has held as follows:

"Now, we summarise the position which is as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

(ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh2 and Pawan8 these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of

the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

(vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised."

29. The judgment in Ashwani Kumar Saxena's case (supra) has been consistently followed by the Apex Court in ***Jodhbir Singh v. State of Punjab: (2012) 13 SCC 591; Ranjeet Goswami v. State Of Jharkhand: (2014) 1 SCC 588; and Kulai Ibrahim @ Ibrahim v. State*** represented by the Inspector of Police, B-I, Bazar Police Station, Coimbatore: (2014) 12 SCC 332.

30. The law that emerges from the aforesaid statutory provisions and decision of the Apex Court is that where there are certificates available, as contemplated by Rule 12 (3) (a) (i) of the Rules, 2007, the date of birth entered in such certificate is to be accepted for determining the age of the juvenile in conflict with law and the other evidences including opinion of the medical board would not be required unless it is shown that those documents or certificates are fabricated or manipulated. The age determination inquiry is to be conducted as per the Rules, 2007 and not in any other manner provided for.

31. Rule 96 of the Rules, 2007 provides that until the new rules conforming to these rules are framed by the State Government concerned under Section 68 of the Act, 2000, the Rules, 2007 shall mutatis mutandis apply. Rule 97 of the said Rules provides that all pending cases which have not received a finality shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder.

32. The question that has been referred to above will get its reply from the aforementioned two provisions, inasmuch as, the provisions of U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 (U.P. Rules) certainly will have to be in line with the provisions as are contained under Juvenile Justice (Care & Protection of Children) Rules 2007 (Central Rules) and till the provisions of 'U.P. Rules' are not brought in line with the 'Central Rules' framed by the Central Government, the recourse to determine juvenility on the basis of the provisions as contained under U.P. Rules, cannot be subscribed. The U.P. Rules will have to be recast in tune with the Model Rules framed by the Central Government and commonly known as 'The Juvenile Justice (Care & Protection of Children) Rules 2007' as Rule 96 of the Rules, 2007 clearly provides that until the new rules conforming to these rules are framed by the State Govt. concerned under Section 68 of the Act, 2000, the Rules, 2007 shall mutatis mutandis apply in that State, in view of this, as far as provision of U.P. Rules are concerned, till they are not revised in consonance with the provisions as are contained under Central Rules, the same cannot be made foundation and basis for determining juvenility and the Courts are duty bound to answer the question of juvenility strictly on the parameters of the provisions that are contained under Central Rules and not on any other parameters as has been provided for.

33. The procedure that has been provided for determining the question of juvenility under Central Rules as to how the question of juvenility is to be determined, the same will have a prevailing effect on U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 as the State of Uttar Pradesh has not framed any rule in tune with the Central Rules referred to above and Central Rule would apply for the inquiry to be held until Rules in this regard are framed by the State of Uttar Pradesh, in view of this, answer to the question posed i.e. *"whether the U.P. Juvenile Justice (Care & Protection of Children) Rules 2004 need be recast consequent upon addition of section 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000 (as amended by Act No. 33 of 2006)"* is '**Yes**' as the provisions of the U.P. Juvenile Justice (Care & Protection of Children) Rules 2004 on its own after introduction of Section 7-A and keeping in view the provisions of the Central Rules until and unless it is not revamped and not at all brought in consonance with the provisions as are contained under the Juvenile Justice (Care & Protection of Children) Rules 2007, the same cannot be subscribed and in view of this, same needs to be modified.

34. The answer to the second question i.e. *"And in case it is found that they need not be recast whether the U.P. Juvenile Justice (Care & Protection of Children)Rules 2004 framed by State Government or The Juvenile Justice (Care & Protection of Children) Rules 2007 framed by the Central Government shall apply to the matter, in Uttar Pradesh"* is that it needs to be modified and till it is not revamped, on the issue of juvenility being raised, the answer to the said question will have to be found on the parameters of the provisions as are contained under The Juvenile Justice (Care & Protection of Children) Rules 2007 and the same shall apply to the matter in the State of Uttar Pradesh also.

35.The reference is accordingly answered. The Revision shall now be placed before the appropriate Bench according to roster for disposal in light of this judgement.

(2016) 9 ILRA 455
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Bail Application No.- 16292 Of 2015

Deepak Kumar Singh ...Applicant
Versus
Union Of India ...Respondent

Counsel for the Applicant:
Rajeev Kumar Singh Parmar, Abhay Raj Singh

Counsel for the Respondent:
Sanjay Kumar Singh-Spp

Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 2(viid), 9-A, 25-A & 37 — Controlled substance — Acetic Anhydride — Bail — Applicant sought bail in case involving recovery of 32.450 litres of Acetic Anhydride from six containers — Contention that "Acetic N hydride" referred in earlier Supreme Court judgment was different substance and no commercial quantity prescribed for Acetic Anhydride — Rejected — Held, Acetic Anhydride is a "controlled substance" notified under S. 2(viid) and regulated under S. 9-A; contravention punishable under S. 25-A — Acetic N hydride and Acetic Anhydride are one and same substance.

NDPS Act — Controlled substances — Acetic Anhydride — Use in manufacture of heroin — Acetic Anhydride widely used in illicit manufacture of heroin and brought within regulatory regime to implement international obligations and prevent narcotic trafficking — Considering percentage of Acetic Anhydride found in seized samples, approximately 11 kg heroin could be extracted from recovered quantity, far exceeding commercial quantity prescribed for heroin.

NDPS Act — Bail — Commercial quantity — Rigour of S. 37 — Where huge quantity of controlled substance capable of producing commercial quantity of heroin recovered, stringent conditions under S. 37 attracted — Court must be satisfied that accused is not guilty and is unlikely to commit offence while on bail — Such satisfaction absent in present case.

NDPS Act — Controlled substance — Distinction from narcotic drugs and psychotropic substances — Though Acetic Anhydride not included in Schedule of narcotic drugs or psychotropic substances, it is specifically notified as "controlled substance" under statutory notifications and 2013 Order issued under S. 9-A — Manufacture, possession, transport and trade thereof without authorization prohibited.

Bail — Recovery of huge quantity of contraband precursor — Seriousness of offence — Offences relating to narcotic drugs and controlled substances have grave societal impact affecting public health and economy — Recovery of large quantity of precursor chemical used for heroin manufacture constitutes serious offence disentitling accused from discretionary relief of bail.

In Result: Bail application rejected.

Cases cited:
1. Union of India Vs. Kuldeep Singh and others2004 (2) SCC 590

2. Ravji v. State of Rajasthan(1996) 2 SCC 175
3. Sharp v. Wakefield(1891) Appeal Cases 173
4. S.G. Jaisinghani v. Union of IndiaAIR 1967 SC 1427
5. Lee v. Budge Railway Co.(1871) LR 6 CP 576
6. Morgan v. Morgan1869 LR 1 P & M 644

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

1. Heard learned counsel for the applicant, learned counsel for Union of India and perused the record.

2. Learned counsel for the applicant contended that the applicant has been falsely implicated for the recovery of 32.450 litres of Acetic Anhydride in six containers; that the recovery is alleged to have been made on 2.11.2014 from the two bags of applicant which was found to be Acetic Anhydride upon testing on the spot and was allegedly admitted to be so by the applicant; that manufacture, trade, commerce, possession and consumption of the recovered commodity without unique registration number has been prohibited by way of Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013 (hereinafter referred to as "2013 Order") wherein in all the three Schedules-A, B & C the above commodity of Acetic anhydried has been mentioned at No.1 and its manufacture, distribution, sell, purchase, possession, storage, consumption as well as export and import is subject to control as specified in this 2013 Order; that no commercial quantity of above substance has been prescribed either in the N.D.P.S. Act or 2013 Order; that recovery of above narcotic substance has been falsely planted on applicant of which there is no independent witness; that Shafiq Khan, the witness of recovery has submitted an affidavit A-3 on 12.12.2014 stating that the arrest of and recovery from applicant was not made in his presence; that compliance of provisions of Section 50 of N.D.P.S. Act was not made; that the applicant has not committed any offence under Section 9A/25A of N.D.P.S. Act; that the case law laid down by the Apex Court in the case of ***Union of India Vs. Kuldeep Singh and others, 2004 (2) SCC 590***, is not applicable to the facts of this case as the commodity of contraband seized therein was altogether a different commodity of contraband from the commodity which is alleged to have been recovered from the applicant; that in above case 'Acetic N hydride' while in the present case 'Acetic Anhydride' was allegedly recovered which are two different commodities; that the progress of trial is very poor as despite framing of charges against sole accused, the applicant on 30.4.2015, only one witness has been produced for examination and there is no likelihood of early disposal of 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 2.11.2014.

3. Learned counsel for Union of India, Department of Narcotics vehemently opposed the prayer of bail and contended that due compliance of provisions of N.D.P.S. Act was made at the time of recovery; that huge quantity of narcotic substance has been recovered from the applicant, which may not be falsely planted; that above liquid form of narcotic is also used in manufacturing of Heroin and the percentage of Acetic Anhydride in the samples of six containers sent for chemical examination was found to be between 94.1% to 95.5% in each of the six samples taken out from the six containers; that the recovery has been made in presence of independent witness and the

applicant has admitted the commission of crime due to greed of money in his statement U/s 67 of N.D.P.S. Act which is binding on him; that allegations about submission of any affidavit by Shafiq Khan on 22.12.2014 denying recovery in his presence are false and incorrect and no such affidavit was produced before the Sessions court, who has rejected bail application of applicant on 22.1.2015; that even if the applicant has obtained any such affidavit from Shafiq Khan by exerting his influence or under threat, the same is not admissible in evidence and may not be considered for disposal of bail application; that in the case of ***Union of India Vs. Kuldeep Singh and others*** (supra) the Apex Court taking note the volume of contraband article 880 litres of Acetic N hydride or Acetic Anhydride, held it to be sufficient for obtaining/extracting a quantity of 300 Kgs. of finished product of Heroin; that considering the percentage of Acetic Anhydride in the samples of each containers and considering the fact that 300 Kgs. Heroin could have been extracted out of 880 litres of Acetic Anhydride, from the recovered quantity of 32.450 litres, around 11.06 Kg. of Heroin could have been extracted which is much more than the commercial quantity of Heroin which is 250 gms. prescribed under the N.D.P.S. Act; that in this manner the applicant was carrying on commercial quantity of prohibited narcotics in liquid form which is used for manufacturing of Heroin; that Acetic Anhydride and Acetic N hydride are one and the same things and it will be incorrect to say that the material referred in the case of Union of India Vs. Kuldeep Singh and others (supra) is different material from that which has been recovered from the applicant and which has been brought under the category of prohibited substance by way of 2013 Order; that in view of provisions of Section 37 of N.D.P.S. Act, since there is nothing to believe that applicant was not involved in the crime and that in case of release, he will not involve in similar type of offences, his application for bail is liable to be rejected.

4. Upon hearing parties counsel, I find that Act No.61 of 1985 The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'N.D.P.S. Act, 1985') was enacted on 16.9.1995 with following aims and objects:-

"An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances [to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances] and for matters connected therewith."

5. The above Act controls and regulates the operations relating to three types of contrabands viz. Narcotics Drugs, Psychotropic Substances and Controlled Substances, defined in Section 2(xiv)(xxiii) & (viid) which are as under:-

"2(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods;

(xxiii) "psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;

(viid) "controlled substance" means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any International Convention, by notification in the Official Gazette, declare to be a controlled substance."

6. The prohibited contraband "Acetic Anhydride" does not find place in the Schedule of N.D.P.S. Act, 1985. The Section 9A has been added in N.D.P.S. Act w.e.f. 29.5.1989 conferring power to control and regulate controlled substances. The exercise of powers conferred in Section 9A along with Section 25A prescribs punishment for contravention of orders, made under Section 9A. The provisions of Section 9A and Section 25A of N.D.P.S. Act, 1985 are as under:-

*"**9A. Power to control and regulate controlled substances**.-(1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.*

(2) Without prejudice to the generality of the power conferred by sub-section (1), an order made thereunder may provide for regulating by licences, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance.

***25A. Punishment for contravention of orders made under section 9A**. -If any person contravenes an order made under section 9A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees:*

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding one lakh rupees."

7. In exercise of powers conferred by Section 9A of N.D.P.S. Act, 1985 the '2013 Order' came into force w.e.f. 26.3.2013 prohibiting the manufacture, trade and commerce, possession and consumption of controlled substances as well as for transportation and selling of controlled substances mentioned in Schedule A and also prohibiting export and import of controlled substances mentioned in Schedules B & C. The above '2013 Order' consists three Schedules A, B & C and the controlled substance "Acetic Anhydride" is mentioned at no.1 in all the three schedules.

8. Considering the possible use of Acetic Anhydride in the production or manufacture of Heroin or Methaqualone and also to implement the provisions of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 vide Notification No.l50198E dated 24.3.1993, the Acetic Anhydride was brought within the definition of controlled substance under Section 2(viid) of N.D.P.S. Act. A list of controlled substances Notifications, issued under the N.D.P.S. Act 1985 is reproduced as under:-

Sl. No.	Substance	Gazette Notification and date
1	Acetic Anhydride	Controlled Notification No. S.O. 198(E), dated 24-03-1993
2	Ephedrine & its Salts	Controlled Notification No. S.O. 1296(E), dated 28-12-1999
3	Pseudoephedrine & its Salts	Controlled Notification No. S.O. 1296(E), dated 28-12-1999
4	N-Acetyl Anthranilic Acid	Controlled Notification No. S.O. 763(E), dated 24-10-1994
5	Anthranilic Acid	Controlled Notification No. S.O. 239(E), dated 26-02-2003

9. From above position of provisions of Act and Controlled Order with regard to Acetic Anhydride, it is absolutely clear that Acetic Anhydride had been defined as a controlled substance, even before '2013 Order' which came into force w.e.f. 26.3.2013. The argument of learned counsel for the applicant that since the case of "Union of India Vs. Kuldeep Singh and others (supra)" relates to an incident dated 12.12.1995 and was decided by the Apex Court on 8.12.2003 much before the '2013 Order' came into existence and that Acetic N hydride and Acetic Anhydride are different substance having no relevancy or applicability to the facts of the case, has no force.

10. It is pertinent to mention that a study of above controlled substances shows that:-

*"**Acetic anhydride**, or **ethanoic anhydride**, is the chemical compound with the formula (CH3CO)2O. Commonly abbreviated Ac2O, it is the simplest isolable anhydride of a carboxylic acid and is widely used as a reagent in organic synthesis. It is a colorless liquid that smells strongly of acetic acid, which is formed by its reaction with moisture in the air.*

Acetic anhydride was first synthesized in 1852 by the French chemist Charles Frederic Gerhardt (1816-1856) by heating potassium acetate with benzoyl chloride.

Because of its use for the synthesis of heroin by the diacetylation of morphine, acetic anhydride is listed as a U.S. DEA List II precursor, and restricted in many other countries."

11. In the case of Union of India Vs. Kuldeep Singh and others (supra), the accused was convicted under Section 9A/25A for recovery of 880 litres of Acetic N hydride from him and upon conviction was sentenced with 10 years rigorous imprisonment and Rs.1 lac fine. In appeal the High Court considering the plea that father of accused was a person of 85 years, mother had expired and the accused was not a habitual offender, reduced the sentence to the period of custody undergone which was taken to be 6½ years and fine was also reduced to Rs.25,000/-. In appeal by Union of India, the Apex Court setting aside the judgment passed by the High Court allowed the appeal and directed the accused to surrender to custody to suffer the remainder of the sentence as awarded by the trial court. Paras 16 to 25 of the above judgment and order of the Apex Court are being quoted as under:-

"16. Similar view has also been expressed in Ravji v. State of Rajasthan, (1996 (2) SCC 175). It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

17. An offence relating to narcotic drugs or psychotropic substances is more heinous than a culpable homicide because the latter affects only an individual while the former affects and leaves its deleterious impact on the society, besides shattering the economy of the nation as well. That the legislature intended to make the offences under the Act so serious to be dealt with sternly and with an iron hand is made clear by providing for enhanced penalties, including even death sentence, in certain class of cases, when convicted for the second time.

18. It is true as contended by learned counsel for the respondent- accused that no minimum sentence is prescribed, but the sentence imposed should fit in with the gravity of offence committed but in the teeth of the other indications in the enactment, mere absence of a provision for minimum sentence is no reason or justification to treat the offences under the Act as any less serious as assumed by the High Court. It was highlighted by learned counsel for the respondent that the Court had a discretion which according to him has been rightly exercised. The High Court seems to wholly misdirected itself not only as to the seriousness of the offences but also with reference to the relevant consideration which should weigh with the Court in exercising its discretion.

19. Discretion is to know through law what is just. Where a Judge has and exercises a judicial discretion his order is unappealable unless he did so under a mistake of law or fact or in disregard of principle, or after taking into account irrelevant matters. It will help to show this if it can be shown that there were no materials on which he could exercise his discretion in the way he did. Not any one of the reasons attempted to be enumerated by the High Court in this case

could in law be viewed as either relevant or reasonable reasons carrying even any resemblance of nexus in adjudging the quantum of punishment in respect of an offence punishable under the Act.

20. When anything is left to any person, Judge or magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. (See Tomlin's Law Dictionary) In its ordinary meaning, the word "discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty of power of acting without other control than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law. (See Tomlin's Law Dictionary).

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, L.C., in Sharp v. Wakefield, (1891) Appeal Cases 173). Also (See S.G. Jaisinghani v. Union of India and Ors. (AIR 1967 SC 1427).

22. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore where the legislature concedes discretion it also imposes a heavy responsibility. "The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable," said (Lord Camden, L.C.J., in Hindson and Kersey (1680) 8 How, St. Tr.57.)

23. If a certain latitude or liberty accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

24. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (Per Willes J. in Lee v Budge Railway Co., (1871) LR 6 CP 576, and in Morgan v. Morgan, 1869, LR 1 P & M 644).

25. As indicated supra, the discretion does not appear to have been judiciously and judicially exercised by the High Court in this case. When the volume of contraband articles is taken note of, it is sufficient for a conclusion that the quantity of finished product out of it which would have been extracted it would have been nearly 300 kilograms of heroine, and the accused would have got about forty kilograms as admitted by him. The disastrous effect (of this quantity of heroin) would be mind-boggling. The High Court seems to have been swayed by the age of accused's father, his family problems and more importantly he being not a "habitual offender". Such considerations are really meaningless when one considers the fact that the accused was in possession of contrabands which would have destroyed the health and mental equilibrium of thousands of people. The Court was not dealing with an accused charged with commission of any minor offence where he being not a habitual offender may have some relevance. But it is really inconsequential for a drug trafficker and smuggler. The reasons given by the High Court to reduce the sentence, according to us, have no foundation. The inevitable conclusion is that the appeal deserves to be allowed which we direct. To put it differently, the sentence imposed by the trial Court is restored. The respondent has been released pursuant to the High Court's judgment. He shall surrender to custody to suffer remainder of the sentence as awarded by the trial Court. The appeal is allowed."

12. There is nothing to show that Acetic N hydride and Acetic Anhydride are different substances and the learned counsel for the applicant has failed to show that Acetic N hydride or Acetic Anhydride was not in category of controlled substance prior to issuance of '1993 Notification' and '2013 Order'. It is pertinent to note that 'Acetic N Hydride' was not been within the category of controlled substance, or had it been different from 'Acetic Anhydride', there could have been no occasion for trial and conviction of Kuldeep Singh by trial court for recovery of its huge quantity on 12.12.1995 and confirmation on sentence by the Apex Court. It appears that in the judgment of the case of 'Union of India Vs. Kuldeep Singh and others (supra)', the spelling of the controlled substance of contraband, Acetic Anhydride has been mentioned as Acetic N hydride considering that 'N' is separate N from hydride and is not included in the spellings of Anhydride which does not make any difference. In above case, the Apex Court has considered the disastrous effect of the seized contraband 880 litres of Acetic N hydride (Acetic Anhydride) and has held that from such quantity of controlled substance in liquid a quantity of 300 Kg. of Heroin could have been extracted. In view of above observation made by the Apex Court, it may safely be accepted, as has been contended by Sri Sanjay Kumar Singh, learned counsel for the Union of India (Narcotics Department) that from above quantity of liquid controlled substance, approximately 1/3rd quantity

of Heroin can be extracted and so from the recovered quantity of 32.450 litres approximately 11.06 Kg. of Heroin may be extracted. Undisputedly the commercial quantity of Heroin as prescribed in the N.D.P.S. Act is 250 gms. and so the above quantity of liquid controlled substance from which approximately 11 Kg. of Heroin could have been extracted, and which has been brought under the list of controlled substance vide control Notification in 1993 and further by '2013 Order', was recovered from the applicant. In view of recovery of such a huge quantity of controlled substance from applicant, it may be said that applicant has virtually been apprehended with recovery of 11 Kg. of Heroin (commercial quantity) for him. It is also contended that the applicant has been accused in murder case in reply to which the learned counsel for the applicant submitted that in above case he has been acquitted and also produced a certified copy of judgment and order dated 15.5.2009 passed by Additional Sessions Judge, Court No.11, Bareilly in S.T. No.794 of 2007 for perusal. However, learned counsel for the first informant states that merely due to the acquittal in the case based on circumstantial evidence, it may not be considered that the applicant is not a person of criminal antecedents.

13. Upon hearing learned counsel for the parties, perusal of record and considering the complicity of accused, recovery of commercial quantity of prohibited contraband/controlled substance, severity of punishment as well as totality of facts and circumstances, at this stage without commenting on the merits of the case, I do not find it a fit case for bail and the bail application of Deepak Kumar is liable to be rejected.

14. The bail application of applicant Deepak Kumar Singh in Case Crime No.06 of 2014, Complaint Case No.01 of 2015, under Sections 9A/25A N.D.P.S. Act, Central Narcotics Bureau, Lucknow, is rejected accordingly.

(2016) 9 ILRA 464
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/s 482 No.- 19681 Of 2011

Shiv Devi & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for the Applicants:
Radhey Shyam

Counsel for the Respondents:
Govt. Advocate, B.P. Mishra

Criminal Procedure Code, 1973 — S. 482 — Quashing of summoning order — Scope of interference — Challenge to order rejecting final report and summoning accused in offences relating to alleged forged Will and fraudulent transfer of property — Held, at summoning stage Court is only required to ascertain existence of prima facie case and not conduct meticulous examination of evidence or adjudicate disputed questions of fact — Where Magistrate applied judicial mind and found sufficient ground to proceed, inherent jurisdiction under S. 482 CrPC not liable to be exercised. (Paras 4 to 8)

Criminal Procedure Code, 1973 — S. 482 — Disputed questions of fact — Limitation on inherent jurisdiction — Dispute regarding genuineness and interpretation of Wills and extent of share in property involved complicated factual issues — Held, such matters are to be adjudicated during trial and not in proceedings under S. 482 CrPC. (Para 8)

Criminal Law — Simultaneous civil and criminal proceedings — Permissibility — Pendency of civil suit for cancellation of Will not a ground to quash criminal proceedings alleging fraud and forgery — Civil and criminal proceedings can continue simultaneously depending upon facts and circumstances of case. (Paras 9 & 10)

Criminal Procedure Code, 1973 — S. 482 — Quashing — Principles governing — Case did not fall within categories warranting quashing as laid down in R.P. Kapur, Bhajan Lal and other precedents — Prayer for quashing summoning order rejected. (Para 11)

Bail — Interim protection — Direction to surrender — Applicants directed to surrender within thirty days and apply for bail — Trial court directed to consider bail expeditiously in light of settled principles — No coercive action directed for limited period. (Paras 12 & 13)

In Result: Prayer for quashing summoning order refused; applicants granted thirty days' protection to surrender and seek bail.

Cases cited:
1. Kishan Singh (D) through I.Rs. Vs. Gurpal Singh and othersAIR 2010 SC 3624
2. P. Swaroopa Rani V. M. Hari Narayana alias Hari BabuAIR 2008 SC 1884
3. Sh. Vishnu Dutt Sharma Vs. Smt. Daya Sapra(2009) 13 SCC 729
4. R.P. Kapur Vs. State of PunjabA.I.R. 1960 S.C. 866
5. State of Haryana Vs. Bhajan Lal1992 SCC (Cr.) 426
6. State of Bihar Vs. P.P.Sharma1992 SCC (Cr.) 192
7. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another2005 SCC (Cr.) 283
8. A.R.C.I. Vs. Nimra Carglass Technics (P) Ltd.(2016) 1 SCC 348
9. Amrawati and another Vs. State of U.P.2005 Cr.L.J. 755
10. Lal Kamlendra Pratap Singh Vs. State of U.P.2009 (3) ADJ 322 (SC)

(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 set aside the order dated 10.;6.2011 passed by Judicial Magistrate, IInd, Gyanpur, Sant Ravidas Nagar, in Case no. 547 of 2011 (State Vs. Hanuman Chaubey) under Sections 417, 419, 420, 421, 423, 466, 465, 467, 468 and 471 I.P.C. By the impugned order dated 10.6.2011, the learned Magistrate has rejected the Final Report submitted by the police, allowed the protest petition filed by the complainant and has summoned the applicants under the aforesaid sections.

2. Heard Mr. Radhey Shyam, learned counsel for the applicants, learned A.G.A. for the State and Mr. B.P. Mishra, learned counsel for opposite party no. 2.

3. To properly adjudicate the controversy involved in the present case, it is desirable to have a look on the pedigree of the parties which is given below :

/	/			/
Satya Narain	Raj Narain			Raj Kishore
/ /				
Hanuman Chaubey				
/	/	/	/	/
Sanjay Kumar	Radhey Shyam	Krishna Shyam	Sabhajeet	Sarvesh Kumar

4. The opposite party no. 2/the complainant Radhey Shyam, who is the eldest son of Raj Kishore, lodged an F.I.R. on 25.11.2008 by means of an application under Section 156(3) Cr.P.C. against Hanuman Chaubey and Sanjay Kumar (son and grandson respectively of Satya Narain) and two others (applicants no. 1 and 2 Shiv Devi and Gayatri Devi, who are the purchasers of disputed property), with allegations that in the family of three brothers consisting his father and two uncles, the second brother Raj Narain was unmarried and issueless, therefore, he bequeathed his share of property by a registered Will, in favour of sons of his two brothers, dividing it equally in 1/5 to

each of them. (Copy of the Will is annexed as annexure no. 1 to the affidavit filed in support of instant application). On the basis of the aforesaid Will dated 14.8.1984 all the four brothers Radhey Shyam, Sabhajeet, Krishna Shyam and Sarvesh Kumar executed registered sale deed in favour of Panna Lal Vijay Nath and Sharad Prasad on 11.8.2000 as Sabhajeet was not present, he signed the registered sale deed on 28.7.2003. The applicant Hanuman Prasad Chaubey filed a partition suit in the civil court showing his half share in the property which was decreed ex-parte in his favour vide order dated 28.3.2005. Thereafter applicant Hanuman Prasad sold his half share in the property fraudulently, showing him to be the owner of half share of the property to Shiv Devi and Gayatri Devi (applicant nos. 1 and 2). In the meantime the son of Hanuman Prasad co-accused Sanjay Kumar, filed another registered Will dated 18.5.1985 alleging it to be the last Will executed by Raj Narain bequeathing his entire share of property to Sanjay Kumar. On the aforesaid facts it was prayed that the matter be investigated and the accused be punished.

5. On the said application, the Magistrate ordered that the case be registered and the matter be investigated. However, the police after investigation, submitted Final Report in the matter. The opposite party no. 2 filed a protest petition against the Final Report alleging that the I.O., without recording the statements of the complainant and the witnesses has submitted Final Report. The learned Magistrate after finding the aforesaid allegation to be true rejected the Final Report and summoned the applicants to face trial by impugned order dated 10.6.2011.

6. The legality and correctness of the aforesaid summoning order has been challenged by learned counsel for the applicants on the grounds that a suit for cancellation of registered Will dated 18.5.1985 had already been filed by complainant Radhey Shyam and his brothers on 14.12.2007 i.e. about one year prior to the filing of the present application under Section 156 (3) Cr.P.C. which is still pending before the court below. But the present F.I.R. has been lodged by O.P. No. 2 during the pendency of the aforesaid civil suit only in order to build pressure on the accused-applicants. It is contended that the learned court below, without considering the aforesaid fact and without applying its judicial mind, has passed the summoning order arbitrarily and mechanically.

7. Learned counsel for opposite party no. 2 and learned A.G.A. have vehemently opposed the application.

8. In the counter affidavit filed by opposite party no. 2, it has been stated that the accused-applicants have not approached this Court with clean hands and they have willfully and deliberately concealed some material facts. It is submitted that in paras 8 and 25 of the affidavit filed in support of the application it has wrongly been mentioned by the applicants that no appeal was filed by opposite party no. 2 against the judgment and order dated 28.3.2005 passed by Civil Judge, Bhadohi whereas the true fact is that opposite party no. 2 had filed Misc. Appeal No. 78 of 2006 against the aforesaid ex-parte order dated 28.3.2005, which was allowed by judgment dated 27.9.2008 passed by Additional District Judge, Court no. 3, Gyanpur, Bhadohi and the ex-parte judgment was set aside. It has been stated that there is no such mention in the Will dated 14.8.1984, that half share belongs to Hanuman Chaubey. Property has been equally divided among all the brothers, therefore, he is entitled to only 1/5 share of the property. It has further been contended that

the applicant Sanjay Kumar committed fraud by fabricating forged Will claiming entire share in the property, and on the basis of the aforesaid Will, got entered his name in the revenue records. On the aforesaid grounds it has been prayed that the application be dismissed.

9. In the rejoinder affidavit, the applicants have stated that the civil suit with regard to genuineness of that Will deed is subjudice before the competent court. However, the applicants have expressed the feeling of regret with regard to their mistake of not bringing on record the judgment dated 27.9.2008, whereby the ex-parte order dated 28.3.2005 passed in their favour was set aside.

10. Considered the submissions.

11. Whether the property was divided equally between all sons i.e. allotting 1/5th share to each of them and whether in two equal portions, allotting half to Hanuman Chaubey and half to the sons of Raj Kishor is a disputed question of fact which cannot be ascertained by this Court in the proceedings under Section 482 Cr.P.C. The impugned order shows that the learned Magistrate, finding a prima facie case against the applicants, has summoned them to face the trial.

12. The law regarding sufficiency of material which may justify the summoning of accused and also the court's decision to proceed against him in a given case is well settled. The court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required. The submissions made by the learned counsel for the applicants call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins.

13. So far as the argument of learned counsel for the applicants with regard to pendency of civil suit for cancellation of Will dated 18.5.1985 is concerned, it is well settled legal position that civil proceedings and criminal proceedings can proceed simultaneously.

14. In **Kishan Singh (D) through I.Rs. Vs. Gurpal Singh and others; AIR 2010 SC 3624,** the Hon'ble Supreme Court relying on the law laiddown in **P. Swaroopa Rani V. M. Hari Narayana alias Hari Babu; AIR 2008 SC 1884** has held as under :

"It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case.....Filing of an independent criminal proceeding, although initiated in terms of some observations made by the civil court, is not barred under any statute.....It goes without saying that the respondent shall be at liberty to take

recourse to such a remedy which is available to him in law. We have interfered with the impugned order only because in law simultaneous proceedings of a civil and a criminal case is permissible."

15. In **Sh. Vishnu Dutt Sharma Vs. Smt. Daya Sapra; (2009) 13 SCC 729**, the Apex Court has held that :

"13. It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the facts and circumstances of each case."

16. At this stage and I do not find any justification to quash the summoning order or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court in a catena of judgments i.e. **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, Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283** and recently **in A.R.C.I. Vs. Nimra Carglass Technics (P) Ltd. (2016) 1 SCC 348**. which may justify its quashing.

17. Therefore, the prayer for quashing the summoning order is refused.

18. At this juncture, learned counsel for the applicants prayed that the applicants are ready to surrender before the court but some time may be granted to them for such purpose. In view of the above, it is directed that in case the applicants appear before the court concerned within thirty days from today and apply for bail, the same shall be heard and disposed of expeditiously by the courts below in view of the settled law laid by the Seven Judges' decision of this Court in the case of ***Amrawati and another Vs. State of U.P., 2005 Cr.L.J. 755*** and affirmed by Hon'ble Apex Court in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P***.

19. For the aforesaid period of 30 days no coercive action shall be taken against the applicants.

20. The application is accordingly disposed of.

(2016) 9 ILRA 469
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/s 482 No.- 20296 Of 2014
&
Application U/s 482 No.- 20297 Of 2014

Awadh Behari & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for the Applicants:
Manish Tiwary, Ashwini Kumar Awasthi

Counsel for the Respondents:
Govt. Advocate, Rajeev Giri

Criminal Procedure Code, 1973 — S. 482 — Quashing of complaint proceedings — Forged Will and mutation dispute — Scope of interference — Complaint alleged that accused persons fabricated forged Will to deprive complainant of ancestral property and sought mutation in revenue records on basis thereof — Magistrate, after recording statements under Ss. 200 and 202 CrPC, summoned accused under Ss. 420, 467, 471, 447 and 448 IPC — Held, prima facie material disclosed commission of cognizable offences and proceedings not liable to be quashed in exercise of inherent jurisdiction.

Penal Code, 1860 — Ss. 415 & 420 — Cheating — Ingredients — False representation and dishonest inducement — Applicants repeatedly moved applications before revenue authorities claiming exclusive rights in property on basis of alleged Will which was never produced before competent authority — Held, conduct disclosed prima facie dishonest intention and false representation aimed at depriving complainant of rightful share in ancestral property — Ingredients of cheating made out.

Evidence — Conduct of parties — Suppression and inconsistency — Applicants took contradictory stands regarding parentage and entitlement of complainant before different forums — Held, applicants had not approached Court with clean hands and their conduct supported prosecution allegations.

Criminal Law — Forged Will — Burden of proof — Where accused claimed exclusion of complainant from inheritance on basis of Will, burden lay upon them to produce and prove such document before competent authority — Failure to produce alleged Will despite reliance thereon created serious suspicion regarding genuineness of claim.

Criminal Law — Civil and criminal proceedings — Simultaneous continuation — Mere availability of civil remedy or existence of civil dispute regarding property does not bar criminal prosecution where allegations disclose ingredients of criminal offences — Civil and criminal proceedings may continue simultaneously.

Bail — Interim protection — Direction to surrender — Though applications under S. 482 CrPC dismissed, applicants granted thirty days' protection to surrender and seek bail — Trial court directed to consider bail expeditiously in accordance with settled law.

In Result: Applications dismissed; summoning order and criminal proceedings upheld; applicants granted thirty days' protection to surrender and apply for bail.

Cases cited:

1. A.R.C.I. Vs. Nimra Carglass Technics (P) Ltd.(2016) 1 SCC 348
2. Kishan Singh (D) through I.Rs. Vs. Gurpal Singh and othersAIR 2010 SC 3624
3. P. Swaroopa Rani v. M. Hari Narayana alias Hari BabuAIR 2008 SC 1884
4. Sh. Vishnu Dutt Sharma Vs. Smt. Daya Sapra(2009) 13 SCC 729
5. Amrawati and another Vs. State of U.P.2005 Cr.L.J. 755
6. Lal Kamlendra Pratap Singh Vs. State of U.P.2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. As both these applications, arising out of the Case No. 955 of 2013, are related to the same occurrence and complainant is also the same, both are being disposed of by this common order.

2. Heard Sri Manish Tiwary, learned counsel for the applicants, learned A.G.A. appearing for the State and Sri Rajendra Pandey holding brief of Sri Rajeev Giri on behalf of opposite party no. 2. Perused the record.

3. By means of both these applications, all the applicants, who are close relatives, they being real brothers and nephews, have invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. with prayer to quash the entire proceedings of Complaint Case No. 955 of 2013 (Hrishikesh Tripathi Vs. Krishna Bihari and others) under Sections 420, 467, 468 and 471 I.P.C., Police Station Nawabganj, district Allahabad pending in the court of Chief Judicial Magistrate, Court No. 10, Allahabad.

4. Some background facts, in brief, are that the applicants were six brothers in all, namely (i) Late Keshav Bihari, (ii) Late Mukund Bihari, (iii) Late Shyam Bihari, (iv) Krishna Bihari, (v) Awadh Bihari and (vi) Janardan Prasad. Opposite party no. 2 is the elder son of Late Keshav Bihari, the eldest brother. An application under Section 156(3) Cr.P.C. was filed by opposite party no. 2 against the applicants with allegations that the accused/applicants were continuously harassing him and his family members in order to deprive them of their share in the ancestral property. In the year 1985, they had made an attempt to kill the applicant by firing on him, for which a case under Section 307 and 337 of I.P.C. was registered against them as Case Crime No. 248 of 1985. It was further alleged that the grandfather and grandmother of opposite party no. 2 Late Shambhu Nath Tiwari and Ganga Devi, had agricultural land in their names in the village Nigdilpur, Pargana Nawabganj, Tehsil Soraon, district Allahabad. After their death, the father of opposite party no. 2/complainant, moved application before the Assistant Consolidation Officer, Kaurihar, district Allahabad for recording the names of the six sons of late Shambhu Nath Tiwari and Late Ganga Devi, as their their legal heirs in the revenue records. However, the applicant Awadh Behari prepared and fabricated a Will of Late Shambhu Nath and Ganga Devi and on the basis of that forged Will, he filed an objection before Assistant Consolidation Officer, Kaurihar and also gave a fresh application, stating therein that he is the sole survivor/legal heir of deceased Shambhu Nath

Tiwari and Ganga Devi, therefore, only his name be recorded in the revenue records, over the properties of his deceased parents. Thereafter, the applicant Janardan Prasad moved another application before Assistant Consolidation Officer, Kaurihar, for recording the names of only five sons of deceased Shambhu Nath Tiwari and Late Ganga Devi, namely Awadh Behari, Krishna Behari, Janardan Prasad, Mukund Behari and Shyam Behari on the basis of a forged and fabricated Will deed, of deceased Shambhu Nath and Ganga Devi.

5. On receiving such application the Assistant Consolidation Officer, Kaurihar, issued notices to the contesting parties for settlement of dispute with regard to the controversy of legal heirs of deceased Shambhu Nath and Ganga Devi but neither the dispute was amicably settled nor any order can be passed by the Consolidation Officer on the application moved by the applicants due to reason that no copy of the Will was filed by the applicants alongwith the application. The matter was pending before the Consolidation Officer, when the eldest brother Keshav Behari, father of opposite party no. 2, expired on 9.10.1992. Thereafter the complainant/opposite party no. 2, contested the matter till July, 2010 and ultimately in the year 2013 the names of legal heirs of Keshav Behari (father of opposite party no. 2) could be recorded in revenue records alongwith other co-sharers. It was further alleged that even after the mutation, the applicants did not permit the opposite party no. 2 to enter into his share of property and to take its possession. On the aforesaid grounds the applicant (opposite party no. 2) prayed that FIR be registered against the accused persons and the police be directed to investigate the matter.

6. On the aforesaid application the court below directed the S.H.O., P.S. Nawabganj, to conduct preliminary enquiry and send a report. The S.H.O. sent report on 24.7.2013 to the effect that the alleged Will was forged as it was prepared after the death of Shambhu Nath and Ganga Devi.

7. The learned Magistrate considering the facts and circumstances of the case, registered the application as a Complaint Case No. 955 of 2013. The statements of the complainant under Section 200 Cr.P.C. and of the witnesses under Section 202 Cr.P.C. were recorded and on the basis of those statements and the documentary evidence filed by the complainant, the learned Magistrate found a prima facie case against the applicants Krishna Behari, Awadh Behari and Janardan Prasad under Section 420, 467 and 471 I.P.C. and against the applicants Dhananjay, Mritunjay, Vipin Behari, Pradhumn, Pranat, Prasant and Prateyesh alias Priyavrat under Section 447 and 448 I.P.C. Accordingly all of them were summoned.

8. Being aggrieved by their summoning, the applicants have approached this Court with prayer to quash the aforesaid summoning order and the entire proceedings of the aforesaid case.

9. In the affidavit filed in support of the application, it has been stated that all the allegations made by the complainant are baseless, absolutely vague and frivolous. It is further submitted that the reference of criminal case under Section 307 I.P.C. has no relevance and that has been mentioned in the application under Section 156(3) Cr.P.C. by the complainant only with a view to prejudice the mind of the court. In fact the aforesaid criminal case has absolutely no bearing

to the facts of the present case. Moreover, that case has resulted into acquittal vide judgment dated 30.3.1998.

10. The applicants have further contended that due to nefarious and illegal activities of Sri Keshav Behari and for the reason that he had falsely implicated his own brothers in the aforesaid criminal case under Section 307 I.P.C., he was not given any share in the property by late Shambhu Nath who executed his Will excluding the name of Keshav Bihari. However, despite the fact that the father of the applicants had specifically intended that any share in the property be not given to Keshav Behari or any of his descendants, the applicants believing in the policy of 'forgive and forget', included the names of opposite party no. 2, his brother and his mother in revenue records and vide order dated 30.7.2011 the names of opposite party no. 2, his brother Gunakesh Tripathi and also of their mother Indrawati Devi, were recorded in the Khatauni.

11. Learned counsel for the applicants has further contended that the crux of the case of opposite party no. 2 is that the applicants on the basis of a false and fictitious Will got transferred the property in their names but it is admitted position that now the names of all the legal heirs of Late Shambhu Nath and Ganga Devi including opposite party no. 2, his brother and their mother, have also been recorded in the revenue records. Learned counsel has next contended that as the alleged Will was not available on record before the learned Magistrate, therefore, the learned Magistrate, without perusing that Will could not have summoned the applicants and summoning of the applicants on the basis of forged document, which is not even available on record, is absolutely illegal. Learned counsel has lastly contended that the opposite party no. 2, if aggrieved by exclusion of his name, had an efficacious alternative civil remedy of filing a suit, challenging the legality of the Will, but instead of pursuing the civil remedy, he has initiated the present case against the applicants only with malafide intention to extract the money from the applicants.

12. On the basis of the aforesaid grounds it has been prayed that the impugned summoning order and entire proceedings be quashed.

13. Learned counsel for opposite party no. 2 Rajendra Pandey and learned A.G.A. have vehemently opposed the applications by contending that the applicants, with a view to grab the share of their elder brother Keshav Bihari, fabricated and forged a Will, with dishonest intention and in pursuance thereof, they moved applications before the Consolidation Officer to record their names in the revenue records as legal heirs of Late Shambhu Nath and Ganga Devi, thereby depriving the opposite party no. 2 from his share in the joint family ancestral property. While drawing the attention of this Court to the copies of various applications filed by the applicants before the revenue courts, which are available on record as annexure nos. C.A. 4, 5 and 6 filed with counter affidavit, learned counsel has vehemently argued that the applicants have not come to the court with clean hands and their applications are liable to be rejected on this ground alone. Learned counsel has submitted that the contents of paragraphs 12 and 13 of the affidavit filed by the applicants are in total contradiction with the objection filed by the applicant Awadh Behari before the Revenue Officer, copy whereof has been annexed as annexure no. C.A. 4 to the counter affidavit. Learned counsel has further submitted that the opposite party no. 2 has got his share after

a long legal battle since 1988 to 2013. It is lastly submitted that civil and criminal proceedings can go on simultaneously and there is no bar that if a civil suit is pending, criminal proceedings can not be initiated.

14. Considered the rival submissions advanced by the parties.

15. A careful perusal of the affidavits filed by the parties, clearly shows, that the applicants have not come to the court with clean hands. Annexure C.A. 4, which is the copy of the objection filed by the applicant Awadh Behari before the Consolidation Officer shows that the applicant Awadh Behari has questioned the parentage of opposite party no. 2 by stating that grandfather of opposite party no. 2 was Shambhu Nath Goswami whereas his father was named as Shambhu Nath Tiwari. He has stated that both of them were two different persons and opposite party no. 2 is the grandson of Shambhu Nath Goswami and not of Shambhu Nath Tiwari and he is only trying to take the advantage of similarity in their names. However, the contents of paragraph nos. 12 and 13 of the affidavit filed by Awadh Behari in the instant Application (No. 26296 of 2014), shows that he has clearly mentioned that the father of the applicants namely Late Sri Shambhu Nath Tiwari had 6 sons and out of which Keshav Behari was the eldest.

16. The contention raised by the applicants that in absence of the alleged Will, the Magistrate could not have summoned the applicants, also appears to be baseless. The primary report dated 29.3.1990 of Assistant Consolidation Officer, copy whereof is annexed as C.A. 7 to the counter affidavit, shows that no Will deed was filed by the applicants before the Consolidation Officer. Thus in absence of any Will which should have been filed by the applicants, how could the opposite party no. 2/complainant be asked to prove it, before the criminal court ? A perusal of various applications moved by the applicants before the Consolidation Officer, the copies whereof are annexed as C.A. 5 and 6 clearly shows that in all these applications they have stated that their mother, who expired on 26.11.1988, had executed a Will in their favour on 2.9.1986, so their names be recorded in the revenue records in place of name of Ganga Devi. But they have not filed any Will deed executed by Ganga Devi in support of their claim.

17. It is the basic principle of law that "one who asserts must prove" or the "plaintiff must stand on his legs". If the applicants were claiming their right in the ancestral property, in exclusion of O.P. No. 2 on the basis of a Will, it was mandatory for them to produce that Will, before the competent court. But instead of producing the Will before the court concerned, they have approached this Court challenging the legality of the proceedings of complaint case, on the ground that opposite party no. 2 has not produced the alleged Will, he is claiming to be forged. This contention raised by the applicants is not only against the settled principles of law but appears to be ridiculous.

18. The conduct of the applicants clearly shows that they tried their level best to record their names on the basis of a Will, which perhaps, even did not exist, otherwise it would have been filed before the Consolidation Officer. Therefore only due to the fact that the applicants did not

succeed in their evil designs or they gave the share to the opposite party no. 2, after a long legal battle since 1988 to 2013, it cannot be said that no offence was committed by them.

19. Section 420 of I.P.C. provides punishment for cheating. The "Cheating" is defined under Section 415 of I.P.C. which runs as follows :

415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". Explanation.--A dishonest concealment of facts is a deception within the meaning of this section.

Thus, the essential ingredients of cheating are :

Ingredients.- The section requires –

(1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that person

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property;

or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

20. In a recent case **A.R.C.I. Vs. Nimra Carglass Technics (P) Ltd. (2016) 1 SCC 348** the Hon'ble Apex Court has interpreted Section 420 I.P.C. as under :

"The essential ingredients to attract Section 420 IPC are: (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security and (iii) mens rea of the accused at the time of making the inducement. The making of a false representation is one of the essential ingredients to constitute the offence of cheating under Section 420 IPC. In order to bring a case for the offence of cheating, it is not merely sufficient to prove that a false representation had been made, but, it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant."

21. Now looking into the facts of the instant case, in wake of the aforesaid definition of "cheating", it cannot be said that there was no false representation or dishonest inducement on the part of the applicants. The fraudulent intention of the applicants is clearly evident from the various applications moved by them to the revenue authorities so that the property be recorded in their names, thus depriving the opposite party no. 2/complainant of his rightful share.

22. So far as the argument of learned counsel for the applicants with regard to civil nature of the offence is concerned, the law has been well settled in a catena of judgments by Hon'ble Supreme Court that both civil and criminal litigation can proceed simultaneously. In the present case, admittedly no civil suit is pending between the parties.

23. In **Kishan Singh (D) through I.Rs. Vs. Gurpal Singh and others; AIR 2010 SC 3624**, the Hon'ble Supreme Court relying on the law laiddown in **P. Swaroopa Rani v. M. Hari Narayana alias Hari Babu; AIR 2008 SC 1884** this Court has held as under :

"It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case.... Filing of an independent criminal proceeding, although initiated in terms of some observations made by the civil court, is not barred under any statute.... It goes without saying that the respondent shall be at liberty to take recourse to such a remedy which is available to him in law. We have interfered with the impugned order only because in law simultaneous proceedings of a civil and a criminal case is permissible."

24. In **Sh. Vishnu Dutt Sharma Vs. Smt. Daya Sapra; (2009)13SCC 729** the Apex Court has held that :

"13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case."

25. Considering all these facts and circumstances, both these applications appear to be without any merit, both are liable to be dismissed and are accordingly **dismissed**.

26. However, considering the fact that the applicants have given the share of opposite party no. 2 to him, it is directed that in case the applicants appear before the court concerned within thirty days from today and apply for bail, the same shall be heard and disposed of expeditiously by the courts below in view of the settled law laid by the Seven Judges' decision of this Court in the case of ***Amrawati and another Vs. State of U.P., 2005 Cr.L.J. 755*** and affirmed by Hon'ble Apex Court in ***2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P***.

27. For the aforesaid period of 30 days no coercive action shall be taken against the applicants.

(2016) 9 ILRA 476
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/s 482 No.- 21766 Of 2014

Chandrapal & Anr. **...Applicants**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for the Applicants:
Siddharth

Counsel for the Respondents:
Govt. Advocate, G.R.S. Pal, Sudhir Kumar

Criminal Procedure Code, 1973 — Ss. 482 & 319 — Quashing of proceedings — Maintainability after dismissal of revision — Applicants challenged entire Sessions Trial after their revision against summoning order under S. 319 CrPC had already been dismissed on merits by High Court — Held, once order summoning applicants under S. 319 CrPC attained finality, subsequent application under S. 482 CrPC seeking substantially same relief not maintainable — High Court cannot review or indirectly nullify earlier order passed by coordinate Bench.
Criminal Procedure Code, 1973 — S. 362 — Review/recall of criminal orders — Bar — Criminal Court has no power to review, recall or alter its own judgment except for clerical or arithmetical errors — Petition seeking quashing of entire proceedings, which would effectively nullify earlier revisional order, impermissible.
Criminal Procedure Code, 1973 — Second complaint — Maintainability — Earlier application under S. 156(3) CrPC filed by father of prosecutrix dismissed as not pressed — Mother of prosecutrix subsequently filed fresh application alleging coercion, abduction and intimidation by accused compelling withdrawal of earlier proceedings — Held, second complaint maintainable in exceptional circumstances where new facts and allegations disclose manifest miscarriage of justice.
Criminal Procedure Code, 1973 — S. 319 — Summoning additional accused — Scope — During trial prosecutrix and informant specifically implicated applicants in kidnapping and gang rape — Trial court justified in summoning applicants under S. 319 CrPC on basis of strong evidence emerging during trial.
Penal Code, 1860 — Ss. 363, 366 & 376-D and Protection of Children from Sexual Offences Act, 2012 — Ss. 5 & 6 — Gang rape of minor — Prima facie case — Prosecutrix in statements under Ss. 164 CrPC and during trial consistently alleged abduction and repeated rape by applicants and co-accused over period of four months resulting in pregnancy — Prima facie case clearly disclosed.
Practice and Procedure — Abuse of process — Costs — Applicants, after dismissal of revision, again approached High Court by changing language of prayer for obtaining same relief — Conduct held abuse of process of Court — Exemplary costs imposed payable to prosecutrix.

In Result: Application dismissed with costs of Rs 10,000/- on each applicant; amount directed to be paid to prosecutrix.

Cases cited:
1. Pramatha Nath Talukdar Vs. Saroj Ranjan SarkarAIR 1962 SC 876

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The applicants by means of the instant application under section 482 Cr.P.C. have invoked the inherent jurisdiction of this court with the prayer to quash the entire proceedings of S.T. No. 935 of 2013, under sections 363, 366, 376-D I.P.C. and 5/6 POCSO Act, P.S. Faizganj Vehta, District Budaun, pending in the court of Additional Sessions Judge, Court No. 8, Budaun.

2. Heard Sri Siddharth, learned counsel for the applicants, learned AGA for the State of U.P. and Mr. R.P.S. Chauhan, learned counsel for O.P. No. 2.

3. Learned counsel for the applicants has submitted that the applicants have been falsely implicated in this case. The applicant no. 1 is a fair price shop dealer, therefore, O.P. No. 2 has falsely implicated him in this case to extort money from him as she had threatened the applicant no. 1 that if the money was not given to her she would sent him to jail resulting in the cancellation of his fair price shop license. It is also alleged that due to strained relations with her husband for the reason that O.P. No. 2 never wanted that her daughter should be married to co-accused Nekpal, she lodged the false report against the applicants, who are the near relatives of Nekpal.

4. The brief facts giving rise to the present dispute are that on 27.4.2013 one Ram Charan Maurya, husband of O.P. No. 2 filed an application under section 156(3) Cr.P.C. in the court of C.J.M., Budaun, alleging that on 23.4.2013 his minor daughter Manju aged about 14 years was kidnapped by accused Nekpal and Siyaram and since the police did not register his FIR, he moved the application under section 156(3) Cr.P.C. praying for lodging of the FIR and its investigation by the police. The learned Magistrate registered the application as a Misc. Case under section 363 and 366 I.P.C. and called for report from the concerned police station. When the application was pending before the Magistrate, waiting for police report, the complainant Ram Charan Maurya and his daughter, Manju, appeared before the court and made statements that they have moved the aforesaid application under pressure of the villagers and they do not wish to press this application. The learned Magistrate, accordingly dismissed the application u/s 156(3) Cr.P.C. as not pressed vide order dated 15.5.2013.

5. However, the wife of Ram Charan Maurya i.e. mother of the prosecutrix, (O.P. No. 2 in the instant application), moved another application u/s 156(3) Cr.P.C. on 8.5.2013 alleging that during the pendency of the application under section 156(3) Cr.P.C. filed by her husband Ram Charan Maurya, he was abducted by the accused persons and the police of P.S. Faizganj Vehta, District Budaun, detained him at some unknown place along with the prosecutrix and they threatened them of dire consequences, if they dared to give any evidence in the court against the accused persons. It was further alleged that the husband of O.P. No. 2 Ram Charan Maurya and her daughter were directly produced from the custody of accused persons before the Additional Sessions Judge on 9.5.2013 and under pressure and threat they gave the statements that they do not

want to press their application. O.P. No. 2- the mother of prosecutrix also named the present applicants in her application u/s 156(3) Cr.P.C. as accused persons along with accused Nekpal and Siyaram. The aforesaid application of O.P. No. 2 was allowed by the learned Magistrate and the police was directed to register and investigate the case. During investigation, the prosecutrix was recovered and she was medically examined in the District Woman Hospital, Budaun, on 2.9.2013. Her radiological age was found to be 16 years and she was found pregnant. Her statement u/s 164 Cr.P.C. was also recorded in which she stated about the active involvement of all the four accused persons in her abduction and rape. However, the police submitted charge sheet only against two accused persons Nekpal and Siyaram and exonerated the present applicants Chandrapal and Ram Prasad. The Magistrate took cognizance on the charge sheet filed against Nekpal and Siyaram and the case being triable by the Court of Sessions, committed it to the Sessions Court, where it was registered as S.T. No. 935 of 2013 and the trial proceeded.

6. During trial, O.P. No. 2 was examined as PW1 and the prosecutrix was examined as PW2. Both these witnesses fully supported the prosecution case in their statements before the trial court. True copies of the statements of both these witnesses have been collectively filed as Annexure no. CA4 to the counter affidavit, showing that the prosecutrix has categorically stated that on the fateful day at about 8.00 P.M. when she had gone to the fields to attend the natural call, Chandrapal and Ram Prasad came there. They pressed her mouth, lifted her, forcibly made her sit on their motorcycle and drove away. After some distance accused Nekpal and Siyaram also joined them on another motorcycle. Thereafter all of them took her to Punjab. At Punjab, they kept her in a rented room. She has further stated that first of all accused Ram Prasad committed rape on her, thereafter Chandrapal and after Chandrapal, Nekpal and Siyaram also committed rape on her. They kept her in that room for about four months and continued to commit rape with her. After four months the applicants handed her over to the police. She got pregnant as a result of rape. She has given birth to a child without getting married to any one.

7. PW1- Lajjawati, her mother, also supported the prosecution story in her statement recorded during trial.

8. After the evidence of PW1 and PW2 i.e. the informant and the prosecutrix, an application under section 319 Cr.P.C. was moved by the prosecution, which was allowed and the learned Additional Sessions Judge, by a detailed order dated 1.5.2014, summoned the applicants Ram Prasad and Chandrapal under section 319 Cr.P.C. to face trial with other accused persons.

9. Aggrieved by the aforesaid order passed by the trial court under section 319 Cr.P.C. the applicants filed Criminal Revision No. 1624 of 2013 before this court, which was dismissed vide order dated 2.6.2014 passed by a coordinate Bench of this court (the copy whereof has annexed as Annexure no. CA4 to the counter affidavit).

10. However, the applicants instead of filing an S.L.P. against the order passed by this court on 2.6.2014 have again approached this court by means of the instant application u/s 482 Cr.P.C. with the prayer to quash the entire proceedings of S.T. No. 935 of 2013.

11. The learned counsel for the applicants has filed written submissions in support of the application. He has contended that O.P. No. 2 had no right to file a second application under section 156(3) Cr.P.C. on the basis of the same facts on which her husband Ram Charan Maurya had already moved an application u/s 156(3) Cr.P.C. earlier, which was dismissed by the court below as not pressed. The learned counsel has contended that after rejection of the first application u/s 156(3) Cr.P.C. the second application on the same facts is not maintainable. The learned counsel has vehemently contended that both the applications filed by Ram Charan Maurya and Lajjawati (O.P. No. 2) in this case are complaints within the meaning of section 2(d) Cr.P.C. and as both the applications are related to the same incident dated 23.4.2013 and are against the same accused persons, therefore, the second application filed by O.P. No. 2, which is a second complaint in respect of the same cause of action being legally barred, is not maintainable in view of the three Judges decision of the Hon'ble Supreme Court reported in ***AIR 1962 SC 876, Pramatha Nath Talukdar Vs. Saroj Ranjan Sarkar***.

12. Per contra learned AGA and learned counsel for O.P. No. 2 have vehemently opposed the application. The preliminary objection raised by them is that the applicants have not come to this court with clean hands. The instant application u/s 482 Cr.P.C. has been filed by the applicants before this court for the same cause of action. The applicants had earlier preferred a criminal revision before this court against the summoning order passed on the application u/s 319 Cr.P.C., which was dismissed on merit by this court vide order dated 2.6.2014, which has become final as the same was never challenged by the revisionist before the Hon'ble Supreme Court. However, after failing in their first attempt, due to dismissal of their revision, the applicants, by changing the language of the prayer, have again approached this court for the same relief. The learned counsel for O.P. No. 2 has submitted that the applicants in the instant application application have prayed to quash the entire proceedings of the sessions trial, which includes the summoning of the applicants under section u/s 319 Cr.P.C. and which has already been upheld by this court in the aforesaid revision. The learned counsel for O.P. No. 2 has prayed that under these circumstances, this application is liable to be dismissed with heavy costs and proceedings under section 340 Cr.P.C. should be initiated against the applicants for misrepresentation and for playing fraud upon this court.

13. Considered the rival submissions of the parties.

14. All the arguments advanced by learned counsel for the applicants appear to be totally misconceived and having no force in view of the settled legal position.

15. The Hon'ble Supreme Court in the case of ***Pramatha Nath Talukdar Vs. Saroj Ranjan Sarkar, AIR 1962 SC 876***, cited by the learned counsel for the applicants, has laid down the law with regard to maintainability of second complaint as under:-

"There is nothing in law which prohibits the entertainment of a second complaint on the same allegations, when a previous complaint had been dismissed under section 203 of the Code of Criminal Procedure. As, however, a rule of necessary caution and of proper exercise of the

discretion given to a Magistrate under section 204(1) of the Code of Criminal Procedure, exceptional circumstances must exist for the entertainment of a second complaint on the same allegations; in other words, there must be good reasons why the Magistrate thinks that there is "sufficient ground for proceeding" with the second complaint, when a previous complaint on the same allegations was dismissed under section 203. The test to determine the exceptional circumstances are (1) manifest error, (2) manifest miscarriage of justice and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings."

16. The facts of the present case clearly indicates that the complainant Smt. Lajjawati, in second complaint filed by her, has made clear allegations that as her husband and daughter were abducted by the accused persons in connivance with the police. They were threatened and forced to make wrong statements before the Magistrate that they do not want to press the application. It is also evident that the learned trial court after finding that there were clear allegations against the applicants in the statement of the prosecutrix recorded u/s 164 Cr.P.C. and during trial, the prosecutrix has categorically stated that the applicants abducted her and committed rape with her for four months while keeping her detained in a rented room, summoned them by exercising power under section 319 Cr.P.C. The summoning of the applicants under section 319 Cr.P.C. was challenged by way of a criminal revision before this court, which was dismissed by this court on merits. The order dated 2.6.2014 passed by this court has attained finality because no SLP was filed by the applicants against the aforesaid order. However, the applicants for the same relief and only by changing the language of their prayer, have again come to this court. They have prayed to quash the entire proceedings of the sessions trial. In case the entire proceedings of the sessions trial is quashed, it will amount to quashing of the aforesaid order of this court dated 2.6.2014 whereby this court has upheld the legality and correctness of the order summoning the applicants u/s 319 Cr.P.C.

17. This court is neither an appellate nor a reviewing authority against the order passed in the criminal revision by a coordinate Bench of this court. As per section 362 Cr.P.C. a criminal court is not authorised to review or recall or alter its own order. Thus, this court cannot recall, review or alter the order passed on 2.6.2014 in Criminal Revision No. 1624 of 2014. The aforesaid order being remained unchallenged has attained finality. Under these circumstances this application is liable to be dismissed with heavy costs.

18. Accordingly, the instant application is **dismissed** with a cost of Rs. ten thousand, imposed on each applicant. The applicants shall deposit the amount of cost in the court where the trial is pending within one month from today. In case they fail to deposit it within the time prescribed, the court below shall recover it from them as arrears of land revenue. The total amount of Rs. 20,000/-, so recovered from the applicants shall be paid to the prosecutrix.

19. A copy of this order be sent to the Special Judge (POCSO Act), Budaun, to ensure compliance.

(2016) 9 ILRA 481
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2016

BEFORE

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

Misc. Bench No.- 22224 Of 2016

M/S Awadh Trading Corporation Thru. Devendra Nath Srivastav ...Petitioner
Versus
Union Of India & Ors. ...Respondents

Counsel for the Petitioner:
Rajiv Srivastava

Counsel for the Respondents:
A.S.G, Arpit Kumar, R.K. Verma, Shailendra Srivastava

Labour Law — Employees' Provident Fund and Miscellaneous Provisions Act, 1952 — Ss. 7-B, 7-Q and 14-B — Review jurisdiction — Exercise of successive review powers — Legality: Where an order passed upon participation of parties is sought to be questioned by an aggrieved authority, the issue whether a review is maintainable in place of a statutory appeal requires examination. The authority exercising review jurisdiction must first determine its competence and maintainability of such review before altering rights already determined.

Administrative Law — Principles of Natural Justice — Notice and opportunity of hearing — Mandatory requirement: Imposition of liability affecting civil consequences without notice and opportunity of hearing violates fundamental principles of natural justice. Any order passed behind the back of an affected party, reversing an earlier order and creating liability, cannot be sustained in law.

Employees Provident Fund — Contractor and Principal Employer — Liability dispute — Adjudication procedure: Dispute regarding liability between contractor and principal employer concerning delayed deposit of provident fund dues and consequences of delayed payments requires adjudication after affording full opportunity to all affected parties. Liability cannot be shifted or re-imposed through unilateral proceedings.

In Result---The writ petition was allowed—Order dated 11.07.2016 passed by the Assistant Provident Fund Commissioner and consequential realization proceedings dated 04.08.2016 were quashed.

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

1. This petition arises out of a dispute relating to a deposit of provident fund under the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

2. The petitioner is a service provider to the respondent Electricity Distribution Division namely Madhyanchal Vidyut Vitran Nigam Limited, Gonda.

3. An agreement was entered into between the petitioner and the said respondent, a copy whereof is Annexure no. 4 to the writ petition. According to clause 2.10 of the said agreement the petitioner firm is responsible for deducting the amount of Employees Provident Fund as per rules from the wages of the skilled and unskilled labour and contribution of the firm is to be got deposited with the Employees Provident Fund Commissioner as per existing rules and regulations. As per clause 6.0 payment has to be made by the Executive Engineer of the respondent-Corporation once in a month on A certified calculation subject to availability of funds.

4. The contention of the petitioner is that the respondent-Corporation being the Principal Employer, the deduction of the EPF can be made only on the basis of payment received.

5. The Assistant Provident Fund Commissioner proceeded to pass an order under section 14-B of the 1952 Act proposing to levy a penalty as there was a default in such deposit for the period 1.8.2009 to 31.10.2014 coupled with an order under section 7-Q of the 1952 Act dated 17.7.2015, copy whereof is Annexure no. 6 to the writ petition. Since the liability had been imposed on the petitioner he moved an application under section 7-B read with B(1)(2) of the 1952 Act for review and during the proceedings it was pointed out that a plea was set up clearly by the petitioner that it was on account of delayed receipt of payment from the respondent-Corporation that the deduction of EPF was followed thereafter. This fact of tendering of delayed payment to the petitioner by the respondent department itself was admitted by the Office Assistant of the Electricity Department Mr. Tarkeshwar Gupta who had attended the proceedings before the competent authority as is evident from the order-sheet dated 13.3.2016. The Assistant Provident Fund Commissioner accordingly reviewed the same on 25.5.2016 imposing the said liability on the respondent-Corporation, copy of the said order is Annexure no. 19 to the writ petition.

6. It appears that the respondent-Corporation moved an application for review instead of filing an appeal against the order dated 25.5.2016 and the said application was entertained. A copy of the said review application moved by the Electricity Department is Annexure no. 1 to the writ petition.

7. The Assistant Provident Fund Commissioner entertained the said application and has allowed it on 11.7.2016, impugned herein, whereupon the consequential action by the impugned realization process dated 4.8.2016 has also been challenged by the petitioner. The contention is that the order is without any notice or opportunity to the petitioner and secondly the respondent Electricity Department was bound to file an appeal instead of filing a review application.

8. Sri R.K. Verma has appeared for the respondent no. 3 and 4 and Sri Shri Prakash Singh has appeared for the respondent-Electricity Department namely respondents no. 4 and 5.

9. We have heard learned counsel for the respondents who have contended that it is the petitioner's liability to deduct and deposit the EPF and is not subject to any such payment as alleged. The petitioner is bound to make timely deductions for which the petitioner can not shift it's liability on the Corporation.

10. From a perusal of the impugned order dated 11.7.2016 it is clear that while proceeding to review the matter a second time, the Assistant Provident Fund Commissioner did not examine the issue of his authority to do so or the remedy of appeal being available to the respondent-Corporation. When the earlier order dated 25.5.2016 had been passed with the participation of the official of the Electricity department, then a review on it's behalf would be entertainable or not was also to be looked into.

11. He also did not extend any notice or opportunity to the petitioner prior to reviewing the earlier order dated 25.5.2016. Thus, the liability has been saddled without any notice or opportunity to the petitioner prior to the passing of the impugned order and initiating the process vide notice dated 4.8.2016.

12. Consequently, on this short ground alone the writ petition deserves to be allowed. The order dated 11.7.2016 being in violation of principles of natural justice cannot be sustained and consequently, the subsequent action dated 4.8.2016 also cannot survive. Both the orders are hereby quashed. The writ petition is allowed.

13. It shall be open to the Assistant Provident Fund Commissioner to examine these issues and pass orders only after giving opportunity to the petitioner.

(2016) 9 ILRA 484
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2016

BEFORE

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

Misc. Bench No.- 22434 Of 2016

Jeevan Lal Bajpai **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Vikas Kumar Agrawal

Counsel for the Respondents:
C.S.C

Land Laws — U.P. Zamindari Abolition and Land Reforms Act, 1950 — S. 9 — Private well situated on private holding — Nature of ownership: A private well situated over the tenure-holder's private land does not lose its proprietary character merely because it has been repaired through public funds or used by villagers. Under Section 9 of the Act, only such wells and water resources vested in intermediaries stood vested in the State; a privately owned well over private land does not automatically become public property.

Property Law — Public use vis-à-vis private ownership — Repair from public funds — Effect: Expenditure of public funds on repair of a private well, undertaken at the instance of villagers and without consent of the owner, does not by itself alter the ownership status or convert private property into public property.

Writ Jurisdiction — Disputed questions of title and possession — Scope: Where dispute exists regarding location of a well and whether it falls upon private land, declaration of rights cannot be adjudicated in writ proceedings and remains subject to determination by the competent forum under applicable law.

In Result---The writ petition was disposed of observing that if the well was situated on Plot No. 395 over petitioner's private land, his property rights should not be interfered with. In case the well posed danger to the petitioner's family, appropriate protective measures including fencing or wire-net protection could be undertaken. The order was clarified not to amount to declaration of rights, which would remain subject to adjudication by the competent forum.

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

1. Heard the learned counsel for the petitioner and the learned Standing Counsel for the State respondents nos. 1 to 5 and Sri B.L. Mishra, Advocate who has filed an application on behalf of six persons *Chandrakant Bajpai and others* contending that the continued use of the well is in the interest of the entire locality and the same has also been recently repaired. It is in the use of all the villagers of the locality. He, therefore, submits that the offer made by the petitioner to get it demolished at his own expense, is not acceptable and is against the interest of the villagers.

2. The petitioner contends that the well is situated over Plot No.395 which is on the private tenure holding of the petitioner and as such the petitioner has every right to control the operation of the said well.

3. From the record it has been pointed out by the learned Standing Counsel that the Sub Divisional Magistrate has taken notice of the fact that the well had gone into disuse and consequently since it felt within the private holding of the petitioner the same should be allowed to be demolished if the other villagers do not have any objection to the same.

4. The said order of the Sub Divisional Magistrate dated 16.04.2016 is annexed as Annexure No.8 to the writ petition.

5. It appears that a report had been called upon and a copy of the same has been filed as Annexure No.7, where it is indicated that the well was in disuse continuously for the past several years and therefore, the existence of the well is dangerous for the petitioner and his family members and his children. However, a rider has been put in the report that since the well had been got repaired from public funds, therefore, appropriate orders should be passed by the Sub Divisional Magistrate.

6. The petitioner contends that the well had been constructed by his predecessors long back and recently got repaired which cannot change the nature of the ownership of the well and consequently, the same cannot be treated to be a public well.

7. We have considered the submissions raised and according to the provisions of the U.P.Z.A. & L.R. Act, 1950, it was only the tanks, well and other water resources that were under the control of the Zamindars, namely the Intermediaries that stood vested in the state. A private well owned by a person over his private land did not loose its propriety status. Reference is made to the provisions of Section 9 of the 1950 Act. Consequently, if the well is located over Plot No.395 then it cannot be said that the said property was available for the use of public merely because it had been got repaired through some public funds at the instance of the villagers without the consent of the petitioners.

8. On the other hand if the well is not situate over the private land of the petitioner then the rights of the parties would be subject to adjudication by the appropriate forum.

9. The claim of the petitioner, therefore, cannot be said to be absolutely unfounded more so when the report itself states that the situation of the well is such that it is likely to cause danger to the family of the petitioner. In such a situation, the Sub Divisional Magistrate shall pass appropriate orders in order to ensure that nobody's private property is interfered with.

10. Consequently, if there is any danger to the life of the family members of the petitioner, who alleges that the well is right in front of his house, it shall be open to the petitioner to take other steps that may be necessary for the protection of his rights and further in the event the well is allowed to continue the same shall be protected with a wire net so as to prevent any accident in future or by raising an appropriate fencing over the same.

11. This order shall not amount to any declaration of rights that shall be subject to the law governing the same and adjudication by the proper forum.

12. With the aforesaid observations, this writ petition is ***disposed off***.

(2016) 9 ILRA 487
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2016

BEFORE

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

Misc. Bench No.- 22812 Of 2016

Abdul Waheed **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Dr. Sheelendra Kumar, Dev Prakash Singh

Counsel for the Respondents:
C.S.C.

Civil Procedure — Withdrawal of suit — Effect of withdrawal without liberty — Subsequent cause of action arising under later Government Order — Maintainability of writ petition: Withdrawal of an earlier civil suit without liberty to institute a fresh proceeding does not bar assertion of rights arising from a subsequent and independent cause of action. Where the original suit was founded upon earlier Government Orders and a new Government Order came into existence thereafter conferring a fresh basis for consideration of rights, withdrawal of the earlier suit cannot amount to abandonment of rights arising under the later Government Order.

Nazul Land — Freehold rights — Consideration under subsequent policy/Government Order: Claim for grant of freehold rights over Nazul land has to be considered in accordance with the prevailing Government policy. Authorities cannot reject consideration solely on the ground that an earlier suit had been withdrawn where entitlement is sought under a subsequently issued Government Order.

Administrative Law — Fair consideration of representation — Direction by Court: Where a claim requires consideration under an applicable Government Order and such consideration has not taken place, the Court may direct the competent authority to decide the request uninfluenced by previous proceedings that do not govern the later cause of action.

In Result ---Writ petition disposed of **—** direction to the District Magistrate, Sitapur **—** to consider the petitioner's request for grant of freehold rights.

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

1. Heard learned counsel for the petitioner. The petitioner contends that he was entitled to grant of freehold rights over the land in question and in the absence of any action being taken by the Nagar Palika Parishad, Khairabad, District Sitapur and the Collector as well as the Nazul Officer the petitioner was compelled to file Original Suit No. 553 of 2014 before the learned Civil Judge (S.D.), Sitapur.

2. However, on assurance given by the Nagar Palika Parishad authorities the petitioner withdrew his suit that his claim will be considered and an order was passed to that effect on 5.2.2016, copy whereof has been filed along with the writ petition as Annexure no. 21 to the writ petition.

3. Learned Standing Counsel states that the petitioner having withdrawn his suit now cannot be permitted to file this petition as the suit was dismissed as withdrawn without liberty to file a fresh suit.

4. Learned counsel for the petitioner contends that a fresh cause of action is available to the petitioner in terms of the Government Order dated 15.1.2015 and the suit had been withdrawn on the assurance given by the Nagar Palika Parishad. The abandonment of the claim, therefore, cannot be presumed so as to bar the claim of any rights that accrued under the Government Order dated 15.1.2015 that came into existence long after filing of the suit.

5. The aforesaid argument of the learned counsel appears to be correct inasmuch as the claim of freehold rights in the suit was based on the earlier government orders that were rescinded and considerations were made permissible under the Government Order dated 15.1.2015 that admittedly came into existence after the filing of the suit. No cause in the suit was based on the said Government Order, and therefore, it's withdrawal cannot eclipse the right of consideration, if available, of the petitioner under the Government Order dated 15.1.2015.

6. The writ petition is, therefore, disposed of with a direction to the District Magistrate, Sitapur to consider the request of the petitioner in the light of the Government Order dated 15.1.2015 without being influenced by the withdrawal of the suit within a period of three weeks from the date a certified copy of this order is produced before him.

(2016) 9 ILRA 489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2016

BEFORE

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

Misc. Bench No.- 22878 Of 2016

Dinesh Pal Verma ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amitesh Pratap Singh, D.P. Singh, Jitendra Bahadur Singh

Counsel for the Respondents:
C.S.C, Shikhar Anand

Right to Information Act — Penalty proceedings — Ex parte order — Recall application — Duty to consider explanation: Where a public authority against whom penalty has been imposed places material facts and explanation in a recall application, the State Information Commission is required to examine and consider such contentions before rejecting the application. Failure to consider relevant explanations vitiates the order passed thereon.
Administrative Law — Non-consideration of material pleas — Effect: Rejection of a recall application without adverting to the substantive defence and explanations raised therein amounts to non-application of mind. Consequential proceedings founded upon such order cannot survive.
Right to Information — Penalty and recovery proceedings — Validity: Recovery proceedings arising out of an order imposing penalty cannot continue where the foundational order suffers from procedural infirmity and failure to consider material facts placed before the authority.
Order dated 04.12.2015 rejecting the recall application, recovery notice dated 08.01.2016 and consequential intimation dated 05.05.2016 were quashed. Liberty was granted to the State Information Commission to pass fresh orders in accordance with law after considering the observations made by the Court and after putting respondent No. 4 to notice.

In Result : Writ petition allowed.

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

1. Heard learned counsel for the petitioner and Sri Shikhar Anand for the State Information Commission.

2. The petitioner is an Executive Engineer from whom, the respondent No.4 is alleged to have sought certain information in respect of the tenure of one Sri Gopal Gupta Assistant Engineer, as is evident from the information sought vide letter dated 08.06.2011, a copy whereof, is Annexure No.5.

3. The petitioner states that in response thereto, the petitioner had got the entire compilation made available and for that a letter was sent to the petitioner on 04.07.2011 and again on 04.08.2011 informing the petitioner that in spite of the demand made in the estimate since the requisite fee was not deposited, the information which was already available, could not be tendered to the petitioner as per Rules. Secondly the letter that were sent had been returned with endorsements of not-availability of the respondent No.4.

4. The respondent No.4 appears to have approached the Chief Information Commission by filing an appeal on account of non-receipt of information and an order was passed on 28.01.2014 imposing a penalty of Rs.25,000/- on the petitioner for having not supplied the information to the petitioner.

5. The petitioner contends that the aforesaid proceeding went on ex parte and, therefore, the petitioner moved an application dated 08.04.2016 for recall stating therein the entire explanation a copy whereof is Annexure-9 to the writ petition. This recall application has been rejected by the order dated 04.12.2015 and as a result whereof, the recovery is now sought to be made of the fine imposed under the order dated 08.01.2016 and 05.05.2016. The petitioner contends that there was absolutely no fault on the part of the petitioner and as a matter of fact if the respondent No.4 only wanted the gist of the information, he could have responded to the estimate given to him for deposit of the requisite fee so as to reduce his burden accordingly. It is urged that the respondent No.4 did not undertake any such steps and the letters sent to him were returned with an endorsement that the addressee was not available on the said address.

6. Learned counsel submits that all these facts were brought on record through the recall application but the State Information Commission without considering the same, proceeded to pass the impugned order and has saddled the petitioner with a recovery which could not be justifiably realized from the petitioner.

7. We have considered the submissions raised and what we find is that the petitioner's contention contained in the recall application having nowhere been considered while rejecting the same, vide order dated 04.12.2015, the consequential action of recovery is vitiated. The State Information Commission ought to have considered the same before passing the orders. Accordingly, the order dated 04.12.2015 contained in Annexure No.2 to the writ petition, the recovery notice dated 08.01.2016 and the consequential intimation dated 05.05.2016 are hereby quashed. It shall be open to the State Information Commission to pass appropriate orders in accordance with law keeping in view the observations made hereinabove after putting the respondent No.4 to notice.

8. The writ petition is accordingly allowed.

(2016) 9 ILRA 491
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ A No.- 31200 Of 2016

Sneha Gupta **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Vijay Kumar Singh, Hritudhwaj Pratap Sahi

Counsel for the Respondents:
C.S.C., Inteshwar Nath Singh

Service Law — Probationer — Termination simplicitor vis-à-vis punitive termination — Test to determine nature of order — Petitioner appointed as Assistant Professor on probation — Services terminated by giving one month's salary in lieu of notice under terms of appointment — However, prior thereto, University constituted enquiry committee to examine allegations of misconduct including insubordination, dereliction of duty, granting attendance to absent students, failure to upload attendance and unauthorized installation of air conditioner — Board of Management found petitioner guilty of misconduct and doubtful integrity — Held, where enquiry is held not to assess general suitability but to establish misconduct and termination is founded on findings of guilt, order though couched innocuously is punitive and stigmatic in nature. (Paras 11 to 21)

Service Law — Probationer — Stigmatic order — Requirement of disciplinary enquiry — Communication terminating petitioner's service specifically recorded findings of indiscipline, insubordination, non-cooperation, dereliction of duty and doubtful integrity — Held, use of stigmatic expressions and findings of misconduct render termination punitive — Such order cannot be passed without regular disciplinary enquiry complying with principles of natural justice and applicable service rules. (Paras 16 to 21)

Service Law — Motive and foundation test — Applicability — Distinction reiterated between termination based on motive and termination founded on misconduct — If employer merely forms opinion regarding suitability without adjudicating misconduct, discharge simplicitor permissible; but where enquiry is conducted to prove charges and findings of guilt become foundation of order, termination becomes punitive notwithstanding innocuous form of order. (Paras 11 to 15)

Natural Justice — Departmental enquiry — Procedural safeguards — Though enquiry committee sought written explanation from petitioner, no formal charge-sheet issued, no oral enquiry conducted and no opportunity granted to lead evidence — Held, termination founded on misconduct without holding regular disciplinary enquiry violative of statutory requirements and principles of natural justice. (Para 22)

University Law — Arbitration clause — Scope — Maintainability of writ petition — Objection raised regarding alternative remedy under S. 40 of U.P. Madan Mohan Malaviya University of Technology Act, 2013 — Held, arbitral remedy confined only to disputes arising from reconstitution of Engineering College into

University under S. 4 of Act — Dispute relating to termination of employee appointed after establishment of University not covered — Writ petition maintainable. (Paras 23 to 26)
In Result: Writ petition allowed; impugned communication of Registrar terminating petitioner's services and decision of Board of Management quashed. (Paras 27 & 28)

Cases cited:
1. Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd. and another(1999) 2 SCC 21
2. Parshottam Lal Dhingra vs. Union of IndiaAIR 1958 SC 36
3. State of Bihar vs. Gopi Kishore PrasadAIR 1960 SC 689
4. State of Orissa vs. Ram Narayan DasAIR 1961 SC 177
5. Samsher Singh vs. State of Punjab(1974) 2 SCC 831
6. Madan Gopal vs State of PunjabAIR 1963 SC 531
7. Ranendra Chandra Banerjee vs. Union of IndiaAIR 1963 SC 1552
8. Jagdish Mitter vs. Union of IndiaAIR 1964 SC 449
9. Champaklal Chimanlal Shah vs. Union of IndiaAIR 1964 SC 1854
10. Gujarat Steel Tubes vs. Gujarat Steel Tubes Mazdoor Sabha(1980) 2 SCC 593
11. State of U.P. vs. Ram Chandra Trivedi(1976) 4 SCC 52
12. State of Maharashtra vs. Veerappa R. Saboji(1979) 4 SCC 466
13. Anoop Jaiswal vs. Government of India(1984) 2 SCC 369
14. Ratnesh Kumar Choudhary Vs. Indira Gandhi Institute of Medical Sciences, Patna, Bihar and othersAIR 2016 SC 467
15. Jaswantsingh Pratapsingh Jadeja Vs. Rajkot Municipal Corporation and another(2007) 10 SCC 71
16. Major Singh Vs. State of Punjab and others(2000) 9 SCC 473

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The sole issue for consideration is whether the termination of the service of the petitioner, a probationer, by giving one month's salary in lieu of notice was a termination simplicitor and thus valid, or is stigmatic in nature and consequently, could not have been made without holding a regular disciplinary enquiry envisaged under the Service Rules.

2. Before embarking upon the legal position, the facts in brief necessary for adjudication may be noted. The petitioner applied for appointment as Assistant Professor in Civil Engineering at Madan Mohan Malviya Engineering College, Gorakhpur pursuant to an advertisement. The Selection Committee found the petitioner suitable for appointment. The recommendation of the Selection Committee was accepted by the Board of Management of the University and in pursuance thereof an appointment letter dated 26 August 2016 was issued under signature of the Registrar. In terms of the appointment letter, the petitioner was placed on probation for two years, extendable by such periods as the Vice Chancellor may deem fit. Clause 3 (b) of the appointment letter, which is of relevance, envisages termination of service of the petitioner by giving one month's notice or pay in lieu thereof during the initial or the extended period of probation. It reads thus:-

"(b). During the initial or extended period of probation her services may be terminated by the competent authority without assigning any reasons by giving him/her one month's notice or pay in lieu thereof."

3. The petitioner started working as Assistant Professor in the Department of Civil Engineering since 1 September 2015. According to the petitioner, on her request, a type IV quarter in the University Campus was allotted to her and she started residing therein alongwith her family. In due course, she was given additional responsibility of Hostel Superintendent of the girls hostel and was allotted two rooms in the hostel premises by an order dated 3 November 2015. She was required to take possession thereof immediately, failing which the allotment would stand automatically cancelled and the petitioner would be debarred from any further allotment. The petitioner being a married woman found it difficult to occupy the said accommodation inside the girls hostel where entry of male members was not permitted. The petitioner claims to have made a representation on 5 November 2015 to the Registrar to permit her to continue in possession of the accommodation allotted to her earlier, as in case she occupies the accommodation inside the girls hostel, her husband would face difficulty in accessing it.

4. However, the request of the petitioner was not acceded to. On the other hand, by communication dated 21 December 2015 issued by the Registrar, the petitioner was informed that the temporary allotment of House No.G/IV/06 in her favour has been cancelled and she should vacate the same and occupy the accommodation meant for the Hostel Superintendent. The petitioner made yet another representation on 4 January 2016 requesting the Registrar to reconsider the matter. Once again, the Registrar refused to accede to the request of the petitioner and directed her by letter dated 22 January 2016 to occupy the accommodation meant for the Hostel Superintendent. She was also warned that in case she fails to occupy the accommodation within two days, the University Administration would be compelled to initiate proceedings against her in accordance with the rules. The petitioner once again refused to abide by the direction and made another representation on 8 February 2016. In this manner, the tussle between the petitioner and the University Administration continued relentlessly.

5. The University treated the aforesaid stance of the petitioner as an act of insubordination. Accordingly, by communication dated 18/21 March 2016, the Registrar issued a warning to the petitioner stating that refusal on her part to vacate House No.G/IV/06 and occupy the quarter meant for the Hostel Superintendent amounts to gross indiscipline and may entail disciplinary action. She was given one last opportunity to vacate the temporary accommodation in her possession within seven days and to occupy the residence reserved for Hostel Superintendent. The petitioner by letter dated 4 April 2016 once again conveyed her unwillingness to occupy the quarter reserved for Hostel Superintendent. She even offered her resignation as Hostel Superintendent.

6. On 13 April 2016 the Registrar sent a communication to the petitioner calling for her explanation as to why action should not be taken against her for having failed to discharge the responsibilities attached to her post. It was stated therein that the petitioner had failed to take possession of the house allotted to her as a Hostel Superintendent and had rather indulged in unnecessary correspondence. Apart from it, certain other charges were also levelled against the petitioner. It was alleged that she failed to upload the attendance of the students of the odd semester 2015-16 on the University web portal despite reminder dated 11 January 2016 indicative of her lackadaisical attitude; she was found late in time for taking classes for which the Head of

Department issued a warning to her. It was concluded that the petitioner was not discharging her responsibilities in a proper manner. In response thereto, the petitioner submitted a detailed reply on 19 April 2016 offering explanation to each and every charge and disputing the correctness of the imputations. It was followed by another notice from the Registrar dated 25 April 2016 calling for an explanation from the petitioner as to how she had installed an air conditioner in House No.G/IV/06, which was alleged to be in her possession unauthorisedly. On 26 April 2016 the petitioner offered explanation to the said notice stating that she was unaware of the requirement of taking permission before installing air conditioner but as soon as the said provision came to her knowledge, she had requested for permission by her letter no.1120/2016. She further stated that her mother is a patient of diabetes and blood pressure and requested for the connection of the air conditioner being restored, as otherwise the condition of her mother may deteriorate. The petitioner was thereafter served with an office order dated 2/4 May 2016 issued under signatures of the Registrar stating that a Committee comprising of Professor Udai Shankar, Professor S.K. Srivastava and Dr. P.K. Singh has been constituted for holding an enquiry against the petitioner for (i) not occupying the official accommodation reserved for hostel superintendent; (ii) offering resignation from the post of Hostel Superintendent; (iii) not uploading the attendance of the students; (iv) not taking the prescribed classes and (v) installing air conditioner in the Transit Hostel without permission from the University authorities. The Committee was required to hold an enquiry and submit its report within seven days. The Committee summoned the petitioner on 14 May 2016. The petitioner appeared before the Committee on the assigned date and time. According to the petitioner, the Committee asked certain questions from her and required her to submit explanation in writing by 4:00 p.m. on 26 May 2016. In this regard, the Chairperson of the enquiry Committee also issued an order in writing on 19 May 2016 requiring her to submit her written explanation in regard to (a) not vacating the accommodation allotted to her on temporary basis; (b) not occupying the accommodation allotted to her as Hostel Superintendent; (c) installing air conditioner in Transit Hostel without permission; (d) failing to discharge her duties by not taking the prescribed classes and (e) not uploading the attendance of the students on the web portal at regular intervals. She was also required to furnish information as to whether any male employee is working in girls hostel and to disclose the name of the persons living alongwith her in the accommodation she was occupying.

7. The petitioner claims to have offered explanation in writing on all the points on 23 May 2016. According to the petitioner, nothing further happened before the enquiry Committee and abruptly, she was served with an order dated 6 June 2016 by the Registrar communicating the decision of the Board of Management of the University taken in the meeting held on the same date dispensing her services under Clause 3 (b) of the Appointment Order by giving one month's salary in lieu of notice. The order of the Registrar reiterates the charges on which her explanation was sought by the enquiry Committee and further states that she has been found guilty of the charges levelled against her. This was held to be a violation of the terms and conditions of the Appointment Order and the Employees Conduct Rules. Aggrieved, the petitioner has preferred the instant writ petition.

8. The University has filed a counter affidavit in which it has tried to justify its action in dispensing with the services of the petitioner. It is pleaded that the petitioner was obliged to

discharge administrative responsibilities assigned on her as per Clause 4 of the appointment order but she failed to discharge the same by offering resignation as Hostel Superintendent and by refusing to occupy the residence reserved for the person holding that post. It is alleged that Quarter No.G/IV/06 allotted to the petitioner in the beginning was the Transit hostel meant for the temporary housing only and after she had been allotted the accommodation reserved for Hostel Superintendent, her insistence to continue in occupation of the Transit Hostel was wholly unjustified. The act of the petitioner in installing the air conditioner in an accommodation which she had been asked to vacate was an act of gross misconduct. The University was therefore compelled to hold an enquiry into these repeated acts of misconduct by constituting a three member Enquiry Committee.

9. The reason why the Board did not find the petitioner suitable for continuing as Assistant Professor has been disclosed in para 28 of the counter affidavit in the following words:-

"Board of Management did not find petitioner suitable for continuing as Assistant Professor in view of petitioner found to be guilty of various misconducts such as non-compliance of orders, offer to resign from assignments, unpardonable academic impropriety of granting attendance to the absent students for making them overcome shortfall of their attendance and facilitating their appearance in examination, which was not possible otherwise as these students actually did not attend requisite classes, not taking classes regularly, failure to upload attendance regularly, unauthorized installation of air conditioner in temporary premises when proper allotment of another accommodation was made to petitioner."

10. In para 29 of the counter affidavit it is asserted that the action of the petitioner in "granting attendance to anyone absent in the class and recommending for allowing the students in examination based on such forge attendance" amounts to "academic fraud" and casts doubt on her "integrity". It is claimed that these acts of serious misconduct on part of the petitioner were considered by the Board of Management and it resolved to terminate the services of the petitioner. Since she was a probationer, as such the termination of her service has been effected by passing a simple order of discharge as provided under Clause 3 (b) of the appointment order. The termination of the service of the petitioner by means of a simple order of discharge is neither stigmatic nor punitive but strictly in terms of the appointment order.

11. The tenure of a probationer or a temporary employee as the term connotes is of a precarious nature. The employer has a greater degree of latitude available to him to dispense with the service of such an employee. He can adopt one of the two modes. A simple order of discharge often called as 'termination simplicitor' in terms of the contract of the service or the rules governing such an employee could be passed. Generally that is possible by giving one month notice or pay in lieu thereof. In such a case, the order is not considered punitive, nor disentitles an employee to re-employment. Consequently, neither Article 311 applies nor a regular disciplinary enquiry is required to be conducted. However, in case the employer chooses to terminate the service on the ground of misconduct, he is required to hold an enquiry, prove the guilt and comply with the requirements of Article 311, in case it is applicable. The reason being that such an order is stigmatic

in nature and thus, requires an enquiry to be held in compliance of the provisions enshrined in the Constitution and/or the service rules, as the case may be. This position, however, gets complicated when the employer ostensibly adopting the first course, infact, terminates the service on account of the misconduct of the employee. The order of termination of service may still be couched in innocuous language not reflective of the fact that the order of discharge had its genesis in a delinquency which in the wisdom of the employer stands established. Dealing with such situations, there are plethora of judgments of the Supreme Court, some of which were also referred to by learned counsel for the parties. Instead of taking a detour through these judgments, we find it convenient to quote the following paragraphs from the judgment of the Supreme Court in the case of **Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd. and another**[1] which succinctly takes note of the development of law on the subject:-

"18. The first decision of the Constitution Bench was in **Parshottam Lal Dhingra vs. Union of India**[2]. There a twin test was laid down - whether the order in terms of the appointment gave a right to terminate and whether the order was punitive in nature. If misconduct was the motive, the order was not punitive but if it was the foundation, it was punitive. In that case, the employee was working in a higher post in an officiating capacity and that appointment was terminated and he was reduced in rank. S.R. Das, C.J. stated (para 28) (p 49) that misconduct, negligence, inefficiency or other disqualification might be the motive or the inducing factor which influenced the Government to take action under the terms of the contract of employment or the specific service rule, and the motive was irrelevant. But if the termination was "founded" on misconduct, negligence, inefficiency or other disqualification, it would have to be treated as a punishment. It was also held that the use of the word "termination" or "discharge" was not conclusive. In spite of the use of such innocuous expressions, the Court could still hold it to be punitive. On the facts of the case the termination of the officiating appointment was based upon certain adverse remarks and it was held that it was not by way of punishment.

19. Next came the decision of the Constitution Bench in **State of Bihar vs. Gopi Kishore Prasad**[3]. Here a test of "enquiry" was laid down. That was a case of a probationer. The Government had come to the conclusion on enquiry that the respondent was unsuitable for the post held on probation. Because of the enquiry, Sinha, C.J. held this to be "clearly by way of punishment". Termination (without notice) but after holding an enquiry into the alleged misconduct or inefficiency or some similar reason would be punitive. Government could not "brand him dishonest and incompetent without enquiry". If it did so, it would be by way of punishment, but not if the position "was that he was found unsuitable", without holding an enquiry. Both **Dhingra**[2] and **Gopi Kishore Prasad**[3] were decided when the law in this branch was just developing.

20. However Shah, J. (as he then was) in **State of Orissa vs. Ram Narayan Das**[4] gave a new dimension to the legal principles. That case also related to a probationer but was governed by Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules which was a special provision and which stated:

"Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment."

If the test of "enquiry" laid down by Sinha, CJ was to be applied, every termination of a probationer made by following the rule and conducting an enquiry would become punitive. The "enquiry test" (as pointed out by Krishna Iyer, J. in **Samsher Singh case**[5]) broke down. A new test had to be invented. Therefore Shah, J. (as he then was) laid down a new test which required that one should look into "object or purpose of the enquiry" and not merely hold the termination to be punitive merely because of an antecedent enquiry. J.C. Shah, J (as he then was) said:

"Whether it amounts to an order of dismissal depends upon the nature of the enquiry, if any, the proceedings taken therein and the substance of the final order passed on such enquiry."

(emphasis supplied)

21. The learned Judge pointed out that the employed being a probationer, "the enquiry against the respondent was for ascertaining whether he was fit to be confirmed". (emphasis supplied) His Lordship pointed out that this enquiry was not of the same nature as an enquiry into charges of misconduct, negligence, inefficiency or other disqualification. On the facts of the case, the termination of a probationer was upheld inasmuch as the purpose of the enquiry was to find out if the employee could be confirmed. The purpose of the enquiry was not to find out if he was guilty of any misconduct, negligence, inefficiency or other disqualification.

22. We then come to the third case decided by the Constitution Bench in **Madan Gopal vs State of Punjab**[6]. Here Shah, J. (as he then was), applied the same principle laid down earlier by him but in this case, he held that the order was punitive. That was a case of a temporary employee. There was a report of the Settlement Officer about the "misconduct" of the employee and the termination was based on the said report. It was, therefore, held that though the order of termination was an order simpliciter, still the Court could go behind the same and further, if the foundation was the finding as to misconduct, then the order was punitive. The termination order was quashed even though the employee participated therein because the statutory procedure for a regular departmental enquiry was not followed. Emphasis was again made on the "purpose of the enquiry". The distinction between the earlier case and this case was that while in **Ram Narayan Das case**[4], the enquiry was made to find out if the probationer could be continued and confirmed and was, therefore, not punitive, the position in the Madan Gopal case6 was that the enquiry by the Settlement Officer was to find out if the employee was guilty of misconduct. In fact, the termination order was based on the enquiry held behind his back and was held to be punitive. In **Ranendra Chandra Banerjee vs. Union of India**[7], being a case of a probationer to whom Rule 55-B of the Central Rules applied, Wanchoo J. (as he then was) upheld the order on the ground that

the limited purpose of the enquiry was to find out whether he could be "retained or not" in the service. In other words, the enquiry was not with a view to see if the employee had misconducted in his duties. This case was similar to **Ram Narayan Das case**[4].

23. The theory of "object of the enquiry" was further emphasised by the Constitution Bench in **Jagdish Mitter vs. Union of India**[8]. That was a case of a temporary employee. The discharge from service was by way of an order "simpliciter". But there, an enquiry was held and the termination order was based on it as it stated on its face that it was "found undesirable" to retain the employee and hence his services were being terminated. The order was held to be punitive on its face and was quashed. Gajendragadkar, J. (as he then was) discussed the earlier cases and held that in every case the purpose of the enquiry was crucial. If the enquiry was held "only for the purpose of deciding whether the temporary servant should be continued or not", (emphasis supplied) it could not be treated as punitive and that the motive operating in the mind of the authority was not relevant. But "the from in which the order terminating the service is expressed will not be decisive". It was held:

"What the Court will have to examine in each case would be, having regard to the material facts existing up to the time of discharge, is the order of discharge, in substance one of dismissal ?" (emphasis supplied)

Therefore, the "form" was not of importance but the "substance" was.

24. Finally, we come to the seventh case, **Champaklal Chimanlal Shah vs. Union of India**[9], a case strongly relied upon by the learned counsel for the respondent, Shri J.M. Khanna. Here, it was the case of a preliminary enquiry which was intended to find out if a prima facia case was made out to start a regular departmental enquiry. The question was whether a termination order passed soon after the completion of the preliminary enquiry could be treated as punitive. Wanchoo, J. (as he then was) held that it could not be so held. Once the preliminary enquiry was over, it was open to the employer not to make a regular enquiry for proving the guilt of the employee. The employer could stop at that stage and pass a simple order of termination. The facts as gathered or revealed in the preliminary enquiry would be the "motive" and not the "foundation" since there was no enquiry as to their correctness made. The order could not be quashed as being punitive.

25. We finally come to the seven-Judge Judgment rendered in **Samsher Singh vs. State of Punjab**[5] to which we made a brief reference at the beginning of this Judgment. The case concerned two Judicial Officers. So far as the termination order passed against Sri Ishwar Chand Agarwal was concerned, it was quashed holding it to be punitive as it was based on the report of an enquiry officer appointed by the Director of Vigilance. The enquiry officer recorded statements of witnesses behind the back of the officer and definitive findings therein were the basis for the termination. It was not a preliminary enquiry. A.N.Ray, C.J. held that the object of the said enquiry was :

"to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the enquiry officer reached the appellant. The enquiry officer gave his findings on allegations of misconduct. ... The order of termination was because of the recommendations in the report.

The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case.... The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may, in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case, the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside." (emphasis supplied)

A.N.Ray, C.J.. wrote the opinion for himself and five other learned Judges. Krishna Iyer, J. wrote a separate but concurring Judgment where he referred to the new dimension to the law given by Shah, J. (as he then was) in the sixties. The learned Judge said that the words "form", "substance", "motive" and "foundation" were baffling and the need of the hour was a simple test.

26. If there was any difficulty as to what was "motive" or "foundation" even after Samsher Singh case5, the said doubts, in our opinion, were removed in **Gujarat Steel Tubes vs. Gujarat Steel Tubes Mazdoor Sabha**[10] again by Krishna Iyer, J. No doubt, it is a labour matter but the distinction so far as what is "motive" or "foundation" is common to labour cases and cases of employees in the government or the public sector. The learned Judge again referred to the criticism by Shri Tripathi in this branch of law as to what was "motive" or what was "foundation", a criticism to which reference was made in Samsher Singh case5. The clarification given by the learned Judge is, in our opinion, very instructive. It reads as follows:

"53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic process but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

54. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here." (emphasis supplied)

27. In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wise to go into their truth but decides merely not to continue a dubious employee. The master does not want to decide or direct a decision about the truth of the allegations. But if he conducts an enquiry only for the purpose of proving the misconduct and the employee is not heard, it is a case where the enquiry is the foundation and the termination will be bad.

28. Subsequent to the above cases, there have been a number of other cases where the above principles have been applied. We shall refer to a few of them where some more principles have been discussed. In **State of U.P. vs. Ram Chandra Trivedi**[11] the employee's services were terminated as he allowed some other employees to impersonate him in an examination. The order was innocuous but the case was preceded by an enquiry and it was held that the petitioner in his pleadings had not made out a case for calling for departmental records to examine if it was a case of punishment. That was how this case was explained by Pathak, J. (as he then was) in **State of Maharashtra vs. Veerappa R. Saboji**[12]. In **Anoop Jaiswal vs. Government of India**[13] it was held while quashing the order of termination that it was open to the Court to go behind the order and find out if the report/recommendation of the superior authority was a camouflage and if that was the basis or foundation for the order, then the report/recommendation should be read along with the order for the purpose of determining the true character of termination. If on a reading of the two together, the Court reached the conclusion that the alleged finding of misconduct was the cause or basis of the order, and that but for the report containing such a finding, the order would not and could not have been passed, the termination order would have to fall to the ground as having been passed without the officer being afforded a reasonable opportunity. It was also held that it was wrong to presume that an order would be punitive only if a regular enquiry was conducted exparte or behind the back of the officer. Even if it was not a regular enquiry, any other enquiry where evidence was taken and findings were arrived at behind the back of the officer, would make the subsequent termination bad. Vankataramiah, J. (as he then was) pointed out in the above case the shift in the law as brought about by **Samsher Singhs case**[5].

12. Thus, in **Radhey Shyam Gupta** (supra) the Supreme Court reiterated the principle that when motive behind the enquiry is to ascertain the suitability of an employee, the consequent discharge is not punitive. On the other hand, when the purpose of the enquiry is to establish the guilt on part of the employee, the termination order though worded innocuously, would not detract from its nature of being an order of dismissal. It is wholly immaterial that the grounds are recorded

in a different proceeding other than the order of discharge. The courts are empowered to pierce the veil and find out the real intention behind the passing of the order.

13. In a recent decision of the Supreme Court in **Ratnesh Kumar Choudhary Vs. Indira Gandhi Institute of Medical Sciences, Patna, Bihar and others**[14] the issue was whether the termination of the service of the appellant was a termination simplicitor as the order purported to be or was punitive in nature. The appellant was a Chest Therapist in Indira Gandhi Institute of Medical Sciences. A complaint was made against him that his appointment was illegal as infact he was the applicant for the post of Physiotherapist but was wrongly considered for appointment on the post of Chest Therapist. His service was terminated in terms of the investigation carried out by the Vigilance department. The Government tried to justify its action by contending that termination simplicitor was permissible as per the conditions of the appointment order, whereas the appellant contended that the motive behind the enquiry was to ascertain the truth of various allegations of misconduct and consequently, it was stigmatic in nature. The Supreme Court noticed that the report that was submitted by the Vigilance department mentions about the conduct and character of the appellant. It indicated misconduct, misbehaviour and disobedience on part of the appellant. The counter affidavit filed by the department reiterated the misbehaviour on part of the appellant. In the aforesaid background facts, the Supreme Court held that:

"The stigma has been cast in view of the report received by the Central Vigilance Commission which was ex parte and when that was put to the delinquent employee, holding of a regular enquiry was imperative. It was not an enquiry only to find out that he did not possess the requisite qualification. Had that been so, the matter would have been altogether different. The allegations in the report of the Vigilance Department pertain to his misbehaviour, conduct and his dealing with the officers and the same also gets accentuated by the stand taken in the counter affidavit. Thus, by no stretch of imagination it can be accepted that it is termination simpliciter."

14. Applying these principles to the facts of the instant case, we have no hesitation in holding that the impugned order of discharge is punitive in nature, as it has its foundation in the charges which, according to the respondents, stood established in the enquiry held by the three member Committee. The three member Committee found that (a) offer of resignation by the petitioner from the post of Hostel Superintendent is reflective of her lackadaisical attitude and is violative of condition no.4 of the appointment order; (b) installation of air conditioner in an accommodation allotted to her on temporary basis without permission is reflective of her whimsical attitude and amounts to gross indiscipline; (c) failure to upload the attendance of the students on the web portal of the University periodically and awarding attendance to students whose attendance was short makes her integrity doubtful and her act unpardonable; (d) refusal on part of the petitioner to occupy the residence reserved for Hostel Superintendent was without any justifiable cause and the petitioner had thereby failed to discharge the responsibilities assigned to her; and (e) apart from not taking interest in discharging her duties as a teacher, she had tried to exert undue pressure on the University by making representations through her mother-in-law and the same is violative of Section 79 of the Employees Conduct Rules.

15. Undoubtedly, the Committee was not formed to adjudge the general suitability of the petitioner for the post held by her but to go into the veracity of the specific charges of misconduct. The Board of Management of the University in its meeting dated 6 June 2016 deliberated upon the report of the three member Committee and having found the petitioner guilty of misconduct, instead of passing an order of dismissal, chose to have recourse to Clause 3 (c) of the letter of appointment and terminated her service by giving one month salary in lieu of notice. The attending facts leading to the discharge of the petitioner leaves no manner of doubt that the foundation of the order is the alleged delinquency on part of the petitioner, which stood established in the enquiry held by the three member Committee.

16. Apart from what has been held above, this Court finds that in the instant case, it was not even necessary to dwell on these aspects, as the decision of the Board of Management dated 6 June 2016 is exfacie stigmatic. It holds the petitioner guilty of indiscipline, insubordination, non-cooperation, dereliction of duty and of being a person of doubtful integrity. Even in the communication issued by the Registrar on 6 June 2016 intimating the petitioner the decision of the Board of Management, it is explicitly recorded that the petitioner had been found guilty of misconduct and breach of various conditions of the order of appointment.

17. In **Jagdish Mitter Vs. Union of India** (supra) the Constitution Bench was considering the validity of order of discharge of an employee which was worded thus:-

"Jagdish Mitter, a temporary second division clerk of this office, having been found undesirable to be retained in Government service, is hereby served with a month's notice of discharge with effect from 1 November 1949."

18. The Supreme Court held that the word 'undesirable' casts aspersion on the employee and consequently, such an order could have been passed without complying with the provisions of Article 311 of the Constitution. The relevant observations made by the Supreme Court in this regard are as under:-

".....It seems that anyone who reads the order in a reasonable way, would naturally conclude that the appellant was found to be undesirable, and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be: Does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal. That being so, we are satisfied that the High Court was in error in coming to the conclusion that the appellant had not been dismissed, but had been merely discharged."

19. In **Jaswantsingh Pratapsingh Jadeja Vs. Rajkot Municipal Corporation and another**[15] the Supreme Court held that where the language used in the order of termination of service of a probationer is exfacie stigmatic, the order is to be held punitive in nature. In that case, the appellant was found absent from duties and guilty of negligence and carelessness. He was discharged from service in accordance with the statutory provisions. The Supreme Court held thus:-

"9. The tests governing termination of probation are no longer res integra. When a disciplinary enquiry is initiated on the premise that there are serious allegations of misconduct on the part of the delinquent officer; his explanation thereupon had been rejected pursuant whereto a full scale formal enquiry has been initiated culminating in a finding of guilt, the order terminating the service would be held to be stigmatic. There may also be cases where the allegations involved moral turpitude on the part of the delinquent officer. The language used in the order of termination of service may ex facie be stigmatic. The language used therein may also show that there was something over and above the assertion that the officer was found unsuitable for the job. The aforementioned tests, however, are not exhaustive.

10. We may apply the said tests in the instant case. In the instant case, the language used in the impugned order is ex facie stigmatic. It referred to the earlier orders containing allegations of misconduct on the part of the appellant and the fact that he had been found guilty thereof. The appellant was said to have absented himself from duties. He had been found guilty of negligence, carelessness and showing absolute disregard towards his duties. A disciplinary proceeding was initiated therefor. His explanation to the show cause notice was rejected. He was, therefore, found guilty of the charges levelled against him. Only thereafter, he was discharged from service by reason of the impugned order dated 29.4.2003.

28. From the discussions made hereinbefore, it is evident that termination of services of the appellant purporting to discharge him simplicitor cannot be accepted, being stigmatic in nature. The form of the order terminating the services coupled with the background facts clearly leads to the conclusion that the order impugned in the writ petition by the appellant was punitive."

20. In **Major Singh Vs. State of Punjab and others**[16], the Supreme Court, considering the language used in the order, held it to be stigmatic, by holding thus:-

"4. Having heard learned Counsel for the parties, in our view, it is impossible on the facts of this case to sustain the impugned order of the High Court. The reason is obvious. A mere look at the termination order shows that aspersions regarding the conduct of the appellant have been cast in the order. Not only that but the order which consists of five pages read as a whole shows that the appellant is completely stigmatised. We may quote relevant extracts from the said impugned order of termination. In the first para it is stated that having considered the conduct and the work of the appellant it is mentioned that his knowledge of law and police rule is much less. He remains loose and weak on his duty. He is in the habit of remaining absent from his duty and in this connection his in-charge has warned him so many times. No special thing came to mind about his

good character..... He is of violent type and confronting his companions. Then a list mentioning his earlier service record and punishments imposed on him is given. Three instances where censure punishment was imposed on him are mentioned. Thereafter, a detailed narration is made about his unsatisfactory work and then in the sixth para, referring to the appellant's own stand before the authorities, it is mentioned that in the opinion of the authority passing the order the appellant could not control himself and had made hooliganism after consuming liquor in the barracks. In the penultimate paragraph it is mentioned that in the details given above, it is proved that he is not fit to become a good police officer and he failed to submit a sound ground in his defence by appearing before him in person thus keeping him for more time in the department is not in the interest of department as well as of the nation (public) thus he dismissed constable Major Singh, No. 80/173 under Rule 12.21 on 14.2.92 afternoon from Government service.

5. To say the least, the order itself shows that the authority concerned was out to dismiss him from service because of his alleged misconduct as a police constable. It is difficult to appreciate how this order, the way it is couched and spread over five pages, could have been treated as an order discharging the appellant from service without casting any stigma as, with respect, wrongly assumed by the learned Single Judge of the High Court."

21. In the case at hand, the language employed in the order of discharge being exfacie stigmatic, we have no hesitation in holding that the order is punitive in nature. It cannot be characterised as a merely an order of discharge of a probationer on ground of unsuitability to the post.

22. Indisputably, the petitioner was an employee of the University as defined under Section 2 (h) of the Uttar Pradesh Madan Mohan Malviya University of Technology Act, 201317 and sub-clause (ii) of Statute 59 of the Uttar Pradesh Mandan Mohan Malviya University of Technology, Gorakhpur First Statute 201518. Under Statute 49 (5) the Board of Management has been invested with the power to remove an employee from service on grounds of misconduct. However, it could be done only after giving due opportunity to the employee. In the instant case, as noticed above, although a three member Committee was constituted by the Board of Management for enquiring into the imputations of misconduct against the petitioner but the enquiry Committee except for asking the petitioner to submit written explanation in relation to certain queries did not itself hold any oral enquiry nor granted any opportunity to the petitioner to lead evidence. Even a formal charge sheet was never issued to her. The same was not considered necessary as the respondents were harbouring under an impression that her services could be dispensed with by a simple order of discharge as the petitioner was a probationer. As held above, even in the case of a probationer where her services are sought to be dispensed with on grounds of misconduct, a regular disciplinary enquiry is required to be held. The same having not been done in the instant case, the impugned order terminating the service of the petitioner cannot be sustained and is hereby quashed.

23. Before parting with the case, it would be necessary to deal with another objection raised by learned counsel for the respondent University regarding availability of an alternative remedy to

the petitioner by way of arbitration in accordance with Section 40 of the Act. Section 40 reads thus:-

"**40. Tribunal of Arbitration**. - (1) Any dispute, arising out of a contract of employment referred to in Section 4 between the University and the employee, or between the University and the existing employees in terms of the provisions of Section 4, shall be referred to tribunal of Arbitration which shall consist of one member nominated by the Board of Management, one member nominated by the employee concerned and an umpire to be nominated by the Chancellor.

(2) Every such reference shall be deemed to be a submission to arbitration on the terms of this section within the meaning of the Law of Arbitration as in force, and all the provisions of that Law with the exception of Section 2 thereof, shall apply accordingly.

(3) The procedure for regulating the work of the Tribunal of arbitration shall be such as may be prescribed.

(4) The decision of the Tribunal of Arbitration shall be final and binding on the parties, and no suit shall lie in any court in respect of any matter decided by the Tribunal."

24. A plain reading of Section 40 would indicate that not all dispute arising out of the contract of employment are referable to arbitration but only those which have been referred to in Section 4 of the Act.

25. Section 4 of the Act is as under:-

"**4. Effect of incorporation of University.** - On and from the commencement of this Act -

(1) any reference to the Madan Mohan Malaviya Engineering College, Gorakhpur in any law (other than this Act) or in any contract or other instrument shall be deemed as a reference to the University:

(2) all property, moveable and immovable, of or belonging to the Madam Mohan Malaviya Engineering College, Gorakhpur shall vest in the University;

(3) All the rights and liabilities of the Madan Mohan Malaviya Engineering College, Gorakhpur shall be transferred to, and be the rights and liabilities of the University;

(4) every person employed by the Madan Mohan Malaviya Engineering College, Gorakhpur immediately before the commencement of this Act shall hold his office or service in the University by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension, leave, gratuity, provident fund, and other matters as he would have held if this Act had not been passed, and shall continue to do so unless

and until his employment is terminated or he has opted for the University's terms and conditions of employment;

(5) notwithstanding anything to the contrary contained in any other provision of this Act, existing students of the Madan Mohan Malaviya Engineering College, Gorakhpur who joined classes before the establishment of the University under Section 4 of this Act, shall continue to pursue their academic courses and programmes of study under the enrolment and affiliation of the Gautam Budh Technical University, Lucknow, which shall conduct examinations for them and award degrees to them upon successful completion of the courses and programmes of study they are pursuing there at presently."

26. A combined reading of these provisions would demonstrate that Section 40 contemplates reference of only those disputes between the employee and the University to the arbiral tribunal, which have come into existence as a result of Madan Mohan Malviya Engineering College, Gorakhpur being reconstituted as Madan Mohan Malviya University of Technology as per the provisions of the Act. In our considered opinion, the termination of the service of the petitioner, who was appointed much after the reconstitution of the Engineering College as an University under the Act, was not a dispute referable to Section 4. It would thus not be covered by Section 40 of the Act.

27. In consequence and for the reasons disclosed above, the writ petition is allowed. The impugned communication by the Registrar dated 6 June 2016 as well as the decision of the Board of Management of University of the even date are quashed.

28. No order as to costs.

(2016) 9 ILRA 507
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 44639 Of 2015

Manjoor **...Applicant**
Versus
State Of U.P. **...Respondent**

Counsel for the Applicant:
Atul Kumar

Counsel for the Respondent:
G.A., N.I. Zafri

Penal Code, 1860 — Ss. 304-B, 498-A & 201 and Dowry Prohibition Act, 1961 — Ss. 3 & 4 — Dowry death — Bail — Applicant-father-in-law sought bail contending absence of specific allegations and non-presence at time of incident — Prosecution relied upon statement of deceased's sister-in-law alleging persistent demand of additional dowry, cruelty and physical assault by applicant and other family members — It was specifically alleged that deceased, while pregnant, was brutally beaten resulting in death of unborn child and thereafter deceased herself died due to further assault — Held, allegations disclose active complicity of applicant in offence of extreme cruelty and dowry death.

Criminal Law — Homicidal death within matrimonial home — Destruction of evidence — Dead body of deceased allegedly buried secretly by accused persons without informing police and was later exhumed on application moved by father of deceased — Post-mortem report revealed fracture of parietal bone and other ante-mortem injuries indicating homicidal death — Held, conduct of accused in clandestinely burying dead body prima facie constituted attempt to destroy evidence under S. 201 IPC.

Bail — Dowry death coupled with homicidal violence — Principles governing — In serious offences involving continuous cruelty for dowry, death of pregnant woman and concealment of evidence, no liberal approach warranted — Gravity of offence and specific role attributed to accused disentitle applicant from discretionary relief of bail.

Criminal Law — Common participation of family members — Inference — Court observed that after commission of offence, concealment and burial of corpse could not ordinarily be exclusive act of husband alone and prima facie indicated participation and assistance of other inmates of house including applicant.
In Result: Bail application rejected.

(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. 463 of 2015 u/ss 304B, 498A and 201 IPC and Section 3/4 of Dowry Prohibition Act, Police Station- Budhana District- Muzaffarnagar.

2. Heard learned counsel for the applicant, learned A.G.A. and Sri N.I. Jafri, learned counsel for the complainant.

3. Perused the record.

4. Submission of learned counsel for the applicant is that the applicant is the father-in-law of the deceased and is an old man and was actually not present at the time of incident in the house. Further submission is that there are no specific allegations against the applicant and, therefore, the case of the applicant should be deemed to be distinguishable from the case of the husband, who alone may be presumed to be interested in the demand of additional dowry.

5. Learned AGA has opposed the prayer for bail and has drawn the attention of the Court to the statement of Smt. Gulfana, who is another daughter-in-law and was present in the house at the time of the incident. It has been narrated by witness Smt.Gulfana that after the marriage of the deceased the applicant and other family members were not satisfied with the dowry that was given and additional demands were extended. Ill-treatment was also meted out to the deceased and when the same situation continued a motorcycle was given by the father of the deceased again but that did not put an end to the cruel treatment to which the deceased was subjected. It was submitted that the deceased as well as this witness Smt.Gulfana, both were often beaten up. It has been specifically stated by this witness that the applicant Manjoor, and other co-accused Tahir, Nasir, Salim , sister-in-law Rukhsana and her husband used to demand additional dowry and also used to beat them. It has been specifically stated by this witness that on the day of occurrence all the aforesaid accused persons had badly beaten up the deceased, as a result of which, the child which she was carrying in her womb, died and the pregnancy got aborted and deceased gave birth to a still child. It has been further stated by this witness that the aforesaid dead child was buried by the accused persons and when the deceased regained her conscious she asked about the child on which the accused persons misbehaved and had again beaten her, as a result of which, she died. It has been emphasized by the learned AGA that the dead body of the deceased was buried with the purpose of destroying the evidence and it was only on the application of the father of the deceased that the dead body of the deceased had to be exhumed by the police and subjected to post mortem examination. It has been further emphasized by the learned AGA that the finding of the post mortem examination report would indicate that the deceased had died as result of homicidal death and her parietal bone was found fractured and some other injuries were also found on the body of the deceased. Next submission is that this is a case in which the extreme cruelty was meted out upon the deceased by the accused persons, as a result of which, both the child and mother have lost their lives. Further submission is that the post mortem report proves the murder of the deceased and the version given by this witness does not leave any doubt that the applicant is complicit in the

crime. After committing murder in the house, none of the inmates furnished information to the police, which the law required them to do. To the contrary as the accomplices in the crime, the cadaver was carried and buried under the ground to give it a complexion of natural death. All this exercise can not be the exclusive conduct of the husband alone or for that matter the exclusive conduct of any solitary accused unaided by others. No liberal view in the matter is, therefore, called for.

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.

(2016) 9 ILRA 510
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 45176 Of 2016

Smt. Mohini Sharma ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Suresh C. Dwivedi, M.C. Chaturvedi

Counsel for the Respondents:
C.S.C.

Constitution of India — Arts. 243-E, 243-Q & 243-U — Conversion of Gram Panchayat area into Nagar Palika Parishad — Effect on tenure of Gram Pradhan — Petitioner elected as Gram Pradhan for five years challenged cessation of her powers after constitution of Nagar Palika Parishad Khoda under U.P. Municipalities Act, 1916 — Contention that tenure of elected Gram Pradhan could not be curtailed before expiry of five years — Held, once area is declared transitional/smaller urban area under Art. 243-Q read with Ss. 3 & 3-A of U.P. Municipalities Act, 1916, identity of Gram Panchayat ceases and provisions of Part IX of Constitution and U.P. Panchayat Raj Act, 1947 no longer apply to such area.

Municipal Law — Constitution of Municipality — Supersession of Panchayat administration — On inclusion of rural area within municipal limits, affairs of such area become governed by U.P. Municipalities Act, 1916 by virtue of S. 5 thereof — Gram Panchayat cannot continue to function simultaneously after constitution of Municipality.

Constitution of India — Arts. 243-E & 243-U — Expression "unless sooner dissolved under any law for the time being in force" — Interpretation — Constitutional protection of five-year tenure of Panchayat/Municipality subject to earlier dissolution in accordance with law — Once Municipality validly constituted under Art. 243-Q, existing Panchayat ceases to function notwithstanding unexpired tenure.

Municipal Law — Transitional administration — Validity of ad hoc committee — Under S. 333, U.P. Municipalities Act, 1916, District Magistrate or committee appointed by him empowered to exercise powers and functions of Municipality till elected municipal body is constituted — Constitution of committee for interim administration held valid.

Local Self Government — Rural area converted into urban area — Consequence — Once State Government, considering factors such as population, density, revenue generation and non-agricultural activities, declares area as urban/transitional area, administration shifts from Panchayat regime under Part IX to municipal governance under Part IX-A of Constitution.

In Result: Writ petition dismissed; petitioner not entitled to continue as Gram Pradhan after constitution of Nagar Palika Parishad; interim administrative arrangement under S. 333 of U.P. Municipalities Act upheld.

Cases cited:
1. State of Maharashtra Vs. Deep Narain Chavan (2002) 10 SCC 565

(Delivered by Hon'ble V.K. Shukla, J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Smt. Mohini Sharma w/o Amar Pal Sharma, r/o Village Khoda, Block Loni, District Ghaziabad, is before this Court for following reliefs:

I. issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.7.2016 passed by the respondent no. 3, Commissioner, Meerut Division, Meerut.

II. issue a writ, order or direction in the nature of mandamus directing the respondent-authorities to allow the petitioner to continue to work and discharge her duties as Gram Pradhan, Gram Panchayat Khoda, Block Loni, District Ghaziabad till validly constituted Nagar Palika Parishad with all powers comes in existence.

III. issue a writ, order or direction in the nature of mandamus restraining the respondent-authorities from taking any action in pursuance of the impugned order dated 20.7.2016 and allow the petitioner to work as full fledged Gram Pradhan, Village Khoda, Block Loni, District Ghaziabad.

IV. issue such other and further writ, order or direction which this Hon'ble Court may deem fit and proper in the nature and circumstances of the present case.

V. award costs of the petition to the petitioner.

2. Brief background of the case, as is emanating from the record, is that petitioner contested elections for the post of Gram Pradhan of Gram Panchayat Khoda, Block Loni, District Ghaziabad in the elections held somewhere in November-December 2015 and in the said elections petitioner was elected as Gram Pradhan and, thereafter, petitioner continued to perform and discharge her duties as Gram Pradhan of the aforesaid Gram Panchayat and it appears that thereafter Nagar Palika Parishad Khoda has been constituted under the provisions of U.P. Municipalities Act, 1916 and at the said point of time the State Government came up with the notification dated 30.3.2015 and at the end of the day Nagar Palika Parishad Khoda Makanpur, Block Loni, District Ghaziabad has come into existence. Petitioner, at the said juncture, preferred Writ Petition (MB) No. 13297 of 2016 [Mohini Sharma & others Vs. State of U.P. & others] assailing the notification dated 10.3.2016 issued in exercise of the powers under Article 243 (E) and Article 243 (Q) of the Constitution of India read with Section 3 of U.P. Municipalities Act, 1916. The ground of the said challenge was that since the tenure of the petitioners as the Pradhan and Member of the Gaon Sabha has not yet come to an end, the aforesaid delimitation and bringing the area within municipal limits is unconstitutional and consequential order dated 28.4.2016 was also prayed for wherein petitioners

have been restrained from exercising financial powers in relation to the said area. The said challenge in question has been considered by the Division Bench and this Court has proceeded to pass the following order;

"Heard Sri H.G.S Parihar learned senior counsel assisted by Sri Sarvesh Kumar Dubey, learned counsel for the petitioners.

This writ petition has raised a two fold challenge one to the notification dated 10.03.2016 issued in exercise of the powers under Article 243(E) and Article 243 (Q) of the Constitution of India read with Section 3 of the U.P. Municipalities Act, 1916 on the ground that since the tenure of the petitioners as the Pradhan and Member of the Gaon Sabha has not yet come to an end, the aforesaid de-limitation and bringing of the area within Municipal limits is unconstitutional.

The second ground raised is that by virtue of such a notification a consequential order that has been passed on 28.04.2016 restraining the petitioners from exercising financial powers in relation to the said area is also ultravires the provisions of the Act and is equally unconstitutional.

To substantiate this submission, learned counsel for the petitioner has invited attention of the Court to the application dated 07.05.2016 filed before the District Magistrate a copy whereof is annexure no. 6 to the writ petition where the actual grievance of the petitioners have been entailed. It has been alleged therein that certain development work has already been carried out and as a result of the aforesaid action taken by the respondent, the payment for the said work already executed before has been withheld and therefore, the same deserves to be redressed.

We have heard learned counsel for the petitioners as well as the learned Standing Counsel for the State-respondent nos. 1 to 4.

The first ground taken with regard to the impugned notification dated 10.03.2016 cannot be accepted inasmuch as the constitutional powers in order to notify an already existing local area as a municipal area is vested in the respondent under Article 243 Q read with Section 3 of the U.P. Municipalities Act,1916. Since the power to do so is available we have not been able to find any error in the issuance of the said notification so as to strike down the same.

The major issue is with regard to the functions already undertaken and the development work carried out prior to any such action which is impugned herein particularly the orders relating to the operation of the financial accounts dated 28.04.2016. From a perusal of the application dated 07.05.2016, it appears that the petitioners allege to have carried out development work on five counts which are mentioned in the said applications, the payment whereof has not yet been made on account of the intervening order dated 28.05.2016.

In order to resolve this crisis, which clearly relates to the exercise of financial powers on account of such declaration of local area as being Nagar Palika Parishad, we find that under the U.P. Municipalities Act, 1916, the prescribed authority has been defined under Section 2 (17)(ii) as follows:-

(17)(ii)"Prescribed authority" means an officer or a body corporate appointed by the State Government in this behalf by notification in the Official Gazette and if no such officer or body corporate is appointed, the Commissioner:

Consequently this being a matter of financial administration the work already carried out under the auspices of the Gaon Sabha therefore has to be looked into, and if the work has been carried out in accordance with rules, then the issue with regard to the payments which are to be made in relation thereto has to be resolved as according to the petitioners the work has been actually carried out.

We therefore, find that it would be appropriate that the Commissioner of the division who is the prescribed authority of Nagar Palika Parishad can after calling for comments from his subordinate officers including the District Magistrate proceed to examine the said claim of the petitioners as it requires to be resolved if the expenses have been actually incurred. Consequently the payment will have to be released if the development work has been carried out in accordance with rules.

The Commissioner Meerut respondent no.2 shall therefore now proceed to deal with the matter in view of what has been stated above and issue necessary instructions or pass appropriate orders, if it is within his jurisdiction in relation thereto and inform the Gaon Sabha concerned of which the petitioner no.1 claiming herself to be elected Gram Pradhan.

Needless to mention that the elections of the Gaon Sabha were held very recently in the year 2015. In such a situation, this financial administration in this peculiar circumstances, therefore, requires to be resolved. The Commissioner shall pass orders expeditiously and preferably within three weeks' from the date of production a certified copy of this order.

In the event Commissioner finds that the matter has to be brought to the notice of the State Government for resolution of any such dispute in the absence of any jurisdiction, then the same shall be dispatched forthwith and the State Government will also be obliged to take a decision within the said period.

With these directions, the writ petition is disposed off."

3. Pursuant to the order passed by this Court the claim in question has been considered and same has been turned down by informing the petitioner that once the provisions of U.P. Municipalities Act, 1916 has come into force, then till the committee in question has not been

constituted, the ad-hoc committee would function. Petitioner at this juncture is assailing the validity of the aforementioned order before this Court.

4. Sri Amit Saxena, Advocate, duly assisted by Sri Anubhav Shukla, Advocate, submitted before this Court that merely because a notification in question has been issued for constitution of Nagar Palika Parishad, same would not automatically ipso facto curtail the tenure for which the petitioner has been elected and, in view of this, this Court should come to rescue and reprieve of the petitioner and permit the petitioner to complete her tenure as Gram Pradhan.

5. Learned Standing Counsel, on the other hand, has contended that once the Gram Panchayat has already come to an end after establishment of Nagar Palika Parishad Khoda, then by no stretch of imagination, petitioner, who has been elected as Gram Pradhan, can be permitted to continue and action, that has been so undertaken, is strictly in accordance with the law, as such, no interference be made by this Court and writ petition is liable to be dismissed.

6. After respective arguments have been advanced the factual situation that is so emerging before us is that Part IX has been inserted in the Constitution of India by the Constitution (73rd) Amendment Act, 1992 and the underlying purpose of Part IX is to create democratic decentralisation for ensuring that traditionally marginalised groups should progressively gain foothold in local self government. Article 243-A deals with the Gram Sabha, Article 243-B deals with the Constitution of Panchayats, Article 243-C deals with the Composition of Panchayats, Article 243-D deals with the Reservation of Seats and Article 243-E deals with Duration of Panchayats etc. in following terms;

"**243-E. Duration of Panchayats, etc.-** (1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Panchayat shall be completed--

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under clause (1) had it not been so dissolved."

7. Article 243-K deals with the Elections of Panchayats in following terms;

"**243-K. Elections to the Panchayats**.-(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like ground as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats."

8. Part IX-A has also been introduced by means of Constitution 74th Amendments, 1992 and the purpose and objectives of IX-A is to create hierarchical structure of elected local bodies, democratic decentralisation, greater accountability between citizens and State apparatus and empowerment of weaker sections.

9. Article 243-Q deals with Constitution of Municipalities in following terms;

"**243-Q. Constitution of Municipalities**.- (1) There shall be constituted in every State,-

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township

(2) In this article, "a transitional area", "a smaller urban area" or "a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part."

10. Article 243-R deals with the Composition of Municipalities in following terms;

"**243-R. Composition of Municipalities**.- (1) Save as provided in clause (2), all the seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide-

(a) for the representation in a Municipality of-

(i) persons having special knowledge or experience in Municipal administration;

(ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area;

(iii) the members of the Council of States and the members of the Legislative Council of the State registered electors within tile Municipal area;

(iv) the Chairpersons of the Committees constituted under clause (5) of article 243-S:

Provided that the persons referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality;

(b) the manner of election of the Chairperson of a Municipality."

11. Article 243-S deals with the Constitution and composition of Wards Committees, etc. and Article 243-W deals with the powers, authority and responsibilities of Municipalities etc., as follows;

"**243-W. Powers, authority and responsibilities of Municipalities, etc**.- Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to ----

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule."

12. Article 243-ZA deals with the Elections to the Municipalities and Article 243-ZF deals with the Continuance of existing laws and Municipalities.

13. On these constitutional provisions, that have been noted above, what we find in the present case is that as far as petitioner is concerned at the point of time when she has been elected as Gram Pradhan, her elections in question was governed under the provisions of U.P. Panchayat Raj Act, 1947. Section 3 of U.P. Panchayat Raj Act, 1947 deals with the Gram Sabha that proceeds to make a mention that State Government shall by notification in the Official Gazette establish a Gram Sabha for a village or group of villages by such name as may be specified and she has been elected to represent such body for five years.

14. Chapter III-A deals with the Gram Panchayats and provides under Section 11-A that there shall be a Pradhan of the Gram Panchayat, who shall be the chairperson thereof. Section 11-B deals with the Election of Pradhan, which is as follows;

"**11-B. Election of Pradhan** - (1) The Pradhan of the Gram Panchayat shall be elected by the persons registered in the electoral rolls for the territorial constituencies of the Panchayat area from amongst themselves.

(2) If at any general election to a Gram Panchyat, the Pradhan is not elected, and less than two-thirds of the total number of members of Gram Panchayat are elected, the State Government or an officer authorized by it in this behalf may, by order, either appoint -

(i) an Administrative Committee consisting of such number of persons qualified to be elected as members of the Gram Panchayat, as it may consider propert; or

(ii) an Administrator

(3) The members of the Administrative Committee or the Administrator shall hold office for such period not exceeding six months as the State Government may specify in the order referred to in sub-section (2).

(4) On the appointment of an Administrative Committee or and Administrator under sub-section (2), the person, if any, chosen as Pradhan or member of the Gram Panchayat before such appointment shall cease to be such Pradhan or member, as the case may be, and all powers, functions and duties of the Gram Panchayat, its Pradhan and Committees shall vest in and be exercised, performed and discharged by such administrative committee or the Administrator, as the case may be.

(5) The Administrative Committee or the Administrator shall be deemed to be duly constituted Gram Panchayat for the purposes of this Act :

Provided that if at any time after the appointment of the Administrative Committee or the Administrator under sub-section (2) the State Government is satisfied that there is no difficulty in duly constituting the Gram Panchayat, the State Government may, notwithstanding that the period for which the Administrative Committee or the Administrator had been appointed has not expired, direct the State Election Commission for holding the elections for constituting the Gram Panchayat.

(6) Except as otherwise provide in this Act, the term of office of Pradhan shall be coterminus with the term of the 'Gram Panchayat'."

15. Section 11-F deals with the Declaration of Panchayat area and Section 12 deals with the Gram Panchayat. Thus from the provisions, quoted above, this much is clear that there has to be constituted for every panchayat area a Gram Panchayat which would be a body corporate and shall consist of a Pradhan. Gram Panchayat, unless sooner dissolved would continue for five years from the date appointed for its first meeting and no longer.

16. In reference of authority conferred under Article 243-Q of the Constitution read with Sections 3 and 3-A of U.P. Municipalities Act, 1916, for every transitional area and urban area there has to be a municipality. Sections 3 and 3-A of the U.P. Municipalities Act, 1916 are extracted below;

"**3. Declaration etc. of transitional area and smaller urban area.-** (1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution

with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.

(2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.

(3) [The notifications referred to in sub-sections (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is, or is part of, a cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section.]

Section 3 of the Act which deals with the functions, powers and duties of the Municipal Council, provides that any area can be included in the existing area of Municipal Council by a subsequent notification under Article 243-Q but the same shall be subject to the formalities to be observed under Section 4 of the Act.

3-A. Municipality for every transitional area and smaller urban area.- [(1) A municipality constituted under clause (1) of Article 243-Q of the Constitution in accordance with Part IX-A thereof shall,-

(a) for every transitional area, be known as the Nagar Panchayat;

(b) for every smaller urban area be known as the Municipal Council.]

(2) Every Nagar Panchayat or Municipal Council constituted under sub-section (1), shall be a body corporate.

(3) Notwithstanding anything in sub-section (1),-

(a) every Municipal Board existing immediately before the commencement of the Uttar Pradesh Urban Local Self Government Laws (Amendment) Act, 1994, shall [from such commencement and until the first constitution of the Municipal Council under this Act as amended by the said Act] be deemed to be a Municipal Council under the Act;

(b) every notified area committee constituted under Section 338 or Town Area Committee constituted under the Uttar Pradesh Town Areas Act, 1914, as it stood immediately before the commencement of the Act referred to in clause (a), shall [from such commencement and until the first constitution of the Nagar Panchayat under this Act, as amended by the Act referred to in clause (a)] be deemed to be a Nagar Panchayat under this Act.]"

17. Section 5 deals with the effect of including area in transitional area or smaller urban area, as follows;

"5. Effect of including area in [transitional area or smaller urban area].- [Whereby a notification referred to in sub-section (2) of Section 3 the Governor includes any area] in a [transitional area or smaller urban area], such area shall thereby become subject to all notifications, rules, regulations, bye-laws, orders, directions, issued or made under this or any other enactment and in force throughout the [transitional area or smaller urban area], at the time immediately preceding the inclusion of the area."

18. A bare perusal of the Section 5 of U.P. Municipalities Act, 1916, would go to show that whereby a notification referred to in sub-section (2) of Section 3 the Governor includes any area in a transitional area or smaller urban area, such area shall thereby become subject to all notifications, rules, regulations, bye-laws, orders, directions, issued or made under this or any other enactment and in force throughout the transitional area or smaller urban area, at the time immediately preceding the inclusion of the area. Thus the affairs of the same will have to be governed under the provisions of U.P. Municipalities Act, 1916 and it may be true that Pradhan in question has been elected for a period of five years but once the very identity of the Gram Panchayat in question has been lost on account of inclusion of such area, then the provisions of U.P. Panchayat Raj Act, 1947, would not at all operate and same will have to be governed under the provisions of the U.P. Municipalities Act, 1916. Any other view would tantamount to diluting the provisions of Section 5 of U.P. Municipalities Act, 1916.

19. Apex Court in the case of ***State of Maharashtra Vs. Deep Narain Chavan, 2002 (10) SCC 565***, while considering the arguments advanced that once Municipal Council is constituted, then its duration shall be five years in accordance with constitutional provisions contained in Article 243-O, has ruled while considering the expression "*unless sooner dissolved under any law for the time being in force"*, that the moment Corporation is constituted in accordance with law, the elected Municipal Council would cease to function.

20. Article 243-E deals with duration of Panchayat, Article 243-U deals with duration of Municipalities and both the constitutional provisions share in common the expression "unless sooner dissolved under any law for the time being in force". Once Governor takes a call for constitution of municipality in exercise of authority conferred under the constitution namely Article 243-Q that specifically refers to three type of municipalities i.e. Nagar Panchayat for transitional area, a Municipal Council for a smaller urban area and Municipal Corporation for a larger urban area, the moment declaration is made under Article 243-Q read with Section 3 of the U.P. Municipalities Act, 1916, by the State Government, then the said municipal body would be a sovereign body having both constitutional and statutory status. As already noted in the earlier part of the judgement, the constitutional as well as statutory provisions pertaining to 'Panchayats' would go to show that object of Part IX of the Constitution was to introduce the panchayat system at grass root level and strengthen the panchayat system by giving uniform constitutional vibrant units of administration in the rural area so that there can be rapid implementation of rural development sector. Once there is complete transformation from rural area to urban area having regard to population of area, the density of population therein, the revenue generated from local administration, the percentage of employment in non-agricultural activities, the economic

importance and other factors, made by the State Government, then the said area is denoted in the notification would be out from the purview of Part IX of the Constitution and the provisions of U.P. Panchayat Raj Act, 1947 and the affairs of the said area treating the same to be urban area would be covered by the provisions of Part IX A of Constitution alongwith the provisions of U.P. Municipalities Act, 1916.

21. For ready reference Section 333 of U.P. Municipalities Act, 1916 is quoted below;

"333. Exercise by District Magistrate of [Municipality's] power pending establishment of [Municipality].- When a new municipality is created under this Act, the District Magistrate, or other officer, or committee, or authority appointed by him in this behalf, may until a [Municipality] is established, exercise the powers and perform the duties and functions of the [Municipality], and, he or it shall, for the purposes, aforesaid be deemed to be the [Municipality].

Provided always that the District Magistrate or such other officer, or committee, or authority shall, as early as possible, make preliminary arrangements for the holding of first elections and generally of expediting the assumption by the [Municipality] of its duties when constituted."

22. Section 333 proceeds to mention that when a new municipality is created under this Act, then a committee has to be constituted and the said committee would look after the affairs of the said municipality.

23. Once the Gram Panchayat in question has ceased to exist and provisions of the Part IX of the Constitution and U.P. Panchayat Raj Act, 1947 cannot be further pressed into service and declaration of transitional area and smaller urban area has been made, a new municipality has been constituted to look after the affairs of the new body, then under Section 333 of U.P. Municipalities Act, 1916, headed by the District Magistrate there has to be a Committee to look after the affairs of the Municipality and in the said direction once the action has been taken, wherein petitioner has also been co-opted as one of the Member of the said Committee, then there is no infirmity in the same.

24. Writ petition lacks merit and same is ***dismissed***, accordingly.

(2016) 9 ILRA 522
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No. - 322 Of 1983

Mohan & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellants:
P.N. Mishra, G. R. S. Pal

Counsel for the Respondent:
A.G.A.

This appeal has been directed against the judgment and order dated 08.02.1983 passed by the learned Special Sessions Judge, Budaun in Sessions Trial No. 72 of 1982 (State Vs. Mohan and others) convicting the accused-appellants Mohan, Shiam Lal, Sita Ram and Har Bilas under Section 302 read with Section 34 IPC and sentencing each of them for life imprisonment.

According to the prosecution case about 4 or 5 months before this incident, theft of 2 or 3 pipes allegedly took place from the tube-well of the appellant no.1. In this incident of theft the appellant no.1 suspected the complicity of the deceased, with whom some altercation was alleged to have taken place in which the appellant no.1 was said to have threatened the deceased "to realize the cost of stolen pipes from his skin". Thereafter, on 26.01.1982 (Tuesday) at about noon, it was alleged by the informant that all the four accused persons arrived at the house of the informant in a group and took the deceased along with them on the pretext of thrashing sugarcane. The appellants going together with the deceased were alleged to be seen by Babu (PW-2) also. On the same evening, at about 6.00 p.m. one Natthu (PW-1), who was returning to his home, had seen the appellants on the well of appellant no.1 Mohan where they were beating the deceased and threatening him by saying "to realize the cost of the pipes from his skin". Natthu (PW-1) at once informed this part of the incident to the informant Khamani (PW-4). On getting the said information, the informant, father of the deceased along with several other persons of his vicinity went to the place of the said incident to rescue his son, but his son was untraceable and the appellants, too, had disappeared from the village.

Thus, in the light of the above discussions, we are not in agreement with the finding and conclusions arrived at by the learned trial judge and are satisfied that the conviction of the appellants in this case cannot be sustained and the appeal ought to be allowed. Accordingly, the conviction of the surviving appellants Sita Ram and Har Bilas for the offences under Section 302 read with Section 34 IPC is set aside and consequently, the appeal is allowed.

The appellants are in jail.It is very unfortunate. Therefore, while directing the concerned jail authority to get the surviving appellants set at liberty forthwith, if not required in any other case, we are compelled to direct the State Government to take recourse to proper medical treatment and their rehabilitation in society, if they or their family members are in capable to provide.

Held: Para-

Case Law discussed:

Ishvarbhai Fuljibhai Patni Vs. State of Gujrat [1995 Supreme Court Cases (Crl) 222] and Lal Mandi Vs. State of West Bengal, [1995 Cr.L.J 2659 (Supreme Court), 2659],
Tulshiram Sahadu Suryawanshi and another Vs. State of Maharashtra (2012) 10 SCC 373,
Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116,
Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047],
Nizam and others Vs. State of Rajasthan AIR 2015 SC 3430 ,
Bodhraj @ Bodha and Ors. Vs. State of Jammu & Kashmir,(2002) 8 SCC 45,
C. Chenga Reddy v. State of A.P. (1996) 10 SCC 193,
Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681,
Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205,
Sampath Kumar vs. Inspector of Police, Krishnagiri (2012) 4 SCC 124 ,
Mohd. Arif @ Ashfaq vs. State (NCT of Delhi), (2011) 13 SCC 621,
Krishnan @ Ramasamy and others Vs. State of Tamil Nadu, 2014 (12) SCC 279, the State of Karnatka Vs. Chand Basha 2016 (1) SCC 501,
Vikramajit Singh alias Vicky Vs. State of Punjab 2007 Crl. L.J. 1000 (Supreme Court),

(Delivered by Hon'ble Alok Kumar Mukherjee, J.)

1. This appeal has been directed against the judgment and order dated 08.02.1983 passed by the learned Special Sessions Judge, Budaun in Sessions Trial No. 72 of 1982 (State Vs. Mohan and others) convicting the accused-appellants Mohan, Shiam Lal, Sita Ram and Har Bilas under Section 302 read with Section 34 IPC and sentencing each of them for life imprisonment.

2. It is relevant to mention here that while hearing of this appeal, it has been noticed by us that during the pendency of this appeal, the appellant no. 1 Mohan and appellant no. 2 Shiam Lal have died, therefore, the appeal filed on their behalf stands abated by a Coordinate Bench of this Court vide order dated 04.04.2014. As such the appeal on behalf of the remaining surviving appellant no. 3 Sita Ram and appellant no. 4 Har Bilas, who are presently detained in jail, is being disposed of by this judgment.

3. The appellants have filed the present appeal against the aforementioned judgment and order dated 08.02.1983 on the ground that the conviction of the appellants is against the weight of the evidence on record and the sentence awarded to them is too severe.

4. The brief fact of the prosecution case is that deceased Nankoo son of the informant Khamani (PW-4) aged about 30 years and the accused appellants no. 1 and 2 Mohan and Shiam Lal

are the residents of village Lakhanpur, P.S. Moosajhag, District Budaun. It is alleged that the appellant Shiam Lal is the neighbour and associate of the appellant no.1 Mohan. Rest of the accused-appellants no. 3 and 4 Sita Ram and Har Bilas are the real brothers and they are residents of village Kakora, P.S. Qadar Chowk, District Budaun. Both appellants no. 3 and 4 are alleged to be the bonded labourers of appellant no.1 Mohan. It is also alleged that at the time of occurrence the deceased was also working as a labourer under the employment of the appellant no.1 Mohan.

5. According to the prosecution case about 4 or 5 months before this incident, theft of 2 or 3 pipes allegedly took place from the tube-well of the appellant no.1. In this incident of theft the appellant no.1 suspected the complicity of the deceased, with whom some altercation was alleged to have taken place in which the appellant no.1 was said to have threatened the deceased "to realize the cost of stolen pipes from his skin". Thereafter, on 26.01.1982 (Tuesday) at about noon, it was alleged by the informant that all the four accused persons arrived at the house of the informant in a group and took the deceased along with them on the pretext of thrashing sugarcane. The appellants going together with the deceased were alleged to be seen by Babu (PW-2) also. On the same evening, at about 6.00 p.m. one Natthu (PW-1), who was returning to his home, had seen the appellants on the well of appellant no.1 Mohan where they were beating the deceased and threatening him by saying "to realize the cost of the pipes from his skin". Natthu (PW-1) at once informed this part of the incident to the informant Khamani (PW-4). On getting the said information, the informant, father of the deceased along with several other persons of his vicinity went to the place of the said incident to rescue his son, but his son was untraceable and the appellants, too, had disappeared from the village.

6. It is further stated in the F.I.R. that the informant searched his son on the following day i.e. 27.01.1982 and also till the afternoon of 28.01.1982 but neither the deceased nor the appellants were traceable. At last in the evening of 28.01.1982 at about 5.05 p.m. he lodged a verbal F.I.R. (Ex.K1) at Police Station Moosajhag, informing the police about disappearance and abduction of his son by the appellants, suspecting that the appellants might have committed murder of his son, which was registered as Case Crime No. 11 of 1982 under Section 364 IPC.

7. After lodging of the F.I.R. (Ex.K1), the investigation proceeding was initiated by the S.I. Moin Uddin (PW-7). Meanwhile, on 30.01.1982 it was informed by the informant Khamani that the dead body of his son (deceased) was found in a field of sugarcane of one Dori of the same village. On receiving this information, the Investigating Officer (PW-7) recovered the dead body from the said field, conducted inquest proceedings etc., sent the body for postmortem and after concluding the investigation he submitted the charge-sheet against all the appellants for the offences under Section 364/302 I.P.C.

8. In the case in hand, cognizance was taken directly in the Court of Special Sessions Judge, Budaun in accordance with the provisions of U.P. Dacoity Affected Areas Ordinance, 1982. The appellants were charged under Section 302 read with Section 34 IPC and also of the offence under Section 12 of the U.P. Ordinance No. 16, 1982 which the accused appellants denied and

pleaded that they were not guilty. They further stated that they had been falsely implicated by the rival group of the village due to enmity and claimed to be tried.

9. In order to prove the charges, the prosecution has filed FIR (Ex.K1), injury report of witness Natthu (Ex.K2), postmortem report of the deceased (Ex.K3), site plans (Ex.K4, K5, K11), inquest report (Ex.K6), sketch of the dead body (Ex.K7), challan of the dead body (Ex. K8), letter to the C.M.O. (Ex. K9), sample seal (Ex. K10), recovery memo of blood stain and plain earth from the place from where the body was recovered (ex.K12), recovery memo of blood stained rope/sting (jyot) near the body of the deceased (Ex.13), supurdgi memo of torch of the witness Onkar (PW3) (Ex. K14) and the charge sheet (Ex. K15) on the record and also placed before the court material exhibits pertaining to the blood stained and plain earth as well as blood stained rope/sting (Jyot) Ex. I, II and III.

10. To bring home the guilt of the accused-appellants, the prosecution has examined total seven witnesses namely PW1 Natthu, PW2 Babu Singh, PW3 Onkar, PW4 Khamani informant, PW5 Dr. A.C. Sharma, PW6 Dr. O.P. Chhimpa and PW7 S.I. Moin Uddin, Investigating Officer in oral evidence and closed its evidence.

11. The statements of the appellants under Section 313 Cr.P.C. were recorded after closing of the prosecution evidence in which they had denied the entire prosecution version and stated that they had been falsely implicated due to enmity and the politics of faction-ridden village, no evidence in defence was placed by the appellants. After hearing the arguments of the parties, the learned Trial Judge, by the impugned judgment and order, convicted all the present appellants and sentenced them as above. Feeling aggrieved, this appeal has been preferred by all the appellants.

12. We have heard Sri Abhishek Srivastava, learned Amicus Curiae for the surviving appellants namely, Sita Ram and Har Bilas and Sri Ajit Kumar Singh, learned AGA for the State as also carefully perused the evidence on record.

13. Learned amicus curiae, appearing for the surviving appellants no. 3 and 4 Sita Ram and Har Bilas, has not disputed the factum of homicidal death of the deceased and also the recovery of his dead body from a sugarcane field and *interalia* raised the following grounds as incriminating circumstances in this appeal; that the prosecution has utterly failed to prove the alleged motive behind the murder of the deceased and that the theory of "last seen together" either alive or with dead body of the deceased was not proved beyond reasonable doubt; because there were serious contradictions in the statements of the witnesses examined by the prosecution to establish these facts. He further contended that neither the dead body of the deceased nor the alleged weapons of assault were recovered from the possession of all or any of the appellants or on their pointing out. In addition to it, all the alleged circumstances, from which the conclusion of the guilt was drawn, could not be fully established by the cogent evidence and the chain of alleged circumstances could not be so complete as not to leave any reasonable ground for the conclusion pointing towards the guilt of the accused persons and not to any other hypothesis.

14. The learned amicus curiae has further submitted that the prosecution has examined only interested/related as well as inimical (members of rival group in the village) witnesses, whose presence and their witnessing the above factums of last seen theory were wholly doubtful, unnatural and improbable, as such they are not worthy of reliance. The F.I.R. was lodged with an inordinate delay having no plausible explanation. According to him basically the FIR (Ex. K1) was antedated and was lodged actually after the dead body was recovered by the informant himself. It also appears from the evidence on record that the deceased Nankoo was murdered by some unknown person/persons and after recovery of his dead body the appellants had falsely been implicated, after due planning with inimical group of the village as well as with the aid of the local police. There is material inconsistency between the ocular and medical evidence. The investigation had been carried out in a most casual, defective and perfunctory manner. He also contended that it was the duty of the prosecution to clearly establish the close proximity between the last seen evidence and the recovery of the dead body but in the instant case there is a huge gap between the two. The entire prosecution story is concocted with a view to implicate the appellants. The surviving appellants, who are admittedly the bonded labourers of the appellant no.1 Mohan (alike the deceased Nankoo himself) against whom neither there was any specific motive for murder alleged or proved nor any specific role assigned or proved by the prosecution and as such they appear to be falsely roped in by the informant due to the above mentioned enmity of the rival group with the appellant no.1 Mohan.

15. Rebutting all the arguments advanced by the learned amicus curie, learned AGA for the State has submitted that all the circumstances concluding the chain have been proved by the cogent evidence and there is no break in the said chain of circumstances, which unerringly proved the guilt of the accused persons. The motive behind the murder of the deceased was consistently and cogently proved by the testimony of PW4 Khamani, father of the deceased. Undisputedly, the death of deceased Nankoo was proved to be homicidal, whose body was recovered by his father from a nearby sugarcane field having multiple injuries, several of them were caused by sharp-edged weapon. According to him, the present case rests on the last seen theory and when by the consistent, unshaken testimonies of the witnesses of the prosecution PW1 to PW4 it was proved by the prosecution that on 26.01.1982 the deceased Nankoo was last seen alive or dead in the company/possession of the accused-appellants then it was for the appellants to explain as to what happened to the deceased and in the absence of any satisfactory explanation thereof, based on the concrete chain of the circumstantial evidence the learned trial Judge has rightly convicted and sentenced the appellants. Therefore, the impugned judgment and order warrants no interference.

16. The learned AGA for the State also contended that all the witnesses examined by the prosecution firmly establish each one of the circumstances specifically. They are trustworthy, their presence at different spot were probable and natural, having no material contradiction, embellishments or exaggeration in their testimonies, as such there is no substance in the arguments of the learned amicus curie. The alleged inconsistency in the ocular and medical evidence is misconceived.

17. Before entering into the merits of the appeal, we would like to remind ourselves the settled proposition of law, to be followed by the High court while exercising the appellate

jurisdiction in criminal appeal, propounded by the Apex Court in the cases of ***Ishvarbhai Fuljibhai Patni Vs. State of Gujrat [1995 Supreme Court Cases (Crl) 222]*** and ***Lal Mandi Vs. State of West Bengal, [1995 Cr.LJ 2659 (Supreme Court), 2659]*** that the High Court, while exercising appellate jurisdiction in criminal appeal, is expected to appraise the credibility of evidence available on record and to draw the inference on the basis of material available on record and has not to be guided by the finding of acquittal or conviction recorded by the learned court below, bearing in mind the basis principle of criminal law regarding innocence of the accused. Bearing in mind the aforesaid proposition of law we have considered the rival contentions and carefully examined the impugned judgment and material on record.

18. It is not in dispute that the conviction of the appellants no. 3 and 4 is based on the circumstantial evidence. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with the innocence. Hence, we have to see how for the prosecution has fully and conclusively proved all the circumstances forming the chain without any gap and thereby able to prove its case beyond reasonable doubt.

19. **Circumstantial Evidence**:

It is pertinent to mention here that in ***Tulshiram Sahadu Suryawanshi and another Vs. State of Maharashtra (2012) 10 SCC 373*** the Apex Court after referring to its earlier decisions in the cases based on circumstantial evidence has laid down as under:

"In ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116***, this Court after referring to various earlier decisions, formulated the following conditions to be fulfilled before a case against an accused can be said to be fully established based on circumstantial evidence:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154.*These five golden principles, if we may say so, constitute the* ***panchsheel*** *of the proof of a case based on circumstantial evidence."*

20. Further, the Supreme Court, while dealing with a case of circumstantial evidence, in ***Nizam and others Vs. State of Rajasthan AIR 2015 SC 3430*** has pointed out as follows:

"The principles of circumstantial evidence have been reiterated by this Court in a plethora of cases. In ***Bodhraj @ Bodha and Ors. vs. State of Jammu & Kashmir, (2002) 8 SCC 45****, wherein this court had quoted a number of judgments and held as under:*

"10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.....

The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab AIR 1954 SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt."

We may also make a reference to a decision of this Court in ***C. Chenga Reddy v. State of A.P. (1996) 10 SCC 193****, wherein it has been observed thus: (SCC pp. 206-07, para 21)*

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In ***Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681****, this court held as under:*

"12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

The same principles were reiterated in ***Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205, Sampath Kumar vs. Inspector of Police, Krishnagiri (2012) 4 SCC 124 and Mohd. Arif @ Ashfaq vs. State (NCT of Delhi), (2011) 13 SCC 621*** *and a number of other decisions."*

21. Keeping these principles in mind, we are now analyzing the circumstances relied on by the prosecution. On perusal of the record of the case it is manifest that the circumstances relied upon by the prosecution are as follows:

I. Motive: all the accused persons have a motive to commit the murder of the deceased because the appellant no.1 Mohan had threatened the deceased 4-5 months before the incident for realizing the costs of his stolen pipes "from the skin of the deceased".

II. On 26.01.1982 at noon all the appellants took the deceased along with them from his house for thrashing sugarcane and on that date and time the deceased was "last seen going together" in the company of the appellants by the witnesses Khamani (PW4) and thereafter by Babu Singh (PW2).

III. At about 6.00 p.m. on the same date the deceased was again last seen alive while being apprehended by the appellants, having sickles in their hands at the tube-well of the appellant no.1 Mohan. At that time all the appellants were extending threats to the deceased for realising the cost of the stolen pipes "from his skin" and were beating the deceased. On the intervention by the witness Natthu (PW1), he also received one sickle blow on his forehead by the appellant Mohan and thereafter, the appellants tried to implicate one of the leaders of the rival village group by extending bribe to the witness, for the said injury which was inflicted to him.

IV. On information of the aforementioned incident, the father of the deceased Khamani (PW4) went along with other members of his vicinity to rescue his son but they did not find the deceased or the appellants anywhere in the village and they were also not traceable till the recovery of the dead body of the deceased.

V. In the night between 26/27.01.1982 all the appellants were last seen by the witness Onkar (PW3), carrying one dead body on "juya" for disposal.

VI. The decomposed body of the deceased was recovered by his father (PW4), from sugarcane field of one Dori, having several marks of injuries on his body.

VII. Since the date of incident, i.e., the evening of 26.01.1982 all the appellants were absconding till they surrendered in the Court on 05.02.1982.

22. Before examining how far the prosecution has succeeded in proving the aforementioned circumstances against the appellants, we would like to have a glance at the medical evidence in this case, which is in the form of statement of Dr. O.P.Chhimpa (PW6), postmortem report of the deceased (Ex.K3) prepared by him as well as the statement of Dr. A.C.Sharma (PW5) and the injury report of the witness Natthu (Ex.K2) prepared by him. Although the appellants have not disputed the homicidal death and the recovery of the injured dead body of the deceased Nankoo from the field of sugarcane of one Dori of the same village on 30.01.1982, even then as an appellate court we are duty bound to examine whether any offence was committed and if so, by whom.

23. Dr. O.P.Chhimpa (PW6) in his statement has stated that he had conducted the postmortem of the deceased on 31.01.1982 at 3.30 p.m.. The deceased was about 30 years of age and he had died within a span of 3-5 days before the date of postmortem examination. He found the following antemortem injuries on the body of the deceased:

1. Contusion 4 cm x 3 cm on right side head 4 cm above and posterior to ear. Right parietal bone fractured below injury. Muscle scalp and brain matter congested. Below injury, about 10 cm. clotted blood present.

2. Incised wound 5 cm x 1 cm x muscle deep on right side neck 3 cm post to pinna ear direction backward. Margins are clean cut.

3. Body of 6th cervical vertebra cut at middle.

4. Incised wound 3 cm x1 cm x bone deep on edge at right side of nose margin, clean cut 2 cm below bridge of nose.

5. Two circular contusion each of 2 cm, oval in shape, at front of the forehead. 3 cm above bridge of nose.

6. Contusion 3 cm x 2 cm on left side of face. 2 cm below left eye.

7. Incised wound 2 cm x 1 cm x muscle deep at the front of chin 2 cm below lip.

8. Incised wound 4 cm x .5 cm x deep cavity on left side chest at mid axilary line. 4 cm below axila. Margins are clean cut.

9. Incised wound 2 cm x .5 cm x muscle deep on front of left leg.n Anterior aspect. 3 cm above ankle joint.

10. Contusion 3 cm x 1 cm on dorsal aspect of right foot.

11. Contusion 2 cm x1 cm on right knee joint.

12. Contusion 3 cm x 2 cm on left knee joint.

13. Contusion 4 cm x 2 cm on posterior aspect of right elbow joint and on upper part of the arm.

14. Contusion 2 cm x 2 cm on dorsum aspect of right wrist joint.

15. Contusion 3 cm x 2 cm on left elbow joint on posterior aspect.

24. In the opinion of the said doctor the death of the deceased was due to antemortem injuries causing shock and haemorrhage. According to him the skin of the deceased was easily pealed off from the tissues. The entire abdomen and chest were absent but the back was present. Skin on the neck was eaten by animals, his penis and scrotum were swollen and teniar of ribs were also eaten by animals. His brain and its membranes were congested on right side and his right parietal bone was fractured. Body of 6th cerival vertebrae was cut in the middle. 1/3rd ribs were present, rest of skin was eaten by animals. Pleura, trachea, both lungs, pericardium and heart were absent. Blood vessels and peritoneum were eaten by animals. He proved the postmortem report of the deceased (Ex.K3).

25. The doctor (PW6) categorically proved that the incised wounds and the contusions found on the corpse appeared to be inflicted by sharp edged weapons and blunt objects, respectively. He further proved that it is possible that the death of the deceased could have been caused on the night of 26/27.01.1982. On cross-examination he has admitted that the death could have been possible in the night of 25/26.01.1982 also. He has specifically opined in his cross-examination that in the injury, inflicted by the sickle, the margins of the injury always appear to be irregular but this type of injury was not found in the body of the deceased. It has also been admitted by the said doctor that there appeared neither any infection nor granulation or pus in the injuries found on the body of the deceased.

26. Similarly, on analyzing the statement of the other doctor PW5 Dr. A.C.Sharma, who had examined the injured witness Natthu (PW1), we find that the said doctor in his statement has stated that he had examined the said injured Natthu (PW1) on 31.01.1982 at 10.45 a.m. and he found a single infected wound 1 cm x 0.5 cm scalp deep on the right side of the forehead, 3.5 cm

above right eyebrow, with pus present in the wound. Little amount of granulation tissues were also present, edges oedematous, slough at places.

According to his opinion, this wound/injury was simple in nature and was about 4-6 days old. According to him, as the said injury was infected and the characters of the edges of the wound and the tissues in the wound are altered, therefore, no opinion could have been given regarding the nature of the object which had caused the said injury. He proved the aforesaid injury report (Ex. K2) and opined that this injury/wound could have been inflicted on 26.01.1982 at about 4-5 p.m. in the evening. During the cross-examination he has also stated that it could have been inflicted on 25.01.1982, too.

27. Admittedly, the case of the prosecution is entirely based on the circumstantial evidence. Therefore, it needs to be examined as to how far the prosecution has succeeded in proving the aforementioned circumstances (I to VII) cogently and firmly forming a chain so complete which consistently establishes a definite tendency unerringly pointing only towards the guilt of the accused persons/surviving appellants. Further, there should be no escape from the above conclusion and they should be incapable of any explanation or hypothesis other than that of the guilt of the accused persons/surviving appellants and are totally inconsistent with their innocence.

28. We carefully examined the first link of the aforementioned circumstances, i.e., the alleged motive of the incident. It appears from the record that based on the solitary testimony of the informant, Khamani/father of the deceased (PW4), the prosecution and the learned trial judge have concluded that in this case the prosecution has proved the alleged motive for murder of Nankoo. When we examine the evidence of the witness Khamani (PW4) and other documentary evidence placed by the prosecution in this regard, it clearly manifests that the solitary witness PW4 Khamani, informant has stated that about 3-4 months before this incident, few pipes were stolen from the tube-well of the appellant no.1 Mohan (since deceased) for which he had suspected the deceased and a quarrel had ensued between the said Mohan and the deceased Nankoo. During that quarrel it is alleged that the said appellant had threatened the deceased that he would realize the cost of his stolen pipes "from the skin of the deceased".

29. Admittedly, this fact was also stated in the FIR (Ex.K1), which was verbally lodged by this witness (PW4). The perusal of this FIR (Ex.K1) itself shows that the deceased was alleged to be seen together with the appellants on 26.01.1982. The distance between the place of incidents and the police station is 7 Kms. On the date of incident itself at about 7-8 p.m. in the evening the witness/informant had got the information that the accused persons/appellants having sickles in their hands had apprehended the accused and were beating him but it is surprising that he did not make any effort to lodge prompt FIR and a highly belated FIR was lodged after about two days of the incident. The reasons for the inordinate delay in lodging the FIR neither appears to be sufficient nor proved by any cogent evidence; rather it appears that this explanation that he was relentlessly searching his missing son and the appellants, is concocted after due confabulations and deliberations with some ulterior motive.

30. In cross-examination the said witness Khamani (PW4) has accepted that the said quarrel with Mohan subsequently ended in compromise then and there with the intervention of some villagers. Under the compromise, Nankoo (deceased) started working as labourer in the employment of the appellant no.1 Mohan, but this fact was neither stated in the FIR nor stated by him during investigation. There is no cogent explanation for nondisclosure of this subsequent fact. Therefore, believing through the informant that the present incident was committed by the accused persons on the aforementioned motive appears to be far-fetched.

31. Moreover, this factum is neither corroborated by any material witness nor proved by any documentary evidence. The evidence of the witness Khamani (PW4) on this point is mere hearsay. He was neither present at the time of the alleged quarrel nor when the alleged compromise took place. He himself has admitted during cross-examination that the alleged quarrel took place on the road of the village and at that time he was not present. He also does not know who had made intervention during the said quarrel. As such his evidence on the point of alleged motive is not acceptable. No other witness has been examined by the prosecution to prove this alleged factum of motive. Also no cogent explanation was given by the prosecution for non-examination of any material witness in this regard. Therefore, it appears that the learned trial judge has erred in accepting the hearsay evidence of this solitary witness, regarding the motive, on the mere ground that this fact was mentioned in the FIR (Ex.K1) when the body of the deceased was not recovered as corroborative piece of evidence.

32. It is also relevant to mention here that the prosecution was unable to prove any motive or factum of prior enmity against the surviving appellants Sita Ram and Har Bilas. This witness Khamani (PW4) has accepted that the surviving appellants were also labourers and were residents of another village Kakora, which is far away from his village. He admitted that there was no enmity between the said appellants and his son (deceased) prior to and at the time of the incident. Admitting that his son was never annoyed with the said appellants, he vehemently denied knowledge of any quarrel between them. According to him both the appellants were bonded labourers of the appellant Mohan since about 2-3 years prior to this incident, but his son (deceased) was not a bonded labour of the appellant Mohan; he had worked there along with the surviving appellants only 10-15 times before the incident. The deceased also never told him about any quarrel between them. These statements of the witness are testimony to the fact that the surviving appellants had no personal enemies or motive for murder against Nankoo, son of the informant.

33. The learned trial Judge has also erred in accepting the aforementioned motive on the ground that there is no other alternative suggestion of either motive or manner involved in the murder of the deceased. It is not obligatory upon the appellants to prove their innocence or any other alternative motive/manner of crime. The prosecution has to stand on its own legs. The infirmity in the defence, if any, would not give any benefit to the prosecution, therefore, we are of the view that the finding of the learned trial judge on the question of motive (first circumstance) is not tenable and the prosecution has utterly failed to prove the alleged motive.

34. It is a settled principle of law that if the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, as in this case, that will not be a ground to throw away the prosecution case. Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.

35. In the case in hand, the prosecution story relies upon the "last seen together" theory (second, third, fourth and seventh parts of the circumstances) as its pivotal evidence which is now herein examined. The Trial Court has also convicted the appellants based on the said "last seen theory" finding it as an important link in the chain of circumstances pointing towards the guilt of the appellants and further that the appellants have not offered a reasonable and probable explanation as to the cause of death of the deceased under Section 106 of the Evidence Act.

36. To prove the aforementioned circumstances, on the basis of "last seen together" theory, the prosecution has examined the informant (PW4), Babu (PW2) and Natthu (PW1). The learned trial judge has also found this fact proved on the basis of the said testimonies that on 26.01.1982 the deceased was last seen alive with the appellants.

37. Reiterating the version of FIR, in his testimony PW4 Khamani has tried to show that on the date of the incident, i.e., on 26.01.1982 at noon the appellants picked up the deceased Nankoo from his house on the pretext of thrashing sugarcane and all the witnesses were armed with sickles. He further stated that his son Nankoo never returned thereafter. The witness Babu (PW2) of his village also told him on the same day that he had also seen Nankoo in the company of the appellants. He further admitted that thereafter at 8-9 p.m. Natthu (PW1) of his village had given him definite information that the appellants having sickles in their hands had apprehended his son Nankoo and were quarreling at the tube-well of the appellant Mohan and when Natthu tried to save him, Mohan inflicted injury on the forehead of Natthu with his sickle. He had also seen the said injury of the witness Natthu. On getting this information he along with other villagers of his vicinity had visited the tube-well of the appellant Mohan but they did not find Nankoo there. They also searched for Nankoo and the appellants in the appellants' house but none of the accused persons were found there and remained untraceable till they surrendered in the Court. He thereafter, searched for his son Nankoo (deceased) at all the known places of the accused persons as well as the places of his own relatives but to no avail.

38. When we carefully analyse the statement of PW4 Khamani, informant, it appears that his entire story is improbable and cooked up. Further, the witness is untrustworthy. His evidence appears to be shaky and full of doubts. Further, when there was a definite information on 26.01.1982 itself that his son was seen apprehended in the custody of the appellants, who were armed with sickles and were beating his son in which the witness Natthu (PW1) also got injured then what prompted him to search for his son for about 2 days (before allegedly lodging of the FIR {Ex.K1}) in the places of his other relatives and other places of the appellants. There is no cogent explanation on this point as well as on the point of lodging of the FIR with inordinate delay, which casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.

39. It is strange to note that even the scribe/head moharrir who had written the FIR (Ex.K1) on the dictation of the informant (PW4) and corresponding General Diary has also not been examined by the prosecution.

40. It is also not satisfying to the conscience of this Court that when the deceased was in the employment of the appellant Mohan before the incident why all the appellants would visit the house of the informant for calling him. These second, fourth and seventh parts of the circumstances have also not been corroborated by any other witness, examined by the prosecution. Even the persons of the vicinity of the informant, who had allegedly accompanied him and whom he had named, have also not been examined. Therefore, in our opinion, evidence adduced by the informant (PW4) alone on these facts, without any corroboration, cannot be made the basis of conviction in this case, based on circumstantial evidence.

41. On scrutiny of the evidence of another witness PW2 Babu Singh on this point, it appears that he has tried to show that on the date of the incident at noon he had seen the deceased in the company of four appellants at a different place in the village, who had proceeded towards the tube-well of the appellant Mohan and the deceased was not seen thereafter. In the cross-examination he clearly admitted that his village was mired with village rivalry and there were two parties one led by Natthu Singh (PW1) etc. and another led by the appellant Mohan etc. According to him 'Vaidya Ji' of his village is not in the party of Natthu Singh (PW1), which clearly demonstrates that the witness Natthu Singh (PW1) and the appellants are members of the rival parties and the witness (PW2) is also in the party of Natthu Singh (PW1). The witness Babu Singh (PW2) has further admitted that the deceased Nankoo was in the regular employment of the appellant Mohan as labour for about past 3-4 months. Contradicting the statement of Natthu Singh (PW1) he admitted that in the night also someone looked after the tube-wells and near the tube-well of appellant Mohan, several tube-wells were located. He also admitted that the surviving appellants Sita Ram and Har Bilas are the residents of village Kakora and were in the employment of appellant Mohan since 3-4 years prior to the incident. He further stated that the witness Natthu (PW1) was village pradhan having 100 Bighas of agricultural land and so was 'Vaidya Ji' with 50 Bighas of agricultural land. The surviving appellants Sita Ram and Har Bilas never worked as labourers in their field because they were bonded labourers of appellant Mohan. During investigation or in the trial this witness has not clarified from which field or place he was coming when he had allegedly seen the deceased in the company of the appellants.

42. In the evidence given by PW1 Natthu, who is also a solitary witness about the third circumstance, he stated that he had seen the appellants having sickles in their hands apprehending the deceased Nankoo on the said date at about 6.00 p.m. and all the appellants were threatening him that the costs of the stolen pipes would be "recovered from his skin". Further, when he tired to save the deceased, the appellant Mohan inflicted injury on the forehead of the witness (PW1) with his sickle. He also tried to prove that the appellant Mohan tried to bargain with him with a view to implicate one 'Vaidya Ji' of his village for the said injury caused on the witness (PW1) because there was enmity between the party of 'Vaidya Ji' and the party of the appellant Mohan, but he refused and he left for his home. At about 8-9 p.m. he informed Khamani, father of the deceased

about the aforementioned incident. Being a solitary witness of this fact there is no corroboration of his evidence.

43. In the cross-examination witness (PW1) has admitted that at the time of the said incident there was no light at all. The date and time of the alleged incident also manifest this fact. There is no explanation in his evidence as to why he had not filed any FIR and also why he had not taken any medical treatment on the date of the alleged incident or the next day of the incident. His evidence and the record show that he was medically examined after the date of alleged recovery of the dead body, i.e., on 31.01.1982 whereas he admitted that when the police and Investigating Officer came to his village and recorded his evidence they saw his said injury. According to PW7 S.I. Moin Uddin he had recorded the statement of this witness on 28.01.1982 but why his injury was not examined on that date or the delay of 4-5 days in examining his injury could not be explained by them, which again casts a shadow of doubt on the evidence of Natthu (PW1).

44. In this regard, we examined the said injury report of Natthu (Ex K2) and the evidence of Dr. A.C. Sharma, Medical Officer (PW5), who had categorically stated that at the time of the medical examination, the alleged injury of Natthu (PW1) was in the shape of a wound having pus and was swollen. Little amount of granulation tissue was also present and slough were present at some places. He opined that as the edges of the said wound and the tissue in the wound were altered, he could not given any opinion about the nature of the object which had caused the injury and the weapon used. According to him this could have been 4-5 days old, in his opinion it could have been inflicted on the alleged date of the incident i.e. 26.01.1982 or may be on 25.01.1982. Therefore, this medical evidence also does not corroborate the ocular evidence of Natthu (PW1) and moreover it does not prove that this injury was actually caused in the alleged incident narrated by him. As such his evidence on this part of alleged incident with regard to factum of "last seen together" cannot be believed and therefore, is not corroborating the evidence of the informant (PW4). His statement that the appellants were persuading him for implicating one 'Vaidya Ji' of his village on the pretext of his said injury clearly points towards the faction-ridden village rivalry, which is admitted by Babu Singh (PW2) and the cooked up theory of "last seen together". His presence on the alleged spot and witnessing the said incident also appears to be concocted. He did not prove that there was adequate source of light. He admitted that near the tube-well of Mohan appellant, where the said part of the incident is alleged to have taken place, tube-wells of Vijendra Singh, Ramesh, Prem Pal, Mahipal, Tejpal and Khem Karan were present but none out of them were ever inquired by the Investigating Officer nor examined. Also he (PW1) did not assign any role or act to the surviving appellants Sita Ram and Har Bilas in the said incident. As such it appears that the evidence of this witness is also of no value in proving the factum of "last seen theory".

45. On careful examination of the entire deposition of the aforementioned three witnesses in the light of the injury report (Ex. K2) as well as Doctor's evidence (PW5) a reasonable doubt arose about their credibility. They appear to be untrustworthy and got-up witnesses, devoid of definite and conclusive nature of evidence in their testimonies. It also appears that the entire prosecution story has been cooked up in connivance with the leaders of the rival party of the village

and the police with a view to implicate the appellants. All this goes on to create a serious doubt about the said "last seen together" theory and the above circumstances placed by the prosecution. The conclusion contrary to it arrived at by the learned Trial Judge in this regard is arbitrary and appears to be based on surmises and conjectures.

46. Now we deal with the fifth part of the circumstance placed by the prosecution. To prove this part, the prosecution has examined solitary witness PW3 Onkar, who is the resident of another village, situated at 8-9 Kose (12-1/2 -13-1/2 Kms.) from the village, where he noticed the incident. On scrutiny of his evidence it is evident that his presence on the spot, from where he is alleged to have seen the appellants carrying the dead body of Nankoo (deceased), appears to be doubtful. He has admitted that he is closely related with the deceased although Khamani informant (PW4) has denied this fact for reasons best known to him (PW4). This witness (PW3) has further categorically stated that as the father of the deceased Nankoo/Khamani had told him that he (PW4) had arrayed him as a witness in the case and when police or anybody would ask him about the aforementioned facts he should say the same and so he had stated the aforementioned facts before the Court. About his presence in the village of incident, he told in cross-examination that on the date of the incident at about 3 a.m. in the dark night, when he was working at the tube-well of the Sarpanch of village Nagla Sarbi, Narayan Singh, he saw the incident. He admitted that he had worked only for one year before the incident and that he did not know who was living in the house of Narayan Singh and the names of any of his family members. He did not even know about the boundaries of the said tube-well and the area of that field. He also did not know about the family members of the accused appellants Shiam Lal and Mohan (since deceased) and their neighbours.

47. According to PW3, he had seen the body of Nankoo in the light of a torch but the said torch was neither placed before the Court nor proved by the witness himself or by the Investigating Officer (PW7). This witness tried to prove that a threat was given to him by the deceased appellants but it was found incorrect, during recording of the evidence. He tried to show that he was siding with the deceased Nankoo because he was of the same caste and also a relative and that Sarpanch Narayan Singh was also siding with the appellants because they were of the same caste. Hence, he had left the job. According to the Investigating Officer (PW7) statement of this witness was recorded by him on 11.3.1982, i.e., about one and a half months after the incident which also casts doubt on the evidence of this witness and he, too, appears to be a got-up witness. Contrary to the said statement of the Investigating Officer (PW7), the witness has denied the recording of any statement by the Investigating Officer. According to him, after about one and a half months of this incident, he conveyed this information (fifth part of the circumstances) to the father of the deceased Khamani (PW4) and before that he did not divulge this information to any one. He admitted that only Khamani, the informant had told him that he had reported against the surviving appellants also. He did not ever visit the place of appellant Mohan Singh.

48. In view of the above, it is amply clear that this solitary witness (PW3) of this part of the circumstance also appears to be unreliable. His presence on the alleged spot and witnessing the alleged crime is quite doubtful. The testimony of this witness cannot be relied upon and made basis

of the fifth part of the said circumstances. The finding contrary to it given by the learned Trial Judge is not convincing at all.

49. The last (sixth) part of the circumstance in this case is that the dead body of the deceased was recovered on 30.01.1982 in a critically injured and decomposed condition by the informant (PW4) himself from the sugarcane field of one Dori of the same village, the information of which was also given by him to the police and was recorded in the General Diary of the date at Report No. 24 at 14.30 hours. However, it appears from the record that strangely this copy of the General Diary has also not been proved by the prosecution. Based on this fact the prosecution pressed hard that the appellants and the deceased were last seen together on 26.01.1982 (although as discussed above this fact has not been proved due to absence of definite and conclusive nature of evidence) and thereafter the deceased was never seen again and his dead body was recovered on 30.01.1982, i.e., after 4 days 5 nights. But in our opinion, in view of the long time gap between the deceased found missing and the dead body that was recovered, possibility of others intervening cannot be ruled out. In the absence of definite and conclusive evidence that the appellants and the deceased were "last seen together" and when the time gap is long between the two, there is no reason to conclude that the appellants are responsible and are guilty of committing the murder of deceased Nankoo.

50. Based on the principles of law laid down in ***Bodhraj @ Bodha and others Vs. State of Jammu & Kashmir, 2002 (8) SCC 45 and Krishnan @ Ramasamy and others Vs. State of Tamil Nadu, 2014 (12) SCC 279,*** the Apex Court recently in a similar matter in the case of ***State of Karnatka Vs. Chand Basha 2016 (1) SCC 501*** held that:

"it will be hazardous come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together".

Therefore, it is a settled principle of law that where the said time gap is long, it would be unsafe to base the conviction on the "last seen together" theory; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution, if any. In the case in hand, from the analysis of the facts and evidence with due care and caution, we find that neither there is any definite and conclusive nature of evidence nor other corroborative piece of evidence for each of the alleged circumstances (I to VII) of "last seen theory".

51. The Apex Court in ***Bodhraj @ Bodha and others (supra)*** held that:

"31. the last seen theory comes into play where the gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

52. Similarly, affirming the above ratio, the Supreme Court in ***Krishnan @ Ramasamy and others Vs. State of Tamil Nadu*** (supra) has observed as follows:

"23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4.4.2004 at Vadakkumelur village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased."

53. Moreover, in **Nizam and others Vs. State of Rajasthan 2016 (1) SCC 550** the Supreme Court has observed as follows:

"it is well settled by this Court that it is not prudent to base the conviction solely on "Last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen".

54. There also arises a reasonable doubt upon the conduct of the father of the deceased, informant Khamani (PW4) who knew that his son Nankoo was missing since 26.01.1982 and was not only apprehended by the appellants but also beaten by the appellants having sickles in their hands and yet he did not lodge any report to the police for about 2 days, which is against the normal human conduct.

55. In the case in hand, neither the weapons of murder were recovered on the pointing out of the appellants nor the dead body of the deceased was recovered on their pointing out. None of the circumstances relied upon by the prosecution and accepted by the learned trial judge can be said to have been pointing only towards the guilt of the appellants and no other inference can be drawn. Therefore, in our view, the appellants must get the benefit of doubt.

56. It is also significant to note at this juncture that there were at least six injuries found on the face/head of the dead body which also find corroboration from the inquest report and sketch of the dead body (Ex. K6 and K7). No clothes were found except underwear on the dead body. Clothes shown in the statement of the informant (PW4) were not enumerated in the FIR. In the entire story of the prosecution it was alleged that the appellants were having sickles in their hands and no other weapon was assigned but on the dead body several incised wounds as well as contusions were found. During cross-examination PW6 Dr. O.P.Chhimpa has categorically admitted that these incised wounds were not found inflicted by sickles because the sickles caused irregular margin in the injury, which were not present on the said injuries of the dead body of the deceased. As such the theory of infliction of injury by sickles to the deceased also does not find corroboration from the medical evidence. This doctor (PW6) has further admitted that in the injuries found on the dead body of the deceased there was no infection or granulation or pus. This fact also goes to show that the date and time of the wounds on the body of the deceased and the wound of the witness Natthu (PW1) are altogether different. This fact also creates doubt on the prosecution story and strengthens the arguments of the learned amicus curiae.

57. The testimony of PW6 Dr. O.P.Chhimpa and the Investigating Officer, S.I. Moin Uddin (PW7) along with the corresponding medical and police documents, i.e., postmortem report (Ex K3) and inquest report as well as the sketch of the dead body (Ex K6 and K7) manifest that the dead body was beyond recognition and the underwear which is alleged to be there on the dead body was not shown in the FIR. Despite these facts no measure was taken by the Investigating Officer to take recourse to proper identification of the dead body. It appears that it was presumed by the police and the informant that it was the dead body of the deceased Nankoo.

58. The Investigating proceeding in this case appears to be biased, tainted and conducted in a perfunctory manner. It is stated by the prosecution witnesses of the alleged circumstances (PW1 to PW4) and the Investigating Officer (PW7) himself that the Investigating Officer had visited the village on the date of lodging of the FIR, i.e., 28.01.1982 and recorded the statements of some of the witnesses and thereafter he regularly visited the village till the recovery of the dead body and so on. But till the recovery of the dead body on 30.01.1982 he did not even try to trace the appellants or conduct any search of their houses. The Investigating Officer has also failed to record the statement of material witness Dori, from whose field the dead body of the deceased is alleged to be recovered by the informant (PW4). He also did not get the witness Natthu (PW1) medically examined on 28.01.1982, 29.01.1982 or 30.01.1982. Copies of General Diary filed by the prosecution during the trial have not been proved by the Investigating Officer (PW7) himself or by any other material witness.

59. Further, the Investigating Officer (PW7) recorded the statement of the witness Onkar (PW3), alleged to be the witness of the fifth part of the circumstance, after a gap of about one and a half months. The alleged torch through the light of which he (PW3) allegedly witnessed the said circumstance, was also not placed before the Trial Court by him. He did not try to record the evidence of those persons whose tube-wells were in the vicinity of the appellant Mohan or the persons residing in the vicinity of the informant (PW4) and neither accompanied him in the alleged search. He even showed his inability to illustrate the position of the structures which were present in the vicinity of the alleged place of incident. His site plans are not in detail. He had not sent the recovered blood samples for medical examination. He has not given any cogent explanation in his evidence about the aforesaid material omissions and commissions which provides ground to the argument of the learned amicus curiae that the FIR, in the case in hand, was cooked up and lodged ante-dated and the investigation proceeding as well as medical examinations, i.e., entire police and medical proceedings, were actually started after the recovery of the dead body of the deceased, on 30.01.1982 in the evening, after instigation and due deliberations with leaders of the rival village party of the appellants and the local police, with a view to falsely implicate the appellants in this case and which cannot be ruled out.

60. In view of the above discussions we are of the opinion that there are many apparent lapses in the evidence of the prosecution as well as in the investigation proceedings and also there are some missing links in the alleged chain of circumstances which are as follows:-

(i) No recovery of sickles/weapons alleged.

(ii) The nature of the injuries/wounds found on the dead body shows that none of the injuries received by the deceased was from the infliction of the sickle.

(iii) The dead body of the deceased was neither recovered from the possession of the appellants nor on their pointing out.

(iv) No proper identification of the dead body had been conducted.

(v) No proper explanation given for the presence of the witnesses at the time of the alleged incidents pertaining to the different circumstances.

(vi) No proper explanation given for the absence of the clothes from the dead body of the deceased.

(vii) No corroboration of any of the circumstances alleged by the witnesses devoid of definite positive and conclusive naturre of evidence, by any other reliable witness.

(viii) It is admitted that the faction-ridden village in question was mired by the village rivalry; one party was of the deceased appellant Mohan (and Shyam Lal) etc. in whose employment the surviving appellants Sita Ram and Har Bilas were working and the other party was of the witnesses Natthu (PW1), Babu (PW2), on whose connivance the informant (PW4) had lodged the present ante-dated FIR and they are all got-up witnesses.

(ix) The witness Onkar (PW3) is also an after thought and a got-up witness.

(x) The highly belated FIR and the medical examination of Natthu (PW1), for which no cogent explanation was given by the prosecution. Thus we find many loopholes in the case of the prosecution.

61. Further, it is a settled principle of law that Section 106 of the Evidence Act does not shift the burden of proof in a criminal trial, which is always upon the prosecution. Be it noted, that only if the prosecution has succeeded in proving the facts by the definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act. (***Vikramajit Singh alias Vicky Vs. State of Punjab 2007 Crl. L.J. 1000 (Supreme Court)).***

62. It is clear from the discussion made above that for establishing the guilt on the basis of the circumstantial evidence, the circumstances relied upon by the prosecution need to be firmly established and the circumstances should form a complete chain establishing the guilt of the accused. In the case in hand, the chain of the circumstances relied upon by the prosecution, cannot be said to be firm and forming a complete chain establishing the guilt of the appellants only and suggesting no other inference. Therefore, none of the circumstances relied upon by the prosecution and accepted by the court below can be said to be fully proved and conclusive in nature, forming a

chain without any gap, which pointing only to the guilt of the appellants and give no other inference as such invoking the provisions under Section 106 of the Evidence Act in this case for conviction is a misconception and against law. It appears that Trial Court failed to appreciate the discrepancies occurring in the prosecution evidence. Hence the judgment passed by the trial court is based on complete misreading of the case and misconception of the legal positions relevant to the matter and the learned judge has not considered the evidence on record in the right perspective.

63. Thus, in the light of the above discussions, we are not in agreement with the finding and conclusions arrived at by the learned trial judge and are satisfied that the conviction of the appellants in this case cannot be sustained and the appeal ought to be allowed. Accordingly, the conviction of the surviving appellants Sita Ram and Har Bilas for the offences under Section 302 read with Section 34 IPC is set aside and consequently, the appeal is allowed.

64. The appellants are in jail. From perusal of the record, it appears that it has been reported by the Chief Judicial Magistrate, Budaun vide his report dated 10.02.2014 that appellant no. 3, Sita Ram has become blind and another appellant no.4 Har Bilas is critically ill during their detention in jail. It is very unfortunate. Therefore, while directing the concerned jail authority to get the surviving appellants set at liberty forthwith, if not required in any other case, we are compelled to direct the State Government to take recourse to proper medical treatment and their rehabilitation in society, if they or their family members are in capable to provide.

65. Let copies of this order be sent to the concerned Court through Sessions Judge, Budaun and to the Chief Secretary, Govt. of U.P. Lucknow for compliance within ten days. The concerned Court will thereafter report the compliance to this Court within a month.

(2016) 9 ILRA 543
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE VINOD KUMAR SRIVASTAVA III, J.

Criminal Appeal No.- 394 Of 1984

Talewar Singh **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
P.N. Misra

Counsel for the Respondent:
AGA

The instant Criminal Appeal has been preferred challenging the conviction and sentence awarded by the impugned judgment and order dated 2.2.1984 passed by Special Judge, Budaun in S.T. No.701 of 1981 (State vs. Satya Ram and two others) arising out of Case Crime No.169/1980, PS.Zarif Nagar, District Budaun convicting and sentencing the appellants Satya Ram and Talewar Singh under section 396 I.P.C. to undergo imprisonment for life. One of the appellant Talewar Singh is in jail and connected Criminal Appeal No.2313/84 filed on behalf of Satyaram has already been abated vide order dated 18.7.2016, since he died during pendency of the appeal.

The brief facts of the case is that the First Information Report was lodged by PW-1 Matru Lal, father of the deceased Durejpal. According to the version of the First Information Report, the informant was present at his house and his son Durej Pal was present at the shop. At about 4.00 P.M. On 1.11.1980 25-26 dacoits came in police uniform who were armed with rifle, pistol and axe and they caught hold his son who tried to run away. One of the dacoits shot fire causing injuries at his chest who fell down. The dacoits started committing dacoity in the shop.

Thereafter they reached at the house of the informant, assaulted him with 'Danda' and asked about the household articles. He gave the keys of the house to them. The dacoits started looting his jewelleries, clothes, utensils, cash etc. Including his DBBL gun with 100 cartridges. Thereafter they went to the house of Dr. Shiv Charan Lal and looted the household articles and his DBBL gun with 60 cartridges. Thereafter, they went to the house of Ram Bharosey Lal and Babu Ram, Chiranjive Lal, Hethram, Chandra Pal and looted household articles in their houses also. Pandit Murari Lal, Lala Murari Lal and Khauraj Singh of the same village fired with their gun. The dacoits were also firing with their firearms, hence due to fear villagers could not reach near them. The incident was witnessed by Raghunandan Prasad, son of Chabi Lal, Sonpal s/o Mishri Lal and other villagers. The dacoits were identified by them so after seeing them they could identify those dacoits who were speaking local languages of near by places. Some of the dacoits were of young and middle age. Their involvement in the looting incident in the village was for about 2-1/2 hours. Subsequently the informant alongwith neighbours reached at the shop and found that his son was lying in injured condition. With the help of villagers he was taken for medical aid to the Government Hospital, Islam Nagar. However, in the way to the

hospital, he succumbed to injuries. Thereafter the dead body was brought and kept on the cot in the verandah of the school. The request was made to register the case and take necessary action.

In view of the above noted facts and discussion according to the prosecution case itself there is no evidence against the appellant Talewar Singh except that he was identified by the witnesses in the test identification parade held after three weeks though within a month. It is day light dacoity in which about 23-25 dacoits were involved, out of which 4-6 had covered their faces though it is not the version of the First Information Report. However, there is no averment that the appellant Talewar Singh had covered his face and during committing dacoity his face was uncovered and witnesses got opportunity to identify. There was no specific averment except general allegation against him who was one of the members of gang of dacoits in which 23-25 dacoits were involved. It is also unnatural and unbelievable that he was resident of nearby place as the distance in two villages was about 1-1/4 miles but had not covered his face. Accused appellant, pleaded that witnesses know them as they were living in nearby places and also visiting the village of the witnesses.

In view of the above-noted discussion the impugned judgment of conviction and sentence in S,T.No.701of 1981 under section 396 I.P.C. PS.Zarif Nagar, District Budaun against the appellant is hereby set aside. Accordingly the appeal is allowed.

Held: Para-

Case Law discussed:

Apex Court reported in 2015 (6) SCC 623 Iqbal and others vs. State of Uttar Pradesh.

(Delivered by Hon'ble Arvind K. Tripathi, J.)

1- The instant Criminal Appeal has been preferred challenging the conviction and sentence awarded by the impugned judgment and order dated 2.2.1984 passed by Special Judge, Budaun in S.T. No.701 of 1981 (State vs. Satya Ram and two others) arising out of Case Crime No.169/1980, PS.Zarif Nagar, District Budaun convicting and sentencing the appellants Satya Ram and Talewar Singh under section 396 I.P.C. to undergo imprisonment for life. One of the appellant Talewar Singh is in jail and connected Criminal Appeal No.2313/84 filed on behalf of Satyaram has already been abated vide order dated 18.7.2016, since he died during pendency of the appeal.

2- Shri Apul Mishra, learned Advocate appeared on behalf of the appellant Talewar Singh and Shri Chandrajit Yadav, learned A.G.A. appeared on behalf of the State of U.P.

3- Heard learned counsel for the parties and perused the record.

4- The brief facts of the case is that the First Information Report was lodged by PW-1 Matru Lal, father of the deceased Durejpal. According to the version of the First Information Report, the informant was present at his house and his son Durej Pal was present at the shop. At about 4.00 P.M. On 1.11.1980 25-26 dacoits came in police uniform who were armed with rifle, pistol and axe and they caught hold his son who tried to run away. One of the dacoits shot fire causing injuries at his chest who fell down. The dacoits started committing dacoity in the shop. Thereafter they reached at the house of the informant, assaulted him with 'Danda' and asked about

the household articles. He gave the keys of the house to them. The dacoits started looting his jewelleries, clothes, utensils, cash etc. including his DBBL gun with 100 cartridges. Thereafter they went to the house of Dr.Shiv Charan Lal and looted the household articles and his DBBL gun with 60 cartridges. Thereafter, they went to the house of Ram Bharosey Lal and Babu Ram, Chiranjive Lal, Hethram, Chandra Pal and looted household articles in their houses also. Pandit Murari Lal, Lala Murari Lal and Khauraj Singh of the same village fired with their gun. The dacoits were also firing with their firearms, hence due to fear villagers could not reach near them. The incident was witnessed by Raghunandan Prasad, son of Chabi Lal, Sonpal s/o Mishri Lal and other villagers. The dacoits were identified by them so after seeing them they could identify those dacoits who were speaking local languages of near by places. Some of the dacoits were of young and middle age. Their involvement in the looting incident in the village was for about 2-1/2 hours. Subsequently the informant alongwith neighbours reached at the shop and found that his son was lying in injured condition. With the help of villagers he was taken for medical aid to the Government Hospital, Islam Nagar. However, in the way to the hospital, he succumbed to injuries. Thereafter the dead body was brought and kept on the cot in the verandah of the school. The request was made to register the case and take necessary action. The chick report was prepared by Head Moharir Devraj Singh and also G.D. entry was made.

5- After the case was registered the investigation was handed over to PW-8 S.I. Hari Ram Sharma, PS.Zarifnagar. In the night of 1/2.11.1980 he went to the village Danpur and visited the place of the incident. He recorded the statement of Smt.Rameshwari, Shiv Charan Lal and other witnesses and inspected the place of incident, prepared the site plan. The statement of Raghunandan Prasad and Matru Lal were also recorded on the same day. The informant Matru Lal was examined by the doctor on 1.11.1980 at 10.00 P.M. who was brought by constable Rajendra Pal PS.Islam Nagar. The First Information Report was lodged initially at Islam Nagar. Subsequently the investigation was transferred to PS.Zarif Nagar. The post-mortem examination report on the body of Durej Pal was conducted on 2.11.1980 at 2.00 P.M. by Dr.A.K.Malkhani, the then Medical Officer, District Hospital Budaun. Following injuries were found on the person of the deceased:

1.Gun shot wound of entry 4 cm x 3.5 cm x cavity deep right side of chest 8 cm away right nipple at 4' O'clock position edges lacerated and inverted blacking and tattooing present around the wound.

2. Abrasion 7 cm x 1.5 cm left chest upper part.

6- According to the opinion of the doctor, the death was due to shock and hemorrhage as a result of anti mortem injury no.1. 37 small pellets were recovered with one tickli from inside body. Right kidney found ruptured and lacerated. Peritoneum was found lacerated. 7 & 8 ribs fractured. Injury report and post-mortem examination report were admitted, hence the prosecution was not required to prove the genuineness of the injury report, Postmortem examination report, First Information Report, and G.D. entry as they were admitted by learned counsel for the accused. After charge sheet was submitted, the charges were framed on 15.1.1983 against the appellant. The accused appellant denied the charges and pleaded to be tried.

7- The prosecution to prove its case examined 12 witnesses namely PW-1 Matru Lal, PW-2 Rajeshwari Devi, wife of the deceased Durej Pal and daughter-in-law of the informant Matru Lal, Shiv Charan Lal PW-3, PW-4 Raghunandan Prasad as eyewitnesses, PW-5 to 12 are formal witnesses. PW-5 Talewar Singh was posted as Head Constable who took Satyaram from the Police Station to District Bulandshahr whose face was covered. Umesh Chandra PW-6 who was Head Moharir sent Satyaram to District Court in custody of constable Hoshiyar Singh PW-7 who was the then SHO ,Gunnaur and the investigation was handed over to him by order of the Superintendent of Police, hence he started investigation w.e.f. 18.1.1981. He tried to apprehend the accused. The accused appellant Satyaram was arrested on 3.4.1981. PW-7 Inspector Hoshiyar Singh submitted the charge sheet, PW-8 Hari Ram Sharma who was Sub Inspector on the relevant date at the Police Station Zarif, when the case was registered on 1.11.1980 at the Police Station Islam Nagar. Thereafter the case was handed over to him who inspected the place of the incident, recorded the statement of the witnesses and prepared the site plan etc., PW-9 Mihi Lal who was sub inspector posted at Police Station Islam Nagar who prepared papers, sealed the dead body of Durej Pal and sent it for post-mortem examination through constable, PW-10 Hargovind Singh who arrested the co-accused Sheodan alias Saudan, PW-11 Mr.Yad Ram Sharma who was posted at that time at the Police Station Divai arrested the accused the appellant Satyaram with illegal firearm and cartridges, PW-12 Rajvir Singh, the then Executive Magistrate before whom the identification parade was conducted, in which out of six witnesses, three identified the accused appellant Talewar Singh and three identified to the accused appellant Satyaram (since dead).

8- When the prosecution closed the evidence, the statement of the accused were recorded under section 313 Cr.P.C. According to the accused appellant Talewar Singh, he was falsely implicated due to party bandi and pressure of the police as there was enmity with the police. He further stated that he was resident of Shamspur Bhoor and one of the relatives was the resident of Danapur where incident of dacoity took place. Bazar at Danapur belonged to his relative and he used to realise tahbazari on behalf of his relative. His uncle Bhagwan Singh was Sarpanch of Nyay Panchayat, Danapur for about 25 years. Danapur was at a distance of one mile from his village. Blacksmiths and carpenters of village Danapur used to do their work. In a case against his father one Narain, who was uncle of the witness Shiv Charan Lal was witness against his father Fateh Singh.

9- The defence examined DW-1 Umrao Singh, DW-2 Shyama and DW-3 Jai Singh. According to DW-1 Supervisor Kanoongo, the distance is in between Danapur and Saraspur is about one and 1/4 mile. He had visited those village and there is direct way from Saraspur to Danapur. DW-2 the sister of the accused appellant Satyaram stated that her mother died when Satyaram was aged about five years, hence she brought up. For about five-six years he was not visiting her house. DW-3 Jai Singh was village Pradhan of village Saraspur and Girdharpur as both the villages were adjacent in the same gram panchayat. The Bazar used to take place on every Tuesday. Bazar belonged to her brother Har Prasad. Rajjoraj of village Danapur is also one of the co-sharer. Talewar Singh use to realise tehbazari on behalf of Rajjoraj and Har Prasad. Talewar Singh was also the relative of Rajjoraj. Son of PW 3 Jai Singh was married to nephew of Talewar Singh, the accused appellant. Nanand of the sister of Talewar Singh was married to Tezpal, son of

Rajjoraj, hence Talewar Singh was known to the resident of village Danapur. Bhagwan Singh, tau of Talewar Singh was Sarpanch of Danapur. There was direct path way in between Danapur and Saraspur which was about 1/4 mile long and according to him, Talewar Singh was known to the witnesses since before the incident. There was fair price shop in the house of Shiv Charan Lal. The essential goods were being distributed to the residents of village Saraspur from that shop and Talewar Singh also used to purchase sugar from there. Doctor was sitting in village Danapur where Shiv Charan Lal was working. Matru Lal, the informant had the shop of general merchant. Talewar Singh used to purchase goods and medicines from the shop of Matru Lal.

10- After considering the statement of the witnesses trial court held the accused appellant Talewar Singh and Satyaram guilty of dacoity with murder, hence they were convicted and sentence for life imprisonment. However, co-accused Sheodan was acquitted from the charges giving benenfit of doubt. Now the present appeal has to be decided on behalf of only surviving appellant Talewar Singh on whose behalf appeal was pressed and argued by counsel for the appellant.

11- Learned counsel for the appellant challenged the impugned judgment and order of conviction and sentence on the ground that in view of the evidence the accused appellants were known to the witnesses, including the informant, since before the incident and due to village party bandi and pressure of police, the appellant Talewar Singh was falsely implicated alongwith other accused. The incident of dacoity took place but the appellant was not involved in the incident. Had there been any intention to commit dacoity, the accused appellant Talewar Singh and the other co-accused must have covered their faces. Theres is no recovery of any looted articles including gun nor recovery of any weapon for committing dacoity. Merely on the test identification parade and identification by three of the witnesses, the appellant was convicted and sentenced. The test identification parade took place after one and half years and after 25 days of arrest of the appellant Talewar Singh and after three months of arrest of the accused appellants Satyaram, hence there was delay in test identification parade. Though the appellant was well known to the witnesses but apart from that there was ample opportunity to show them to the witnesses. According to test identification three witnesses identified the accused appellant Satyaram and three identified to the appellant Talewar Singh which is too good to be believed. The appellant was falsely implicated due to village party bandi and pressure of the police. According to prosecution case about 23-25 dacoits committed dacoity in 3-4 houses including in the house of the informant Matrul Lal. If the appellants are not known to the informant and other witnesses, there was no opportunity to identify them especially after more than one and half year. According to PW-4, only 4-6 dacoits have covered their faces, even according to prosecution case initially there was no intention to kill Durej Pal, son of Matru Lal. The dacoits were in the police uniform. According to PW-1, Durej Pal caught hold one of the dacoits, scuffle took place. Thereafter the accused appellant Satyaram (since dead) shot fire causing firearm injury on chest of Durej Pal who succumbed to the injuries. Subsequently though the informant was caught hold, he handed over the keys but the assailants did not shot fire at him.

12- Learned counsel for the appellant also relied the judgment of Apex Court reported in 2015 (6) SCC 623 **Iqbal and others vs. State of Uttar Pradesh**. He submitted that in view of the judgment the appellant is not liable to be held guilty and to be convicted merely on the basis of identification in test identification parade unless the same is corroborated by other substantive evidence. Hence the conviction and sentence of the appellant is against the weight of evidence on record and the impugned judgment of conviction and sentence is liable to be set aside and the appellant is entitled to be acquitted and released from jail.

13- Learned A.G.A. opposed the aforesaid prayer and submitted that it is a day light incident. There was ample opportunity before the witnesses to identify the dacoits. The test identification parade of Satyaram took place after three months as he was arrested on 7.3.1981 and test identification parade took place on 22.6.1981 but Satyaram is dead.

14- However, so for as the appellant Talewar Singh is concerned he has surrendered on 25.5.1981 and his test identification parade took place alongwith Satyaram on 22.6.1981, hence that was within a month. There was no delay. Test identification parade was also proved by Executive Magistrate PW-12 Rajvir Singh before whom test identification parade took place and three witnesses rightly identified the appellant Talewar Singh namely witnesses Shiv Charan, Matru Lal and Suresh Chandra, Even if, there was no recovery from the appellant Talewar Singh, since he was identified by the witnesses, hence his complicity in the dacoity which took place on 1.11.1981 at the house of the informant and at the house of other villages is proved, beyond reasonable doubt. According to witnesses the appellant was not known since before the incident. First time they saw him at the time of the incident and second time in the court, subsequently in the test identification parde and thereafter in court, hence the appellant is not entitled to any benefit of doubt as in view of the fact in which dacoity took place in 4-5 houses on the same day which continued for more than two hours in which one person was shot dead and the informant also received injuries.

15- Considered the submissions of the learned counsel for the parties.

16- The genuineness of the First Information Report, Injury report, Postmortem examination report were not disputed as as the same were admitted. Hence it is admitted case that the dacoity was committed on 1.11.1980 in between 4.00 P.M. to 6.30 P.M. The only controversy, has to be decided regarding complicity of the only surviving the appellant Talewar Singh. This is also admitted case that except identification of Talewar in test identification parade there is no other evidence adduced by the prosecution. No other substantive evidence adduced by the prosecution to establish the involvement of the appellant in the incident of dacoity. Admittedly neither there is recovery of any looted article including gun nor any weapon used by the appellant and co-accused.

17- According to the prosecution case there were 22-25 dacoits. According to prosecution case it is a day light incident. The appellant is resident of nearby village and the village of the appellant and village Danapur where the incident took place are in the same Gram Panchayat of which uncle (tau)of the appellant was Sarpanch for about 25 years but according to the prosecution

case the appellant and other co-accused had not covered their faces, except statement of PW 4. According to PW-4 Raghunandan Prasad 4-6 accused had covered their faces.

18- So for as the appellant Satyaram is concerned, there was specific allegation that he shot fire on the deceased Durejpal when he caught hold one of the dacoits and scuffle took place in between them so there might be one of convincing reason and opportunity to identify Satyaram but no specific role assigned to the appellant Talewar Singh, due to which they identified him out of 24-25 dacoits. The specific case of the defence is that they were well known to the witnesses since before the incident so it is unbelievable that he would have participated in the incident alongwith the co-accused without covering his face. According to the accused appellant Talewar Singh the distance of his village Saraspur and Danapur was about one mile but according to DW-1 Umrao Singh, the then Supervisor Kanoongo the distance in between two village was about 1-1/4 miles as direct path way connecting two villages Saraspur and Danapur. According to DW-3 Jai Singh both the villages Saraspur and Girdharpur were adjoining villages. The bazar was organised at Danapur on every Tuesday which belonged to his brother Har Prasad and Rajjoraj of village Danapur who was co-sharer. The appellant Talewar Singh was collecting tehbazari from the bazar on behalf of Rajjoraj and Har Prasad. Talewar Singh was relative of Rajjoraj and Talewar Singh was also his son-in-law. His son was married to the sister of the appellant Talewar Singh. The direct distance in between the village Danapur and Saraspur was about 1-1/4 mile. Bhagwan Singh, tau of Talewar Singh was Sarpanch of Danapur Panchayat and village Girdharpur. Saraspur was also part of the Nyay Panchayat. One doctor has clinic at village Danapur and witness Shiv Charan was doing the business of supply of medicines. The informant PW-1- Matru Lal had general merchant shop and the appellant Talewar Singh used to purchase goods and medicines from their shop. There was fair price shop in the house of Shiv Charan in which sugar was being distributed by DW-3. The appellant Talewar Singh also used to purchase sugar from there, hence in view of the fact he was known to the witnesses since before the incident in question.

19- Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witness in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence. Benefit of doubt was given to one of the accused Sheodan who was also identified in the test identification parade.

20- In view of the above noted facts and discussion according to the prosecution case itself there is no evidence against the appellant Talewar Singh except that he was identified by the witnesses in the test identification parade held after three weeks though within a month. It is day light dacoity in which about 23-25 dacoits were involved, out of which 4-6 had covered their faces though it is not the version of the First Information Report. However, there is no averment that the appellant Talewar Singh had covered his face and during committing dacoity his face was uncovered and witnesses got opportunity to identify. There was no specific averment except general allegation against him who was one of the members of gang of dacoits in which 23-25 dacoits were

involved. It is also unnatural and unbelievable that he was resident of nearby place as the distance in two villages was about 1-1/4 miles but had not covered his face. Accused appellant, pleaded that witnesses know them as they were living in nearby places and also visiting the village of the witnesses.

In the present case the inspection was conducted by the trial judge on the application of D.G.C. merely in respect of the distance in two villages i.e village of the appellant and village where the dacoity took place and according to him the distance was about 5 km but in 1980 distance was from road as he went by four wheeler jeep from village Danapur to village Saraspur and direct pathway was only about 1-1/4 miles.

21- Hence in view of the aforesaid fact in the present case since there is no substantive piece of the evidence adduced by the prosecution to establish the involvement of the accused appellant Talewar Singh in the dacoity because neither there is recovery of any looted article including gun nor weapon used by the appellant in committing dacoity nor any other substantive evidence except the identification of the appellant in test identification parade. Though in the present case one person lost his life but in view of the facts prosecution story regarding involvement of the appellant appears to be doubtful and the appellant is entitled for the benefit of doubt. It will not be safe to hold the appellant guilty in the present case.

22- In view of the above-noted discussion the impugned judgment of conviction and sentence in S,T.No.701of 1981 under section 396 I.P.C. PS.Zarif Nagar, District Budaun against the appellant is hereby set aside. Accordingly the appeal is allowed.

23- The appellant Talewar Singh shall be released forthwith from jail, if he is not wanted in any other case, after compliance of section 437(A) Cr.P.C.

24- Let this judgment and order be communicated to the court concerned to ensure the compliance of the order.

(2016) 9 ILRA 551
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Criminal Appeal No.- 440 Of 2004
&
Other Connected Cases

State Of U.P. (State Appeal) **...Appellant**
Versus
Rahmat & Ors. **...Respondents**

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:
Ratnesh Trivedi

Three separate appeals have been filed against Judgment dated 13.08.2001 passed by Addl. Session Judge, Court No.3, Lakhimpur Kheri in Sessions Trial No. 206 of 1990 under Sections 302/307/452/325 & 323 Indian Penal Code 1860 (here-in-after referred as Code for brevity) whereby accused Sirdar son of Natha, resident of Bhadura, Police Station Phardhan District Lakhimpur Kheri has been acquitted and accused Rahmat son of Fakira, resident of Village Bhadura, Police Station Phardhan, District Lakhimpur Kheri and accused Jaan Mohd. Son of Subhan, resident of Birampur Police Station Mitauli, District Lakhimpur Kheri have been convicted under sections 323/325 & 452 of the Code. State has filed Criminal Appeal No. 440 of 2004 to set aside the judgment acquitting accused Sirdar and to enhance the sentence under sections 302/307/452/323 & 325 of the Code against respondent-accused Rahmat and accused Jaan Mohd. Respectively. Simultaneously Criminal Appeal No. 784 of 2001 and 866 of 2001 have also been filed by accused Rahmat and Jaan Mohd. Against their conviction. Since all the three appeals have been filed against one and the same judgment, they all are taken up together for disposal.

Brief facts as revealed from First Information Report (Exhibit Ka-01) are that on 23.5.1989 one Gobare son of Kadhile resident of Kotva, District Lakhimpur Kheri was making "Kothari" in the neighborhood of his son-in-law Siddhique in Village Bhadura for his residence. At about 4.30 p.m. on the same day respondent-accused Rahmat son of Fakira, Fakira son of Abdulla, Sirdar son of Natha and Jaan Mohd. Son of Subhan came there and started giving him beating. Accused Rahmat and Jaan Mohd. Were armed with "kanta" and accused Fakira and Sirdar were having "lathi" in their hands. On his hue and cry Harun Khan son of Siddhique reached there. Gobre ran away into house of Munshi to save himself, but accused chased him there also and assaulted him. When his wife Haffizan tried to save him they also gave beating to her also. The accused persons were inquiring about his daughter Zaibunnisha and son-in-law Siddhique. When Gobare told him that Zaibunnisha and Siddique had gone to Sallihabad bazar to consult doctor they left him and went to Sallihabad bazaar. Accused persons found them near old Crusher at about 5 o'clock in the evening, while Siddhique and Zaibunnisha were coming back through lakhimpur-mohammadi road. Accused persons assaulted them there with "kanta and "lathi". Witnesses Mustafa, Mohd. Raza-father of Siddhique, Khalil, Callector singh and many

others, who were there at "Crusher" came in and saved them. Siddhique and Fakira had old enmity due to some property. Due to this animosity accused persons had attacked them with intention to kill. F.I.R. was lodged by Gobare verbally on 23.5.1989 at 8.20 p.m. in police station Phardhan, District Lakhimpur Kheri and medical examination of injured persons were conducted by Dr V. K .Dixit on the same day in district hospital Kher.

In the instant case, the First Information Report was lodged verbally in Police Station. His statement was recorded by Head Constable, who was on duty in that point of time. P.W.-5 Sub-Inspector Shyam Raj Yadav has disclosed his name as C.C 120 Ram Briksha Yadav, but C.C 120 Ram Briksha Yadav has not been produced in the Court to prove that Gobare made such statement to him. In absence of proof, the statement contained in First Information Report cannot be used as substantive piece of evidence under the category of dying declaration. In these circumstance, the F.I.R. cannot be used as dying declaration.

For the reasons stated above, respondent-accused cannot be held guilty of offence under Section 302 of the Code. Trial court has rightly convicted respondent accused Rahmat and Jaan Mohammad under Sections 323, 325 & 452 of the Code. Therefore, Criminal Appeal No. 440 of 2004 deserves to be allowed partially only to the extent that accused Sirdar is also guilty under Sections 323, 325 & 452 of the Code. Criminal Appeal No. 784 of 2001 and 866 of 2001 are liable to be dismissed.

In view of above discussion, Criminal Appeal No. 784 of 2001 and 866 of 2001 are dismissed and Criminal Appeal No. 440 of 2004 is allowed partially only to the extent that accused Sirdar is guilty under Sections 323, 325 & 452 read with Section 34 of the Code. Respondent accused Rahmat and Jaan Mohammad shall appear in the Court of Additional Sessions Judge, Lakhimpur Kheri to serve out the sentences imposed by the Court. Respondent accused Sirdar son of Natha, resident of Bhadura, Police Station Phardhan District Lakhimpur Kheri is held guilty under section 323/325 and 452 read with section of the Code.

Held: Para- For hearing on the quantum of sentence list on 22.09.2016.

Case Law discussed:

Sidhartha Vashisht @ Manu Sharma Vs. State (Nct of Delhi) 2010 (6) SCC page 1,
Jodhan Vs. State of M.P. 2015 CRLJ Page 3291,
Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC Page 1853,
Sucha Singh v. State of Punjab, AIR 2003 SC 3617,
Paramjeet Singh v. State of Uttarakhand;AIR 2011 SC 200 also Hon'ble Apex Court,
Kans Raj Vs. State of Punjab (2000) 5 SCC page 207,

(Delivered by Hon'ble Ravindra Nath Mishra-II, J.)

1. Three separate appeals have been filed against Judgment dated 13.08.2001 passed by Addl. Session Judge, Court No.3, Lakhimpur Kheri in Sessions Trial No. 206 of 1990 under Sections 302/307/452/325 & 323 Indian Penal Code 1860 (here-in-after referred as Code for brevity) whereby accused Sirdar son of Natha, resident of Bhadura, Police Station Phardhan District Lakhimpur Kheri has been acquitted and accused Rahmat son of Fakira, resident of Village Bhadura, Police Station Phardhan, District Lakhimpur Kheri and accused Jaan Mohd. Son of Subhan, resident of Birampur Police Station Mitauli, District Lakhimpur Kheri have been convicted

under sections 323/325 & 452 of the Code. State has filed Criminal Appeal No. 440 of 2004 to set aside the judgment acquitting accused Sirdar and to enhance the sentence under sections 302/307/452/323 & 325 of the Code against respondent-accused Rahmat and accused Jaan Mohd. Respectively. Simultaneously Criminal Appeal No. 784 of 2001 and 866 of 2001 have also been filed by accused Rahmat and Jaan Mohd. Against their conviction. Since all the three appeals have been filed against one and the same judgment, they all are taken up together for disposal.

2. Brief facts as revealed from First Information Report (Exhibit Ka-01) are that on 23.5.1989 one Gobare son of Kadhile resident of Kotva, District Lakhimpur Kheri was making "Kothari" in the neighborhood of his son-in-law Siddhique in Village Bhadura for his residence. At about 4.30 p.m. on the same day respondent-accused Rahmat son of Fakira, Fakira son of Abdulla, Sirdar son of Natha and Jaan Mohd. Son of Subhan came there and started giving him beating. Accused Rahmat and Jaan Mohd. Were armed with "kanta" and accused Fakira and Sirdar were having "lathi" in their hands. On his hue and cry Harun Khan son of Siddhique reached there. Gobre ran away into house of Munshi to save himself, but accused chased him there also and assaulted him. When his wife Haffizan tried to save him they also gave beating to her also. The accused persons were inquiring about his daughter Zaibunnisha and son-in-law Siddhique. When Gobare told him that Zaibunnisha and Siddique had gone to Sallihabad bazar to consult doctor they left him and went to Sallihabad bazaar. Accused persons found them near old Crusher at about 5 o'clock in the evening, while Siddhique and Zaibunnisha were coming back through lakhimpur-mohammadi road. Accused persons assaulted them there with "kanta and "lathi". Witnesses Mustafa, Mohd. Raza-father of Siddhique, Khalil, Callector singh and many others, who were there at "Crusher" came in and saved them. Siddhique and Fakira had old enmity due to some property. Due to this animosity accused persons had attacked them with intention to kill. F.I.R. was lodged by Gobare verbally on 23.5.1989 at 8.20 p.m. in police station Phardhan, District Lakhimpur Kheri and medical examination of injured persons were conducted by Dr V. K .Dixit on the same day in district hospital Kheri and injury report was prepared (Exhibit Ka-13) in which following injuries were found on the body of Smt. Zaibunnisha:

" 1. Lacerated wound 7 cm x 1.5 cm x Scalp deep on left side of head 12 cm above the left ear. Clotted blood adhere in an around the wound.

2. Abrasion Multiple in an area of 9cm x 3cm on back of left elbow & upper part of left forearm.

3. Abrasion 2cm x 1.5 cm on top of left shoulder.

4. Contusion 5 cm x 2 cm on back of Right Arm 17 cm below to top right shoulder Red Around the swelling 12 cm x 8 cm.

5. Contusion 5 cm x 2 cm on outer aspect of left thigh 15cm above the left knee jt.

6. Complains of plain in right thigh but mark of external injury not visible."

3. Gobare was also medically examined and following injuries (Exhibit Ka-15) were found on his body:

" 1. Traumatic Swelling 5.5 cm x 3 cm on top of head 17 cm above the root of neck.

2. Contusion with Abrasion 5 cm x 2 cm on back of left forearm 15 cm below the left elbow Jt.

3. Abraded Contusion 7.5 cm x 2 cm on back of Right forearm 15 cm below the Right elbow Jt. Around the Swelling 12 cm x 8 cm colour Red.

4. Lacerated wound 3 cm x 1.5 cm x bone deep on front of Right leg 18 cm below the Rt. Knee.

5. Abrasion 2 cm x 0.5 cm on inner side of Rt. Ankle Jt.

6. Complains of pain in left leg and chest but mark of external inj. Not visible."

4. Siddique had also injuries on his body(Exhibit Ka-16), which may be described as follows:

" 1. Lacerated wound 8 cm x 1 cm x bone deep on left side of head 13 cm above the left ear blood oozing.

2. Lacerated wound 7 cm x 0.8cm x bone deep on left side of head on back 13 cm above posterior to left ear.

3. Lacerated wound 3.5 cm x 0.4 cm x muscle deep on back of left fore arm 8 cm below the left elbow Jt.

4. Contusion 5 cm x 2 cm on back of left elbow Jt. Red.

5. Traumatic Swelling 7 cm x 4 cm on back of left hand.

6. Abrasion 2.5 cm x 1 cm on from of Right leg 27 cm below Rt knee.

7. Multiple contusion in an area of 25 cm x 22cm on back (illegible) scapular region of back on both sides."

5. Following injuries were found on the body of Smt. Haffizan(Exhibit Ka-14):

"1. Lacerated wound 1.5 cm x 0.4 cm x muscle deep in between the web in between the left thumb of left index finger.

2. Traumatic swelling 5 xm x 3 cm on back of left hand 2 cm below the left wrist."

6. Injured persons were admitted in District Hospital.

7. Investigation was entrusted to Sub Inspector R.B. Mishra, who recorded statement of CC Ram Briksha Yadav, scribe of First Information Report and General Diary of Police Station. Next day he also recorded statement of witnesses Harun Khan, Hafizan and Khalil and thereafter he inspected the place of occurrence and prepared site plans (Exhibit Ka-3) and (Exhibit Ka-6). The injuries of Gobare were serious in nature, therefore, he was kept in Hospital till 14.6.1989 when he died of Septicemia in hospital. Inquest report (Exhibit Ka-7). Was prepared on 14.6.1989 at about 14.20. Post-mortem (Exhibit Ka-18)was conducted on 15.6.1989 thereafter the case was converted into Sections 302/34, 307, 325 & 452 of the Code. Having found prima facie case against accused persons, charge-sheet (Exhibit-Ka 12) was submitted under Sections 307/ 325/302/34 & 452 of the Code.

8. Accused Fakira had died after submission of charge sheet Hence trial proceeded only against accused Rahmat, Sirdar and Jaan Mohd and charges under Sections 307/302 read with 34 & 452 of the Code. Were framed against them to which they denied and claimed to be tried.

9. In order to prove charges against accused persons, prosecution examined P.W.-1-Zaibunnisha, P.W.-2 Mushtak, P.W.-3, Haffizan, P.W-4 Harun Khan, P.W.-5 Sub Inspector Shyam Raj Yadav, P.W.-6 Dr. V.K.Dixit, P.W.-7 Dr. A.K.Srivastava.

10. After conclusion of prosecution, accused persons were examined under Section 313 Criminal Procedure Code in which they pleaded false implication and had stated that due to enmity witnesses have given statement. No witness has been examined on behalf of accused persons.

11. After hearing submissions of both the parties and appreciating the evidence on record, trial Court found sufficient evidence to convict accused Rahmat and Jaan Mohd. Under Sections 323, 325 & 452 of the Code but acquitted accused Sirdar of the charges levelled against him on the ground that prosecution has failed to prove charges against him beyond reasonable doubt. Accused persons were sentenced to one year rigorous imprisonment under Sections 323 of the Code., five years rigorous imprisonment and fine to the tune of Rupees 1,000/- each and in default of payment of fine two months additional rigorous imprisonment under Section 325 of the Code and three years rigorous imprisonment and fine of Rs. 500/- and in default one month rigorous imprisonment under Section 452 of the Code. Trial court found no case under Sections 302 & 307 of the Code against accused persons.

12. Feeling aggrieved by the judgment passed by the trial court, State has filed Criminal Appeal No. 440 of 2004 to set aside judgment of acquittal of accused Sirdar and to enhance the sentence passed by trial court against accused Rahmat and Jaan Mohd. And to convert the same under Sections 302 & 307 of the Code Accused Rahmat and Jaan Mohd also being aggrieved by the

judgment, have filed Criminal Appeal No-784 of 2001 and Criminal Appeal No-866 of 2001 respectively against their conviction under section 323/325 & 452 of the Code.

13. Learned A.G.A., Smt. Smiti Sahay has argued that in an appeal against acquittal, this appellate court has full power to review, re-appreciate and re-considered the evidence available on record; that trial Court has committed grave error in acquitting accused Sirdar, whereas on the basis of same evidence respondent-accused Rahmat and Jaan Mohd. Have been convicted under Sections 323/325 & 452 of the Code. She has also argued that trial Court has committed error in concluding that charges under Sections 307 and 302 of the Code are not proved whereas evidence available on record was sufficient to hold accused persons guilty of the charges under Sections 307/ 302 & 452 of the Code. The trial court has failed to appreciate the same and has caused injustice by not considering the same. The trial Court did not consider the fact that the statement made in First Information Report lodged by injured Gobare, who later on succumbed to Septicemia resulted from ante-mortem injuries comes within category of his dying declaration. The trial court committed error in considering only the cause of death as mentioned in the post-mortem report.

14. Per contra, the learned counsel for the accused has argued that the trial court has rightly held that charges against accused Sirdar could not be proved by the prosecution beyond reasonable doubt; the trial court cannot interfere with the judgment of acquittal when on the basis of evidence available on record Conclusion drawn by trial court is also plausible. He has also argued that trial has appreciated the evidence on record in arbitrary manner to come to the conclusion that respondent-accused Rahmat and Jaan Mohd. Are guilty under Sections 323, 325 & 452 of the Code; there is no evidence on record to prove that accused persons had any intention to kill deceased Gobare; that it is not proved that death of Gobare was caused by septicemia developed out of ante-mortem injuries; motive for the incident is also not proved; no independent witness supported the prosecution case.

15. Time and again it has been propounded by Hon'ble Apex Court that the appellate court while dealing with appeal against acquittal should not interfere in the judgment of acquittal as the principle of criminal jurisprudence with regard to presumption of innocence of accused is further strengthened by their acquittal. The golden thread which runs though the web of administration of justice and criminal jurisprudence is where two views are possible on the evidence adduced in the case, one pointing towards guilt of the accused and the other to his innocence, the view favouring accused person should be adopted. Acquittal of the guilty is no less than conviction of an innocent. It also results in miscarriage of justice. Where admissible evidence is ignored acquitting accused, a duty is cast upon the trial court to re-appreciate the evidence for the purposes of ascertaining as to whether any of the accused really committed an offence. Prevention of miscarriage of justice is the paramount consideration of the Court. Keeping in view the above principle of presumption of innocence of accused and prevention of miscarriage of justice Hon'ble Apex Court in **Sidhartha Vashisht @ Manu Sharma Vs. State (Nct of Delhi) 2010 (6) SCC page 1** has culled down certain guidelines in following terms :

"(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."

16. In the backdrop of above principles laid down by Hon'ble Apex Court, it is to be examined whether there is any compelling and substantial reasons for interference in acquittal of accused.

17. Genesis of incident is said to be enmity over some property between Siddhique, son in law of Gobre and accused Fakire. Learned A.G.A. has pointed out towards statement of P.W.-1 Zaibunnisha where she has disclosed the reason for enmity. She has stated that her husband was three brothers one of them Noor Mohd. Died living behind his window Khiarunisha who after his death entered into Nikah with another brother Dost Mohd. Khiarunisha had tranferred certain property inherited by her from Noor Mohd. In favour of Siddhique through power of attorney holder Mordhawaj, but later on Khiarunnisha herself sold the same land to Rahmunnisha, who on her turn sold it to accused Rahmat. Therefore, they both became enmical. The enmity over property is also disclosed in First Information Report (Exhibit Ka-1). This fact does not appear to have been denied by the accused persons. They have not said anything regarding this sale of property in their

statement recorded under Section 313 Criminal Procedure Code. Nothing has been suggested in cross examination of witnesses. Hence the trial court has committed no error in concluding that the parties were on inimical terms.

18. In order to bring home the charges against accused persons, the prosecution has examined P.W.-1 Zaibunnisha, daughter of deceased Gobare, P.W.-2 Mustaq, an independent person, P.W.-3 Haffizan and P.W.-4 Harun Khan who are wife and son of deceased Gobre respectively. Out of these witnesses P.W.-1 Zaibunnisha, P.W.-3 Haffizan are injured witnesses. P.W.-3 Haffizan has stated on oath that on fateful day when deceased Gobare was getting foundation of his house laid on the land towards South of Hata of Munshi. She heard cry of her husband, on which she rushed to the place of incident where she saw accused Rahmat and Jaan Mohd. Armed with "kanta" and Fakira and Sirdar armed with "lathi" attacking her husband Gobare. Her husband Gobare in order to save himself rushed into house of Munshi, but there also accused persons caused severe injuries with their arms. When P.W.-3 Haffizan tried to save him, they attacked her in which she suffered injuries. Her injury report Exhibit Ka-14 indicates one lacerated and one traumatic swelling on her body. As per Injury report of deceased Gobare (Exhibit Ka-15) One traumatic swelling, contusion with abrasion, abraded contusion, lacerated and one abrasion wound were found on the body of deceased Gobare. Learned Additional Government Counsel has argued that special status has been conferred on an injured witness in law. Haffizan, being injured, her presence on the place of occurrence, cannot be doubted. For this contention reliance has been placed on **Jodhan Vs. State of M.P. 2015 CRLJ page 3291**—

"22. From the aforesaid summarization of the legal principles, it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt- guarantee of his presence at the place of occurrence."

19. Thus the testimony of P.W.-3 Haffizan is not liable to be disbelieved. Her statement is also supported by P.W.-4, Harun Khan, who is son of injured Zaibunnisha. He has supported the case of prosecution that accused Rahmat, Jaan Mohd. And Ali Ahmad who were armed with "kanta" and "lathi" inflicted injuries on the body of Gobare, and when he rushed in the house of Munshi in order to save himself, they chased him there also and caused injuries in the house of Munshi. When Haffizan tried to save him accused persons attacked her also. Though P.W.-4 Harun Khan is not an injured witness, but there is nothing in his statement to disbelieve his testimony.

20. Similarly Zaibunnisha and Siddique daughter and son-in-law of deceased Gobare were also attacked with "kanta" and "lathi" by accused persons near "old crusher" when they were coming back from Salihabad market. Zaibunnisha suffered injuries on her body. Injuries were found on her body as per injury report (Exhibit Ka-13). Her statement is also supported by an independent witness P.W.-4 Harun Khan, who had reached the place of occurrence near "old crusher". Though P.W.-2 Mustaq was declared hostile by the prosecution as he did not support the

prosecution in his cross examination, but learned A.G.A. has argued that he had supported the prosecution case in his examination-in-chief. But later on when he was called for cross-examination after lapse of considerable period of time he became hostile under pressure of accused persons. Thus she has argued that examination of chief of PW-2 Mustaq which supports prosecution version can be relied upon to prove guilt of the accused. She has further argued that even testimony of hostile witness cannot be brushed aside in toto.

21. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. She has relied on judgment Hon'ble Apex Court in in **Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC page 1853** has held that:

"The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

22. The term "hostile witness" does not find place in Evidence Act 1872 (here-in-after referred as Act of 1872 for brevity). It is a term borrowed from English Law. Though in English Law to allow a party to contradict its own witness was not acceptable view. The theory of contradicting its own witness was resisted on the ground that party should be permitted to discard or contradict his own witness, which turns unfavorable to party calling him, however, this rigidity of rule was sought to be relaxed by evolving a term "hostile" or "un-favourable witness" in common law.

23. The Act of 1872 merely, provides by enacting Section 154 of the Act of 1872 that –

"the Court may, in its discretion, permit the person who calls a witness to put any question to him, which might be put in cross examination by the adverse party".

Sub-Section (2) of Section 154 of Act of 1872, further provides that

"Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of evidence of such witness".

24. Thus discretion is vested in Court to permit a person to put such question, which may be put by adverse party, if Court deems it appropriate. Thus the term "hostile witness" has been borrowed from English Law and developed in through case Laws.

25. The principle of "***falsus in uno falsus in omnibus***" (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court . In Sucha Singh v. State of Punjab, AIR 2003 SC 3617, had held that

"even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim ***falsus in uno falsus in omnibus*** *(false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."*

26. Similarly in **Paramjeet Singh v. State of Uttarakhand**; AIR 2011 SC 200 also Hon'ble Apex Court has propounded that—

"When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony".

27. Perusal of statement of P.W.2-Mustaq, shows that Pw-2 has fully supported the prosecution story when he was examined on 17.3.1994 but on that day accused did not cross examined him and his cross examination was adjourned for 02.08.1995. On 2.8.1995 i.e after a lapse of about a year and half, he was declared hostile when he was cross-examined. There can be no two opinion that this witness turned hostile on account of pressure exerted upon him by the accused persons. He refused to state truth about the occurrence, and therefore, he was declared hostile in his cross examination. In his cross-examination he also refused to have witnessed the occurrence; that he ever gave any statement under Section 161 Cr.P.C., but surprisingly neither prosecuting officer nor the Court asked him about the statement given by him in his examination-in-chief. He should have been cross examined on the point as to under what circumstances he had given statement in the Court on 17.3.1994. He was required to submit his explanation regarding his previous statement given in examination-in-chief supporting the prosecution case.

28. We feel pain to observe that our present system of trial has turned most of the trial Court judges into umpires and despite having sufficient power to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the

chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile, is not uncommon in the trial Courts. Trial Court judges just sit and watch like an umpire. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

29. Coming to the present case, perusal of the statement of P.W.-2 makes it evident that he changed his statement under the pressure exerted by accused persons his statement given in examination-in-chief must be taken to be truthful and reliable. Evidence of such witness cannot be treated as effaced or washed off the record altogether, but acceptable to the extent his version is found to be dependable on a careful scrutiny thereof.

30. No explanation of injuries on the person of injured witnesses have been given. It has been suggested to the witnesses that Zaibunnisha, Haffizan, Goabre and Siddique suffered injuries in a robbery case. Mere suggestion is not sufficient. Moreover it itself indicates a false defence. All the witnesses being the close relatives, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent.

31. Learned counsel for the appellant accused Rahmat and Jaan Mohd has further argued that the accused persons are alleged to have inflicted injuries with "*Kanta and lathi*". Kanta is a sharp aged weapon but no injury was found on the body of injured which can be said to have been caused with sharp edged weapon. We have gone through the impugned judgment and evidence on record. The trial court relying on the testimony of witnesses has concluded that the accused had attacked Gobre, his daughter and his son in law with other side i.e blunt side of "*kanta*". Therefore no sharp edged injury has been caused. Looking into the totality of statement of witnesses, the Conclusion drawn by the trial court cannot be said to be unreasonable. Hence I do not find any error in arriving at conclusion of guilt of accused appellant.

32. However trial Court relying on the statement of P.W.-3 Haffizan that she did not see accused Sirdar on the place of occurrence has acquitted accused Sirdar. Learned A.G.A. has argued that this finding of trial court suffers with perversity. Trial Court overlooked the statement of P.W.-1 Zabunnisha, who has stated in her statement that Sirdar was also there, but he was empty handed and he did not cause any injury to her or her husband. As has been seen in proceeding paras while dealing with ambit and scope of power of interference by appellate Court in judgment against acquittal, the finding of trial Court can be reversed only when finding suffers with perversity. The word "perversity" in terms as understood in law has been defined to mean "against the weight of evidence" i.e. to say when conclusion drawn by trial Court is against material available on record and unreasonable then there is scope of interference. It is established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness. P.W.-3 Haffizan herself in the examination-in-chief has stated that Sirdar came along with other accused, he was armed with 'lathi". She has also stated that Sirdar also inflicted injuries to Gobare and to her. It is admitted case

of prosecution that witness Haffizan did not go to "old crusher", which is second place of occurrence. P.W.-1 Zaibunnisha in her statement has stated that Sirdar was also there, but did not cause any injury to her or her husband. From this statement, presence of accused Sirdar on the second place of occurrence cannot be doubted. He was present on the second place of occurrence, but he did not cause any injury. Even if it is believed that Sirdar did not cause any injury to the injured persons his presence on the place on occurrence is not doubtful. When he was present along with other co-accused, his common intention with other co-accused is well established. Apart from this witnesses P.W.-3 Haffizan and P.W.-4 Harun also have proved presence of accused Sirdar at the first place of occurrence and also his participation in the crime. They have stated that on fateful day Gobre was constructing house near house of Munshi when she heard his cry, she reached there and saw accused persons attacking her husband with "lathi" and "kanta" when her husband rushed into the house of Munshi to save himself, accused persons chased him there also. When PW-3 tried to save her husband, she was also attacked by them. P.W.-4 Haroon has also supported the statement of PW-3. He has also witnessed the incident. Thus the trial court has overlooked the material evidence available on record with regard to guilt of accused Sirdar and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and therefore, liable to be reversed.

33. On the point of enhancement of sentence in Appeal No. 440 of 2004, learned A.G.A. has argued that Gobare has died due to Septicemia out of ante-mortem injuries inflicting by respondent-accused, therefore, respondent-accused should be held guilty under Section 302 I.P.C.. Trial Court has committed grave error in convicting respondents Rahmat and Jaan Mohd. Only under Section 323, 325 & 452 of the Code.

34. Repelling the argument of learned A.G.A., It has been argued on behalf of respondent while inflicting injuries on the body of Gobare on the date of incident, had no intention to kill him. Before we proceed with the merit of the case, Section 299 of the Code. Must be looked into:

"299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it A, intend-ing to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."

Thus in terms of Sections 299 I.P.C. culpable homicide is described as an act of causing death:

a With the intention of causing death

b With the intention of causing such bodily injury as is likely to cause death

c. With the knowledge that such an act is likely to cause death.

35. Section 299 of the Code. Makes it clear that emphasis is on the expression "intention" and "knowledge". Once an offence is caused in any of the three stated manners, noted above, it would be "culpable homicide".

36. Now reverting to the facts of the case, it is established from records that Gobare has died due to Septicemia. Septicemia is an infection of the blood also knows as bacteria or blood poisoning. The incident had occurred on 23.5.1989 and Gobare has died on 14.6.1989. Gobare was examined medically on 23.5.1989. His injury report (Exhibit Ka-15) shows that there was one traumatic swelling on the top of head, two contusions were on forearm. There was one lacerated wound below right knee and one abrasion on right Ankle. The injuries shows that there was only one open wound from where infection can be said to have developed. The post-mortem (Exhibit Ka-18) also mentions one septic wound on the same place where open wound was caused. Bedsore were also all over the back. Thus the only source from where Septicemia can be said to have developed is the open wound on Right leg. The

prosecution has not adduced any evidence that Gobare was in Hospital till his death. There is no whisper of evidence that the secondary infection was not hospital acquired, however, presuming that Septicemia was caused due to injuries inflicted by respondent-accused. The question arises whether there was any intention to kill on the part of the respondent-accused. The nature of injuries found on the body of Gobare is not sufficient to indicate this intention on the part of the respondent-accused.

37. Evidence led by prosecution also does not prove intention of killing Gobare. P.W.-3 Haffizan, who is widow of Gobare has stated that respondent-accused were inquiring about Siddique and Zaibunnisha and as soon as Gobare told them that his son-in-law and her daughter Siddique and Zaibunnisha respectively had gone to Salihabad market to consult doctor, respondent-accused left him and proceeded to Salihabad market. It has also come in the statement of P.W.-3 Haffizan that accused Rahmat had "kanta", but he did not assault with reserved side of Kanta i.e blunt side of "kanta" and with "lathi". Had they intended to kill Gobare, they would have used sharp side of "kanta" causing severe injuries. It has also come in evidence that accused attacked Gobre just to know where-about of Siddique and Zaibunnisha and the moment Gobre told them about Siddique and Zaibunnisha, they left him and went to Salihabad market. Thus evidence pertaining to intention of accused to kill Gobare is evidently lacking. For the above reasons, we do not find any substance in the argument of learned A.G.A. that respondent-accused are guilty of offence under Sections 302 or 307 of the Code.

38. Learned A.G.A. has also argued that the First Information Report was lodged by Gobare, which contains his statement as to cause of his death or it can be said that as to circumstances of the transaction, which resulted in his death, therefore, First Information Report should be treated as dying declaration under Section 32 of the Act of 1872.

39. From the side of respondent-accused, learned counsel has argued that at the time of lodging of First Information Report, Gobare was not under eminent expectation of death. Hence a First Information Report containing his statement cannot be treated as dying declaration.

40. Now question is whether in order to attract the provisions of section 32 of the Act of 1872, is it necessary that at the time of making statement, the maker of the statement must be under eminent expectation of death. Provision of Section 32 of the Act of 1872 may be reproduced as follows:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. Is relevant – Statements, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death:- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

41. Reading of above provision of Section 32 of the Act of 1872 shows mark difference of Indian law on the subject from English law. Unlike English law Section 32 of Indian Evidence Act does not use any word showing that the maker of statement should be under the sense of impending death. If statement is made relating to cause of his death or circumstances of the case causing her death, then the statement is admissible if the maker of the statement is dead or cannot be found.

42. Thus the statement made by Gobare relating to circumstances causing his death is certainly admissible. Gobare has stated in his First Information Report, dictated to Constable Ram Briksha Yadav, who had recorded the First Information Report is certainly admissible in evidence but at the same time recording of statement has also to be proved as per law. Hon'ble Apex Court in **Kans Raj Vs. State of Punjab (2000)** 5 SCC page 207 has observed that:

"To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement."

43. In the instant case, the First Information Report was lodged verbally in Police Station. His statement was recorded by Head Constable, who was on duty in that point of time. P.W.-5 Sub-Inspector Shyam Raj Yadav has disclosed his name as C.C 120 Ram Briksha Yadav, but C.C 120 Ram Briksha Yadav has not been produced in the Court to prove that Gobare made such statement to him. In absence of proof, the statement contained in First Information Report cannot be used as substantive piece of evidence under the category of dying declaration. In these circumstance, the F.I.R. cannot be used as dying declaration.

44. For the reasons stated above, respondent-accused cannot be held guilty of offence under Section 302 of the Code. Trial court has rightly convicted respondent accused Rahmat and Jaan Mohammad under Sections 323, 325 & 452 of the Code. Therefore, Criminal Appeal No. 440 of 2004 deserves to be allowed partially only to the extent that accused Sirdar is also guilty under Sections 323, 325 & 452 of the Code. Criminal Appeal No. 784 of 2001 and 866 of 2001 are liable to be dismissed.

45. In view of above discussion, Criminal Appeal No. 784 of 2001 and 866 of 2001 are dismissed and Criminal Appeal No. 440 of 2004 is allowed partially only to the extent that accused Sirdar is guilty under Sections 323, 325 & 452 read with Section 34 of the Code. Respondent accused Rahmat and Jaan Mohammad shall appear in the Court of Additional Sessions Judge, Lakhimpur Kheri to serve out the sentences imposed by the Court. Respondent accused Sirdar son of Natha, resident of Bhadura, Police Station Phardhan District Lakhimpur Kheri is held guilty under section 323/325 and 452 read with section of the Code.

46. For hearing on the quantum of sentence list on 22.09.2016.

(2016) 9 ILRA 566
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.09.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal Defective No.- 480 Of 2012

Kamlesh Singh **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
R.S. Tomar

Counsel for the Respondent:
Govt. Advocate

This appeal has arisen against the judgment and order dated 18.02.2008 passed by learned Sessions Judge, Lakhimpur Kheri in Sessions Trial No. 910 of 2004 (State Vs. Kamlesh Singh) arising out of Case Crime No. 568 of 2004 under Sections 364, 364, 302 & 201 IPC, P.s. Pradhan District Kheeri whereby accused was found guilty of the offence punishable under Sections 302, 364 & 201 IPC and was sentenced for imprisonment for life under Section 302 IPC, ten years rigorous imprisonment under Section 364 IPC and two years rigorous imprisonment under Section 201 IPC. All the sentences were directed to run concurrently.

In the case of Hari Om Sharma Vs. State of U.P. And Anr., 2011 (1) ACR 569, wherein it was held that it is established principle of law that no one should be condemned unheard. It the opportunity for cross-examination of accused-appellant it would prejudice to him, so his valuable rights should not be curtained and he may be afforded an opportunity to cross-examine the witnesses (See. Jawahar Singh s/o Mishri Lal Vs. State of U.P., 2004 Cri. LJ 2413).

Thus, keeping in view the abovesaid fact we are of the considered opinion that even if there is some fault on the part of accused for not taking appropriate steps for cross-examining P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, thereafter when the opportunity was granted to him by way of recall the said witnesses for re- cross-examination he had failed to do so even in that facility his right to cross-examination cannot be curtained down in any manner and the same is in contravention of principles of natural justice and fair-play.

For the foregoing reasons, we are of the opinion that the matter should be remanded back to the trial court for reconsideration after giving opportunity to the accused for cross-examination of the prosecution witnesses. Accordingly, the appeal is allowed. Order dated 18.02.2008 passed by trial court is set aside and the trial court is directed to allow the accused/Kamlesh Singh to cross-examine the prosecution witnesses, namely, P.W.-1/Amar Singh and P.W.-2/Rajendra Singh and P.W.-5/Vijay Singh subject to payment of Rs. 9,000/- i.e. Rs. 3000/- each to the prosecution witnesses and the trial court is further directed to conduct trial of the case on day to day basis without giving unnecessary adjournment. Further as the appellant in jail, so he will remain in jail subject to outcome of the decision of the trial court.

Held: Para-

Case Law discussed:
(Green V Blake,[1948]IR 242),
Mohinder Singh Gill v The Chief Election Commissioner: (1978) 1 SCC 405,
Bhagwan Shukla, v. Union of India and others 1994 (6) SCC 154,
Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors. JT 2012 (10) SC 476,
Munna Lal Gautam Vs. State of U.P., 2007 (3) ACR 3231,
Hari Om Sharma Vs. State of U.P. And Anr., 2011 (1) ACR 569,
Jawahar Singh s/o Mishri Lal Vs. State of U.P., 2004 Cri. LJ 2413),

(Delivered by Hon'ble Anil Kumar, J.
&
Hon'ble Anil Kumar Srivastava-II, J.)

1. Heard Sri R.S. Tomar, learned counsel for appellant, Sri Izhar Husain, learned AGA and perused the record.

2. This appeal has arisen against the judgment and order dated 18.02.2008 passed by learned Sessions Judge, Lakhimpur Kheri in Sessions Trial No. 910 of 2004 (State Vs. Kamlesh Singh) arising out of Case Crime No. 568 of 2004 under Sections 364, 364, 302 & 201 IPC, P.s. Pradhan District Kheeri whereby accused was found guilty of the offence punishable under Sections 302, 364 & 201 IPC and was sentenced for imprisonment for life under Section 302 IPC, ten years rigorous imprisonment under Section 364 IPC and two years rigorous imprisonment under Section 201 IPC. All the sentences were directed to run concurrently.

3. According to the prosecution version, FIR was lodged by Amar Singh on 26.06.2004 stating that his son, namely, Swabhiman Singh aged about 6 years had gone in the field along with accused Kamlesh Singh on 25.06.2004 at about 10.00 a.m. Kamlesh Singh returned to the house but his son did not came back.

4. First Information report was lodged at Case Crima No. 568 of 2004, thereafter on 27.06.2004 accused-Kamlesh Singh arrested at 09.00 a.m. On pointing out the accused, the body of the deceased-Swabhiman Singh was recovered from bushes of the Rehua forest. Inquest proceedings were conducted on 27.06.2006. Postmortem of the dead body was conducted on 27.06.2006 at 04.20 p.m. and the following external injuries on the body of the deceased were found:-

(1) Abraded contusion 15 cms. X 10 cms. over both side of face just below right eye.

(2) Abraded contusion 10 cms. x 3 cms over front of neck, 3 cm below chin. ON dissection, underlying root of neck, trachea ring and hyoid bone were found fractured. Trachea found deeply congested.

(3) Contusion 15 cms. x 10 cms. over front of chest just below right clavicle. On the dissection, underlying 1st to 4th ribs on both sides found fractured. Both pleura, both lungs found lacerated and 50 ml. Clotted fluid blood was found present in chest cavity.

5. Investigating Officer prepared site plan. After concluding the investigation, chargesheet under Section 364, 302 & 201 IPC was submitted against the accused.

6. Accused was charged for offence punishable under Sections 364, 302, 201 IPC, who pleads not guilty and claimed trial.

7. In order to prove his case prosecution has produced P.W.-1/Amar Singh complainant and father of the deceased. P.W.-2/Rajendra Singh, witness of recovery of the dead body and sleepers of the deceased. P.W.-3/Rajendra Singh, his statement could not be recorded as he was aged about 6 years only and was not having mental status to depose before the court. P.W.-4/Dr. Ramesh Singh, who conducted postmortem of the dead body of the deceased. P.W.-5/Vijay Singh, who has conducted the investigation and P.W.-6/S.I. Gyaneshwar Yadav who has submitted chargesheet before the Court.

8. After appreciating the evidence on record, learned trial court has recorded a finding of conviction against the accused and convicted and sentenced accused as above.

9. The main thrust of the argument advanced by learned counsel for appellant is that in the present case the accused-appellant has been denied his valuable right of cross examination and once the valuable right of cross examination of the witnesses has been denied, it is in violation of principles of natural justice and fair-play as he is unable to put forward his case in defence in effective manner, so keeping in view the said facts, the impugned judgment passed by learned trial court is liable to be set aside.

10. Per contra, learned AGA on the other hand while supporting the impugned judgment submits that after recording of the evidence of P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, the right to cross examination has been afforded to the accused but he/his counsel did not turn up to cross examine the witnesses and an application for adjournment has been moved by his counsel which was rejected and the opportunity for cross-examination has been closed. The said order was challenged by the accused before this Court at Lucknow and this Court has given a aright to cross examine the witnesses subject to condition that the accused deposits Rs. 2000 i.e. Rs. 1000/- for each payable to the witnesses for cross examination and the copy of the said order may be produced within ten days.

11. Learned AGA further submits that in spite of the said order passed by this Court, the said order has not been produced before the trial court within time rather at a belated stage in the month of November, 2005 and the accused has not been deposited the amount, so keeping in view the said fact, the application moved on behalf of the accused for cross examination in pursuance to the order passed by this Court has been rejected. Thus, keeping in view the abovesaid facts, once again, the accused itself is of guilty then he cannot agitate the matter before this Court on the ground that his valuable right for cross-examination has been closed and on the basis of which it cannot be said that the impugned judgment dated

27.05.2005 passed by trial court thereby convicting and awarding the sentence to the accused suffer from any illegality or infirmity, so the appeal lacks merit and is liable to be dismissed.

12. We have heard learned counsel for parties and gone through the record.

13. Witness in a particular case plays a great role and importance as they are eyes and ears of the justice and on the basis of their evidence the court reaches to a correct conclusion in a particular case to give a decision in a case. Further as per the provisions of the Act which are stated hereinabove, it is the first right of prosecution to produce his witnesses in order to establish and prove his case, thereafter the accused got a right to cross-examine the said witness in order to establish that he is innocent in the matter. Thus, a right to cross-examination of an accused is a valuable right rather is a great role in order to defend him in the matter in issue.

14. So far as the facts of the present case are concerned, there is no quarrel or dispute between the parties. Only the bone of contention in the present case is that the right of cross-examination to the accused has not been afforded in the present case and the said point is to be considered and to be decided in the matter.

15. From the perusal of the record, the position which emerged out is that on 04.02.2005 the examination in Chief of P.W.-1/Amar Singh by the prosecution was closed, thereafter his cross-examination was deferred on the application of the accused and the witness was directed to appear for the said purpose on 17.03.2005 but on behalf of accused his counsel has not turned up to cross-examine the witness, so by an order dated 17.03.2005 the right of cross-examination of the witness P.W.-1/Amar Singh has been closed on 04.02.2005. Sri Rajendra Singh/P.W.-2 was also cross-examined and his examination was deferred on an application of the accused and for the said purpose the next date fixed as 24.03.2005. On the said date on behalf of the accused, nobody has turned up for cross-examination of the witness, as such on 04.05.2005 the right of cross-examination of P.W.-2/Rajendra Singh was also closed, thereafter on behalf of accused, an application has been moved for cross-examination and the date was fixed as 16.05.2005.

16. On 16.05.2005 the case was adjourned to 25.05.2005, thereafter to 27.05.2005. On the said date, the said witness, namely, P.W.-1/Amar Singh and P.W.-2/Rajendra Singh were present, however, the counsel for the accused did not turn up for cross-examination. In view of the said fact, the application moved on behalf of accused for cross-examination was rejected. Aggrieved by the said fact, the accused approached this court for redessal of his grievances and on 24.06.2005, an order was passed by this Court, relevant portion quoted hereinbelow:-

"Looking to the seriousness of charge for which the petitioner is facing trial and also keeping in view that the witnesses must be examined and cross-examined when they are in attendance and defence should not be permitted to unnecessary delay the matter, the prayer of the learned counsel is granted on costs of Rs. 2000/- i.e. Rs. 1000/- payable to each witness for their reappearance. This is further made clear that if on the next date, the witnesses are not cross-examined, by the defence, the trial

court shall be free to proceed further and discharge witnesses without cross-examining. The petitioner shall file a copy of this order before the trial court within 10 days."

17. Although by an order dated 24.06.2005, this Court has directed the accused to file the copy of said order before trial court within ten days but the same was not filed within the said period and filed on 22.11.2005 and the amount as directed by this Court i.e. Rs. 2000/-, Rs. 1000/- payable to each witness(for their reappearance) has not been deposited, so in view of the said fact, the application/request made on behalf of the accused for recall of the witnesses P.W.-1 & P.W.-2 for cross-examination were rejected on the ground that accused has also been examined under Section 313 Cr.P.C., thereafter final judgment has been passed.

18. In view of the abovesaid factual background, in order to decide the controversy involved in the present case, it is appropriate to go through the relevant provisions provided in respect to examination of witness in the Indian Evidence Act, 1872 (hereinafter referred to as the Act) as well as Criminal Procedure Code.

19. Chapter 10 of the Act deals with "**of the examination of witnesses**".

20. Section 135 of the Act provides as under:-

*"135- **Order of production and examination of witnesses** - -The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.*

Section 137 of the Act provides as under:-

*"137- **Examination-in-chief. Examination-in-chief**.-The examination of witness by the party who calls him shall be called his examination-in-chief.*

***Cross-examination**.-The examination of a witness by the adverse party shall be called his cross-examination.*

***Re-examination**.-The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination."*

And Section 138 of the act provides as under:-

*" 138- **Order of examinations** - Witnesses shall be first examined-inchief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination *- The re-examination shall be directed to the explanation of matters referred to in cross- examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*

21. In addition to abovesaid provisions, Section 309 of the Code of Criminal Procedure provides as under:-

"309- ***Power to postpone or adjourn proceedings****- (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.*

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

[Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.]

Explanation 1.-If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.-The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

22. And Section 311 of the Code of Criminal Procedure provides for power to summon the material witness or examine the person which reads as under:-

" 311. ***Power to summon material witness, or examine person present****. -- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. Recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

23. A bare reading of the abovesaid sections as indicated by the legislature in the Act as well as Code of Criminal Procedure, 1973, the position which exists is to the effect that the object underlying the said section is that there may not be a failure of justice on account of mistake or either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. So keeping in view the abovesaid facts in the instant matter no doubt the opportunity has been given to the accused for re-examination of the witnesses, namely P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, initially by the trial court and thereafter by the High Court and thereafter some fault/lacunae of first part is not applying the direction as given by the trial court and by this Court by an order dated 24.06.2005 even then his valuable right to cross-examine the witnesses which were produced on behalf of the prosecution in order to prove his case cannot be denied as by denying him the right to cross-examine his defence in the present case cannot be considered rather will not come into light which will against this well settled principles of natural justice.

24. Natural justice is a parameter of all the modern constitution of the world. I find that Black J has most aptly described it as" Natural justice understandably meant no more than justice without the adjective" (Green V Blake,[1948]IR 242). Justice Krishna Iyer in **Mohinder Singh Gill v The Chief Election Commissioner: (1978) 1 SCC 405** has traced its root in Kautilya's Arthasastra in following terms,

"Indeed, from the legendary days of Adam -- and of Kautilya's Arthasastra – the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

In the case of Bhagwan Shukla, v. Union of India and others 1994 (6) SCC 154 wherein paragraph no.3 (relevant portion)held as under:-

"The appellant has obviously been visited with civil consequence but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There, has, thus been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being hears. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequence should be passed without putting the employee concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.7.1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant."

25. In the case of **Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors. JT 2012 (10) SC 476**, Hon'ble the Supreme Court in paragraph no.3 held as under:-

"The principles of natural justice embody the right to every person to represent his interest to the court of justice. Pronouncing a judgment which adversely affects the interest of the party to the proceedings who was not given a chance to represent his/its case is unacceptable under the principles of natural justice."

26. In the case of **Munna Lal Gautam Vs. State of U.P., 2007 (3) ACR 3231**, this Court has held that it was a right of accused to cross-examine a witness to put his defence and it is not proper order to close his right of cross-examination and proceed to an order against him and further held in order to meet the ends of justice to protect the right of cross-examination of the accused to cross-examination to be provided to be provided to an appellant.

27. In the case of **Hari Om Sharma Vs. State of U.P. And Anr., 2011 (1) ACR 569**, wherein it was held that it is established principle of law that no one should be condemned unheard. It the opportunity for cross-examination of accused-appellant it would prejudice to him, so his valuable rights should not be curtained and he may be afforded an opportunity to cross-examine the witnesses (See. **Jawahar Singh s/o Mishri Lal Vs. State of U.P., 2004 Cri. LJ 2413**)

28. Thus, keeping in view the abovesaid fact we are of the considered opinion that even if there is some fault on the part of accused for not taking appropriate steps for cross-examining P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, thereafter when the opportunity was granted to him by way of recall the said witnesses for re- cross-examination he had failed to do so even in that facility his right to cross-examination cannot be curtained down in any manner and the same is in contravention of principles of natural justice and fair-play.

29. For the foregoing reasons, we are of the opinion that the matter should be remanded back to the trial court for reconsideration after giving opportunity to the accused for cross-examination of the prosecution witnesses.

30. Accordingly, the appeal is allowed. Order dated 1802.2008passed by trial court is set aside and the trial court is directed to allow the accused/Kamlesh Singh to cross-examine the prosecution witnesses, namely, P.W.-1/Amar Singh and P.W.-2/Rajendra Singh and P.W.-5/Vijay Singh subject to payment of Rs. 9,000/- i.e. Rs. 3000/- each to the prosecution witnesses and the trial court is further directed to conduct trial of the case on day to day basis without giving unnecessary adjournment. Further as the appellant in jail, so he will remain in jail subject to outcome of the decision of the trial court.

31. Office is hereby directed to certify this order to the court concerned immediately for compliance.

32. Record of the trial court should also be returned back immediately.

(2016) 9 ILRA 574
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 849 Of 2015

Saharanpur Cinema Exhibitors Association ...Petitioner

Versus

State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sumit Goyal, H.N. Singh

Counsel for the Respondents:
C.S.C., Chandra Kant Parekh

This writ petition has been filed under Article 226 of the Constitution praying for issue of a writ of certiorari quashing notification dated 22.09.2014 issued by Nagar Ayukt/ Municipal Commissioner, Saharanpur published in U.P. Gazette dated 10.01.2015 in so far as it relates to imposition of show tax on Cinema Halls, whereby rate of show tax has been revised from Rs. 20/- to 100/- per show.

Petitioner is an association of Cinema exhibitors running Cinema Halls at Saharanpur registered under the Societies Registration Act, 1860 (hereinafter referred to as the "Act, 1860"). Earlier Saharanpur had Nagar Palika governed by the provisions of U.P. Municipalities Act, 1916 (hereinafter referred to as the "Act, 1916") but vide notification dated 01.10.2009 published by State Government, exercising power under Section 3 of U.P. Municipal Corporation Act, 1959 (hereinafter referred to as the "Act, 1959"), read with Article 243-Q(1) of Constitution, covering a larger urban area of Saharanpur, it has been notified as Municipal Corporation and erstwhile Municipal Council stood dissolved. Since the date Municipal Council, Saharanpur has been notified as Municipal Corporation, no election has been held to constitute an elected body of Corporation at Saharanpur and it is still functioning under the Administrator who is exercising all powers of Corporation by virtue of Section 8(4) of Act, 1959, which has been inserted by U.P. Act No. 23 of 2005.

Admittedly in present case aforesaid procedure has not been followed. What has been done is that Tax Superintendent published a proposal of revision of show tax on 08.08.2014 giving ten days time to file objections and thereafter Municipal Commissioner approved said proposal on 20.09.2014 and that has been published in gazette on 10.01.2015. Under Act, 1959 two weeks time is permitted to make objection under Section 201 but in the present case ten days time was given for inviting objections. Said proposal thereafter was approved by Municipal Commissioner and notified in gazette. There is no sanction or approval of proposal by State Government as contemplated under Sections 200 and 201. Respondents no. 2 and 3, therefore, have completely misdirected themselves by making an amendment in existing provisions imposing show tax which was not permissible without following procedure prescribed under Sections 199 to 202 by virtue of provision of Section 204 of Act, 1959.

In this case it is not necessary for us to go into the question, whether Municipal Commissioner can validly exercise powers of Corporation, Executive Committee etc. But for our purpose assuming what is contended by respondents that Municipal Commissioner is entitled and empowered to discharge all functions etc. Of Corporation and Executive Committee etc., still if procedure prescribed for certain things, has not been followed, the act performed would be illegal and that is how impugned notification is not sustainable. Hence, impugned notification, in so far as it has enhanced rate of show tax, is illegal.

Writ petition is allowed. Impugned notification dated 22.09.2014 issued at the instance of Municipal Commissioner, Nagar Nigam, Saharanpur, in so far as it relates to show tax, is hereby set aside.

Held: Para-

Case Law discussed:
Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633,
Anjum M.H. Ghaswala (supra) and Dhananjaya Reddy (supra),
Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440,
Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477,
State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri H.N. Singh, learned Senior Advocate, assisted by Sri Sumit Goyal, learned counsel for the petitioner and learned Standing Counsel as well as Sri C.K. Parekh, Advocate for respondents.

2. This writ petition has been filed under Article 226 of the Constitution praying for issue of a writ of certiorari quashing notification dated 22.09.2014 issued by Nagar Ayukt/ Municipal Commissioner, Saharanpur published in U.P. Gazette dated 10.01.2015 in so far as it relates to imposition of show tax on Cinema Halls, whereby rate of show tax has been revised from Rs. 20/- to 100/- per show.

3. Petitioner is an association of Cinema exhibitors running Cinema Halls at Saharanpur registered under the Societies Registration Act, 1860 (hereinafter referred to as the "Act, 1860"). Earlier Saharanpur had Nagar Palika governed by the provisions of U.P. Municipalities Act, 1916 (hereinafter referred to as the "Act, 1916") but vide notification dated 01.10.2009 published by State Government, exercising power under Section 3 of U.P. Municipal Corporation Act, 1959 (hereinafter referred to as the "Act, 1959"), read with Article 243-Q(1) of Constitution, covering a larger urban area of Saharanpur, it has been notified as Municipal Corporation and erstwhile Municipal Council stood dissolved. Since the date Municipal Council, Saharanpur has been notified as Municipal Corporation, no election has been held to constitute an elected body of Corporation at Saharanpur and it is still functioning under the Administrator who is exercising all powers of Corporation by virtue of Section 8(4) of Act, 1959, which has been inserted by U.P. Act No. 23 of 2005.

4. Sri C.K. Parekh, learned counsel appearing for respondents no. 2 and 3, however, informed that this Amendment Act No. 23 of 2005 has been declared ultra vires of Constitution by this Court vide judgment dated 05.12.2011 passed in **Misc. Bench No. 11226 of 2011 (Sandeep alias Sandeep Mehrotra vs. State of U.P. and others).** We are also informed that State has preferred appeal before Supreme Court being Special Leave Petition (Civil) No. 34436 of 2011, which is pending and Court has only extended period for holding election.

5. Be that as it may, case set up by petitioner is that procedure for imposition of tax has been provided in Sections 199 to 204 of Act, 1959. Without following said procedure Chief Tax Assessment Officer, Nagar Nigam, Saharanpur published a notice on 08.08.2014 that a decision has been taken to revise rates of various taxes and fees and any person objecting thereto may file his objection. Thereafter alleging that no objection was filed, impugned notification dated 22.09.2014 has been published in U.P. Gazette dated 10.01.2015.

6. It is said that process followed by respondents is inconsistent with statutory provisions and impugned notification in so far as it has revised rate of show tax is illegal and without jurisdiction. It is also said that in the present case notification has been issued by Municipal Commissioner and not State Government. Municipal Commissioner has no jurisdiction or authority to revise such rate of show tax. It is said that power of Corporation has been conferred, to be exercised by Administrator, appointed under Section 8-AA and Municipal Commissioner has not been conferred such power. He is an employee of Corporation appointed under Section 58 of Act, 1959. He cannot function as Corporation and discharge functions as a substitute for Corporation.

7. Counter affidavit has been filed on behalf of respondents no. 2 and 3 stating that prior to 01.10.2009 there existed a Nagar Palika Parishad for City Saharanpur functioning under the provisions of Act, 1916. With effect from 01.10.2009, a notification was issued under Section 3 of Act, 1959 read with Article 243-Q(1) of Constitution and thereby Nagar Palika Parishad was replaced by Municipal Corporation. Nagar Palika Parishad during its functioning had already imposed certain taxes and fees under the provisions of Act, 1916. Show tax, i.e., Theater Tax was imposed under Section 128(1)(iii)(a) of Act, 1916. Petitioner-Members were paying show tax at the rate of Rs. 20/- per show prior to 01.10.2009. The State Government vide order dated 25.11.1995 informed that now for publication of rules and bye-laws of Municipalities, prior approval of Municipal Corporation and Nagar Panchayat is not required and as and when such rules and bye-laws are received shall be published in gazette as it is. This Government order was issued by Secretary, Urban Development to Director Printing and Publication. With respect to Saharanpur, Nagar Palika Parishad was in fact superseded and District Magistrate, Saharanpur was appointed as Administrator, when by notification dated 01.10.2009 Municipal Corporation, Saharanpur was created. The effect was that District Magistrate, as Administrator, continued to work. It is then said that Municipality is empowered to impose licence fee under Section 294 and it does not violate Article 19 of Constitution. The rate of Rs. 20/- per show has now been revised to Rs. 100/- per show after a long time. By virtue of Section 8-A of Act, 1959 an Administrator in law is deemed to be Corporation, Mayor, Committee or Municipal Corporation. Municipal Commissioner being Administrator is exercising all powers under Act, 1959 in view of judgment dated 27.11.2013 and

Government Order dated 24.01.2014. Thereafter several provisions of Act, 1959 are referred to. Sometimes respondents no. 2 and 3 have talked about licence fee and sometimes "Show Tax" as if they are not clear which show tax is actually a tax or fee.

8. A supplementary counter affidavit thereafter has been filed which has been sworn by Keshav Prasad, Tax Superintendent, Nagar Nigam, Saharanpur. He has said that sub-section (4) was inserted in Section 8 of Act, 1959 by U.P. Act No. 23 of 2005 but struck down by this Court in Sandeep alias Sandeep Mehrotra (supra). This Court also directed that till a newly elected representative resume work, affairs of Municipalities and Municipal Corporations shall be managed by Executive Officers and Municipal Commissioners. Consequently, State Government on 17.12.2011 issued orders directing District Magistrate to handover charge to Municipal Commissioner. Then details have been given of various Municipal Commissioners worked from time to time which in our view is not relevant. It is said that by virtue of Sections 8-AA and 579-A as read by this Court in **Sandeep alias Sandeep Mehrotra (supra)**, power of administration which was to be exercised by Administrator is to be exercised by Municipal Commissioner.

9. Sri H.N. Singh, learned Senior Advocate appearing for petitioner, did not dispute that under Act, 1959, Theater Tax can be imposed by Corporation under Section 172(2)(i). However, sub-section (3) of Section 172 provides that Corporation taxes shall be assessed and levied in accordance with the provisions of Act, 1959 and rules and bye-laws framed thereunder. Section 197 provides for certain exemptions from Theater Tax. Sections 199 to 206 lay down procedure for imposition of taxes.

10. Sections 199, 200, 201, 202 and 203 read as under:

*"**199. Framing of preliminary proposals**:- (1) When a Corporation desires to impose a tax specified in sub-section (2) of Section 172 it **shall by resolution direct the Executive Committee to frame proposals specifying** –*

(a) the tax, being one of the taxes described in sub-section (2) of Section 172 which it desires to impose;

(b) the persons or class of persons to be made liable, and the description of property or other taxable thing or circumstances in respect of which they are to be made liable, except where and in so far as any class or description is already sufficiently defined under clause (a) or by this Act;

(c) the amount or rate leviable from each such person or class of persons;

(d) any other matter referred to in Section 219 which the State Government requires by rule to be specified.

(2) ***Upon a resolution being passed*** *under sub-section (1) the* ***Executive Committee shall frame the proposals and also prepare a draft of the rules*** *which it desires the State Government to make in respect of the matters referred to in Section 219.*

(3) The ***Executive Committee shall, thereafter, publish in the manner prescribed by rule the proposals*** *framed under sub-section (1) and the* ***draft rules framed under sub-section (2) along with a notice in the form to be prescribed by rule****.*

200. Procedure subsequent to framing proposals*: - (1)* ***Any inhabitant*** *of the City* ***may, within two weeks from the publication of the said notice****, submit to the Corporation* ***an objection in writing to all or any of the proposals framed under the preceding section, and the Corporation shall take any objection so submitted into consideration and pass orders thereon by special resolution****.*

(2) ***If the Corporation decides to modify*** *the proposals of the Executive Committee, or any of them the Municipal Commissioner* ***shall publish the modified proposals and, if necessary, revised draft rules*** *along with a notice indicating that the proposals and rules (if any) are in modification of proposals and rules previously published for objection.*

(3) Any objections which may be received to the modified proposals shall be dealt with in the manner prescribed in sub-section (1).

(4) When the ***Corporation has finally settled its proposals, the Municipal Commissioner shall submit them along with the objections*** *(if any) made in connection therewith* ***to the State Government****.*

201. ***Power of State Government to reject, sanction or modify proposal****: - Upon receipt of the proposals and objection under the preceding* ***section the State Government may either refuse to sanction*** *the proposals* ***or return them to the Corporation*** *for further consideration* ***or sanction them*** *without modification or with such modification not involving an increase of the amount to be imposed, as it seems fit.*

202. Resolution of Corporation directing imposition of taxes:- (1) When the proposals have been sanctioned by the State Government*, the State Government,* ***after taking into consideration the draft rules submitted by the Corporation, shall proceed forthwith to make such rules in respect of the tax as for the time*** *being it considers necessary.*

(2) ***When the rules have been made the order of sanction and a copy of the rules shall be sent to the Corporation,*** *and thereupon the* ***Corporation shall by special resolution direct the imposition of the tax with effect from a date to be specified in the resolution****.*

203. Imposition*. - (1) A copy of the* ***resolution passed under Section 202 shall be submitted to the State Government.***

(2) Upon receipt of the copy of the ***resolution the State Government shall notify in the official Gazette****, the imposition of the tax from the appointed date, and the imposition of tax shall in all cases be subject to the condition that it has been so notified.*

(3) A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act."

(emphasis added)

11. For the purpose of making any alteration or abolition of a tax in respect of matters specified in Clauses (b) and (c) of Section 199(1), Section 204 provides that procedure prescribed in Sections 199 to 202, as far as, may be followed. Section 199(1)(c) talks of amount or rate and, therefore, if there is any alteration in the matter of amount or rate procedure prescribed by Sections 199 to 202 has to be followed.

12. A combined reading of aforesaid provisions show that following procedure has to be followed:

(1) A resolution by Executive Committee to be passed to frame proposals specifying tax, the person/ class of persons and description, upon whom it is to be leviable and the amount of rate etc.

(2) After resolution is passed the Executive Committee shall frame proposal and also a draft of rule. Proposal as well as draft of rule both shall be published by Executive Committee in the manner prescribed alongwith notice in the form prescribed by rule.

(3) Any inhabitant of city may make objections within two weeks from the date of publication of said notice.

(4) If any objection is made the Corporation shall consider same and pass order thereon by special resolution.

(5) If Corporation decides to modify proposal of Executive Committee the Mukhya Nagar Adhikari shall publish modified proposals and, if necessary, revised draft rule alongwith a notice indicating that proposals and rules are in modification of proposals and rules previously published, inviting objections.

(6) If any objection is again received against modified proposal it shall be considered in the manner prescribed in Section 200(1).

(7) When proposal is finally settled by Corporation, Mukhya Nagar Adhikari shall submit alongwith objections received to State Government.

(8) The State Government after receiving proposal and objection consider the same and may either refuse to sanction proposal or return same or sanction same without modification or with such modification not involving an increase of amount to be imposed, as it seems fit.

(9) When proposal has been sanctioned by State Government ti shall proceed to make such rule in respect of such tax. When rules are made by State Government, the order of sanction and copy of rules shall be furnished to Corporation who shall by special resolution direct imposition of tax with effect from the date specified in resolution.

(10) A copy of resolution passed under Section 202 shall be submitted to State Government.

(11) Upon receipt of copy of resolution the State Government shall notify in official gazette imposition of tax from appointed date.

13. Admittedly in present case aforesaid procedure has not been followed. What has been done is that Tax Superintendent published a proposal of revision of show tax on 08.08.2014 giving ten days time to file objections and thereafter Municipal Commissioner approved said proposal on 20.09.2014 and that has been published in gazette on 10.01.2015. Under Act, 1959 two weeks time is permitted to make objection under Section 201 but in the present case ten days time was given for inviting objections. Said proposal thereafter was approved by Municipal Commissioner and notified in gazette. There is no sanction or approval of proposal by State Government as contemplated under Sections 200 and 201. Respondents no. 2 and 3, therefore, have completely misdirected themselves by making an amendment in existing provisions imposing show tax which was not permissible without following procedure prescribed under Sections 199 to 202 by virtue of provision of Section 204 of Act, 1959.

14. It is well settled that procedure prescribed in statute to do something has to be followed in words and spirit and anything done otherwise would be patently illegal. This principle was recognized in **Nazir Ahmad Vs. King-Emperor AIR 1936 PC 253** and, thereafter it has been reiterated and followed consistently by the Apex Court in a catena of judgements, which we do not propose to refer all but would like to refer a few recent one.

15. In **Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9** in para 23 of the judgment the Court held :

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

16. In **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633**, it was held :

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

17. The judgments in **Anjum M.H. Ghaswala (supra) and Dhananjaya Reddy (supra)** laying down the aforesaid principle have been followed in **Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440**.

18. In **Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477**, it was held :

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

19. In **State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368** in para 26 of the judgment, the Court held :

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

20. In this case it is not necessary for us to go into the question, whether Municipal Commissioner can validly exercise powers of Corporation, Executive Committee etc. but for our purpose assuming what is contended by respondents that Municipal Commissioner is entitled and empowered to discharge all functions etc. of Corporation and Executive Committee etc., still if procedure prescribed for certain things, has not been followed, the act performed would be illegal and that is how impugned notification is not sustainable. Hence, impugned notification, in so far as it has enhanced rate of show tax, is illegal.

21. In the result, writ petition is allowed. Impugned notification dated 22.09.2014 issued at the instance of Municipal Commissioner, Nagar Nigam, Saharanpur, in so far as it relates to show tax, is hereby set aside.

22. No order as to costs.

(2016) 9 ILRA 582
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 1382 Of 1983

Ram Ratan **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
V.P. Srivastava, Abdul Majeed, N.I. Jafri

Counsel for the Respondent:
A.G.A

The appellant/accused Ram Ratan has filed this appeal, against the judgement and order dated 24.05.1983 passed by the learned Special/Additional Sessions Judge, Pilibhit in Session Trial No. 10 of 1983 (State v. Ram Ratan), arising out of Case Crime No.217 of 1982, P.S. Bilsanda, District Pilibhit, convicting the appellant/accused for the offence under section 302 I.P.C. and sentencing him to imprisonment for life, on the ground that the conviction of the accused is against the material evidence available on record and the sentence awarded to the appellant/accused is excessive.

After careful examination of material on record and in view of the direct evidence of crime against the present appellant by the ocular testimony rendered by the highly credible prosecution witnesses, whose presence on the spot has been established and cannot be doubted, which in turn is in consonance with the medical and other prosecution evidence/documents available on record, we are of the opinion that the prosecution has been able to prove its case beyond all reasonable doubt and has been able to bring home the guilt of the accused-appellant by credible and trustworthy evidence. Therefore, the learned Special/Additional Sessions Judge has rightly believed the prosecution story and also rightly recorded the finding of guilt against the present appellant. Hence, we do not find any ground to differ from the finding of guilt recorded by the learned Special/Additional Sessions Judge. The judgement and order dated 24.5.1983 passed by the Special/Additional Sessions Judge, Pilibhit in S.T. No. 10 of 1983 (State Vs. Ram Ratan) arising out of Case Crime No. 217 of 1982, P.S. Bilsanda, District Pilibhit does not require any interference.

In view of the above, the appeal preferred by the appellant Ram Ratan lacks merit and is, accordingly, dismissed. The conviction and sentence awarded by the learned Special/Additional Sessions Judge against the accused-appellant Ram Ratan are confirmed. The accused/appellant Ram Ratan is directed to serve out the remaining part of the sentence awarded by the learned trial court in the impugned judgement. The accused-appellant Ram Ratan is on bail. He shall surrender before the trial court for serving out the sentence within 15 days from the date of this judgement, failing which the trial court shall ensure his arrest and shall send him to jail for serving out the remaining part of the sentence in accordance with law.

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],

State of Punjab Vs. Surza Ram, 1995 Cri. L.J. 4161,

Shyamal Ghosh Vs. State of WB, AIR 2012 SC 3539, Dhari & others Vs. State of U.P., AIR 2013 SC 308, Shanmugam and another Vs. State of TN (2013) 12 SCC 765 and Nand Kumar Vs. State of Chhatishgarh 2015 Cri. L.J. 381.

Ashok Kumar Choudhary Vs. State of Bihar, 2008 (61) ACC 972 and Dimpal Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239

State of Rajasthan Vs. Ramesh, (2011) 3 SCC 685.

Budhi Singh Vs. State of Himachal Pradesh, (2012) 13 SCC 663.

K. Ravi Kumar Vs. State of Karnataka, (2015) 2 SCC 638.

Mancini Vs. Director for Public Prosecutor [1941] 3 All ER 272,

K.M. Nanavati Vs. State of Maharashtra, 1962 (1) Cri. L.J. 521,

Vasanta Vs. State of Maharashtra, AIR 1983 SC 361(1),

State of Karnatak Vs. Surendra, 1995 Cri. L.J. 3824,

B. D. Khunte Vs. Union of India and others, 2015 Cri. L.J. 243,

(Delivered by Hon'ble Alok Kumar Mukherjee, J.)

1. The appellant/accused Ram Ratan has filed this appeal, against the judgement and order dated 24.05.1983 passed by the learned Special/Additional Sessions Judge, Pilibhit in Session Trial No. 10 of 1983 (State v. Ram Ratan), arising out of Case Crime No.217 of 1982, P.S. Bilsanda, District Pilibhit, convicting the appellant/accused for the offence under section 302 I.P.C. and sentencing him to imprisonment for life, on the ground that the conviction of the accused is against the material evidence available on record and the sentence awarded to the appellant/accused is excessive.

2. Brief facts of the prosecution case are that two sons of the deceased Ram Bhajan namely Puttu Lal and Ram Ratan were living separately and their father Ram Bhajan (now deceased) was living with his younger son/accused Ram Ratan. The deceased Ram Bhajan owned 24-25 Bighas of

agricultural land. Earlier, before the date of occurrence, he distributed 50 Kgs. of the paddy to his son Puttu Lal, informant also. On 28.10.1982 at about 3.00 P.M. when Ram Bhajan (now deceased) was thrashing the paddy in front of the door of Daya Ram, he suggested his younger son Ram Ratan (accused) to part with some paddy to his elder son/informant Puttu Lal. Ram Ratan opposed the suggestion, by saying that not even a single grain shall be given to Puttu Lal, which evoked altercation between the Ram Ratan accused and Ram Bhajan. Meanwhile, the enraged accused Ram Ratan brought a sword from his house and cautioned his father Ram Bhajan that he would kill him, if he tried to part with a single grain to Puttu Lal, also charging his father that earlier, too, he had distributed 50 Kgs. of paddy to Puttu Lal. Whereupon Ram Bhajan (since deceased) replied that Puttu Lal also happened to be his son, so he certainly would give the paddy to him. Getting infuriated by the said reply accused Ram Ratan started inflicting repeated sword blows on Ram Bhajan, who tried to run away but fell down after being struck by a peg and resultantly, succumbed to the fatal sword injuries instantly, in front of the door of Hori Lal. On hearing the hue and cry raised by the informant and his neighbours, Daya Ram, S/o Ghurai, Hori Lal, S/o Sri Ram and also many other villagers arrived there and witnessed the incident. Thereafter, on being reprimanded by them (the witnesses) the accused Ram Ratan fled away with the sword, from the scene of occurrence. Leaving the dead body of his father Ram Bhajan lying in front of the door of the aforesaid Hori Lal, the informant, Puttu Lal gave written report (Exhibit Ka-1) of this incident to the Head Moharrir Ram Das Sharma at the Police Station Bilsanda, District Pilibhit at about 5.20 P.M. on the same day.

3. Subsequently, a chik FIR (Ext.Ka-2) was registered as Case Crime No. 217 of 1982 under section 302 IPC, which was entered in the General Diary (G.D.) (Ext.Ka-3), by the Head Moharrir Ram Das Sharma. Investigation of the case was conducted by the Sub Inspector Feru Singh Yadav, P.S. Bilsanda, District Pilibhit (PW-4). After conclusion of the investigation, charge sheet was submitted by him against the accused Ram Ratan. Thereafter, the case was committed to the court of Sessions, where he was charged for the offfence under section 302 IPC by the Special/Additional Sessions Judge, Pilibhit. The accused appellant denied the charge and pleaded not guilty. He further stated that he had falsely been implicated in the instant case due to enmity with regard to agricultural property and claimed to be tried.

4. In order to prove the charge, besides other papers, prosecution has filed written report (Exhibit Ka-1), formal chik report (Exhibit Ka-2), copy of the General Diary (Exhibit Ka-3), Search Memo of the house of the accused (Exhibit Ka-4), Inquest Report (Exhibit Ka-5), Diagram of the dead body (Exhibit Ka -6), Challan Nash (Exhibit Ka-7), sample of seal (Exhibit Ka-8), letter addressed to the C.M.O., (Exhibit Ka-9), Recovery memo of blood stained and plain earth (Exhibhit Ka-10), Site Plan (Exhibit Ka-11), Charge Sheet (Exhibit Ka-12), Post mortem report of the deceased (Exhibit Ka-13) and placed before the trial court relevant material Exhibits 1 to 5.

5. To bring home the guilt of the accused, the prosecution has also examined as many as six witnesses, P.W.-1, complainant Puttu Lal, P.W. 2 Daya Ram, P.W. -3 Hori Lal, P.W.- 4 Sub Inspector Pheru Singh Yadav, P.W.- 5 Constable Ram Pal. P.W.-6 Dr. AK Srivastava and closed the evidence.

6. Thereafter, the statement of accused-appellant Ram Ratan under section 313 Cr.P.C. was recorded after closing of the prosecution evidence and was provided opportunity to adduce evidence in defence. Admitting the inter-se relationship with the deceased and the informant, the appellant also admitted in his said statement that the deceased was residing with him at the time of the incident in question and the informant was living separately in the same village. He denied the entire prosecution case and the evidence adduced by the prosecution stating that he had been falsely implicated in the case due to enmity with regard to the landed property. Despite opportunity given, no evidence had been adduced by the appellant in support of his contention/defence.

7. After hearing the arguments of the parties the learned trial Judge by the impugned judgement and order convicted the present appellant and sentenced him as above. Being aggrieved by the aforesaid judgment and order of the trial court, this appeal has been preferred by the accused-appellant Ram Ratan.

8. We have heard Sri N.I. Jafri, learned counsel for the appellant and Dr. Abida Syed, learned A.G.A, for the State and carefully perused the evidence on record.

9. It has been argued on behalf of the appellant that the prosecution has utterly failed to prove the alleged motive, the prosecution story as well as the charge framed against the appellant-accused beyond reasonable doubt. The prosecution has also failed to examine independent witnesses, whose presence was natural at the scene of the crime or rather, examined interested/partisan as well as inimical witnesses, whose presence at the site of the crime was wholly doubtful, unnatural and improbable, having inter-se material contradictions as well as shaky testimony and as such they are not worthy of reliance. It is also contended by the learned counsel for the appellant that the appellant was made a scapegoat in the case by the informant and his pocket witnesses only with a view to usurp the entire property of the deceased.

10. It is further submitted by the learned counsel for the appellant that the stomach of the deceased was found empty by the doctor whereas it has been stated by the informant that the deceased had taken meal in the noon, which shows that the murder had actually taken place in the darkness of night by unknown persons. Further, that the weapon of assault/sword was not recovered for the reason best known to the prosecution. Belated inquest proceedings and postmortem of the deceased are some of the features in this case, which cast doubt on the prosecution story and affirming that the FIR was ante-dated and ante-timed as well as there appears manipulation in police and medical papers with a view to frame the accused in the matter. Lastly, based on several decisions of the Apex Court as well as this Court, it has been contended by the learned counsel for the appellant that for the sake of argument, if the complicity of the appellant is found to be proved then also this case falls in the ambit of exception-I to the Section 300 IPC, i.e., the offence committed by the appellant in the course of 'grave and sudden provocation'.

11. It has also been contended that there is material inconsistency between the ocular and the medical evidence; the entire investigation in the case is faulty as well as against the rules and procedures prescribed by law. Prosecution has failed to prove as to what prompted the appellant to

commit this murder. Counsel for the appellant has also questioned that under what circumstances only all the related, interested and pocket eyewitnesses were present at the same date, time and place to see this incident of murder. He has submitted that the entire prosecution story is concocted and presence of the eyewitnesses, as mentioned above, is highly doubtful, improbable and unnatural, therefore, the appellant accused is entitled to get benefit of doubt.

12. Refuting all the arguments advanced by the side of the appellant, Dr. Abida Syed, learned A.G.A. has submitted that the previous grudge in the mind of the appellant as well as immediate motive have been elaborately stated in the FIR and proved by the witnesses. The chik FIR was lodged promptly by the elder son of the deceased/Puttu Lal (P.W.-1). Similarly, the process of investigation was also started with equal promptness. It is also contended by the learned A.G.A. that the prosecution by placing cogent, oral and documentary evidence has proved the incident in question and the charge framed against the appellant/accused, beyond reasonable doubt. All the witnesses are trustworthy; their presence at the spot is very natural and probable being neighbours. Also their testimony are natural having no material contradictions, embellishments or exaggerations. Some minor contradictions, as pointed out by the learned counsel for the appellant, either in the inter-se statements of the eye witnesses or in the ocular and medical evidence are misconceived. The learned Sessions Judge has convicted the appellant/accused by a reasoned judgement and order; hence there is no scope for interference by this Appellate Court in the impugned judgement and order.

13. Before entering into the merits of the appeal, we would like to recall the observation made by the Apex Court in the case of **Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Crl) 222]** whereby duties of the appellate court have been outlined. 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."

14. 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 the 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."

15. Therefore, it is the settled proposition of law that the High Court, while exercising appellate jurisdiction in criminal appeal, is expected to appraise the credibility of evidence available on record and to draw the inference on the basis of material available on record and has not to be guided by the finding of acquittal or conviction recorded by the learned court below, bearing in mind the basic principles of criminal law regarding innocence of the accused.

16. In the light of the above guidelines, firstly, we would like to have a glance at the medical evidence, which is in the form of statement of Dr. A.K. Srivastava (P.W.6) and postmortem report (Ext. Ka-13). Though on behalf of the defence death/murder of Ram Bhajan has not been disputed, we are duty-bound to examine whether any offence was committed and if so, by whom.

17. Dr. A.K. Srivastava (P.W.-6) in his statement has stated that he was posted as Radiologist, District Hospital, Pilibhit on 29.10.1982. On that date at about 3.30 P.M. he conducted the postmortem examination on the corpse of Ram Bhajan, whose age was about 65 years. He deposed that the dead body was brought to him by constable Rampal CP 52 and Ram Pal CP 212, who also produced the necessary papers before him. On external examination of the body, he claimed to have found that the deceased was of an average built. Rigor mortis was present on the body and death had occurred about one day before. He found following ante-mortem injuries on the dead body of deceased:-

(1) Incised wound 10 cm x 2 cm x bone deep on the right side of the lower jaw.

(2) Incised wound 12 cm x 3 cm x right parietal bone, cut on the right side skull in the parietal region.

(3) An incised wound 8 cm x 2 cm x bone tissue deep on the back of right side skull, on the occipital region and was cut under the injury.

(4) Incised wound 7 ½ cm x 3 cm x bone deep on the front side of left fore-arm.

(5) Incised wound 2 cm x 1 cm in the middle part of the front of right middle finger.

(6) Incised wound 3 cm x 2 cm x bone deep on the right shoulder bone.

(7) Incised wound 9 cm x 3 cm x bone deep on the back of left elbow.

18. On the internal examination of the dead body of the deceased the doctor (PW-6) found fracture of the bones under injury Nos. 2 and 3, the membranes of the brain were found lacerated. The brain was also lacerated under injury nos. 2 and 3. The heart was empty. The stomach and small intestine were empty and faecal matter was present in the large intestines. Urine was present in the bladder. No abnormality was detected in the remaining organs.

19. The doctor (PW-6) opined that the death of the deceased was caused due to shock and haemorrhage as a result of the aforesaid injuries. The doctor further opined that in ordinary course, the aforesaid injuries found on the dead body of the deceased are sufficient to cause his instantaneous death. He proved the postmortem report (Ext.Ka-13).

20. We have gone through the deposition of Dr. A.K. Srivastava, which reveals that he has been cross-examined only on one point, in reply to which he had stated that if any person happened to fall down on the ground by striking on a peg, it was not necessary that any injury would be caused to him. He admitted that there was no abrasion on the right leg of the deceased. Except for the above point, no other question was asked by the defence to the said doctor, vividly describing the seven incised wounds on the body of the deceased Ram Bhajan. The witness has proved that the death of the deceased Ram Bhajan would have happened on the date and time of the incident, i.e., 28.10.1982 at about 3.00 P.M. and these injuries were probably inflicted by the sword. In his opinion, these fatal wounds were sufficient to cause death of the deceased in ordinary course.

21. Therefore, the testimony of P.W.-6 Dr. A.K. Srivastava is more or less unrebutted and the postmortem report (Ext.Ka-13) as well as the clothes found on the body of the deceased (Ext.Ka-3,4 and 5), proved by the witness before the trial court, corroborate the incident in question as also the entire ocular and other oral testimony and documentary evidence placed by the prosecution. Relying thereon in totality, we hold that the above-mentioned seven anti-mortem injuries found on the body of the deceased, out of which two are on vital parts and are also fatal in

nature, on the date and time of the incident in question, were caused only by a sword which resulted in the death of Ram Bhajan deceased.

22. Now, we deal with the ocular version of the occurrence. In this regard, we would like to refer to the statements of three eye witnesses P.W.-1 Puttu Lal, informant, P.W.-2 Daya Ram and P.W.-3 Hori Lal. Endorsing the promptly recorded FIR (Ext.Ka-2), the informant Puttu Lal (P.W.-1) has corroborated the written report (Ext.Ka-1) and stated in his deposition that he and the appellant/younger brother Ram Ratan were living separately for about 10-12 years but their father/deceased Ram Bhajan was living with his younger brother/appellant. He further stated that the entire agricultural land which was 24-25 Bighas was owned and cultivated by his father (deceased), the produce of which was being given to the appellant alone by his father regularly. But on the date of the incident at noon, when the witness was present in his house and the deceased was thrashing paddy crop in front of the door of Daya Ram (P.W.-2), it is stated that the deceased had told the accused that he had distributed 50 Kgs. of paddy to his elder son/the witness (PW-1) in the morning, as he was also one of his sons. Thereafter, he told the appellant that he had never given anything to the witness till date so he wanted to give some share from it to the witness Puttu Lal (PW-1). Whereupon, the appellant Ram Ratan got infuriated and started quarrelling with his father. During the said quarrel he told his father that he would not let him to part with a single grain to his brother/witness Puttu Lal (PW-1). In reply to him, the deceased asked him as to why he would not permit him to do so as the witness also was his son, which ensued in an altercation between the appellant and his father/deceased and in the course of this altercation, the appellant moved to his house and brought a sword from there and started inflicting repeated sword blows upon his father Ram Bhajan (deceased). The witness present at the spot then raised a hue and cry, which attracted Daya Ram (PW-2), Hori Lal (PW-3) and other villagers, who were residing in the vicinity of the place of occurrence. Due to the said sword injuries his father fell down on the ground, after moving barely 10 to 12 paces, and succumbed to his wounds in front of the house of Hori Lal (PW-3). Soon, thereafter, the appellant Ram Ratan started to run away, with the said weapon/sword used in this crime.

23. Similarly, in his testimony P.W.-2 Daya Ram has also supported the entire prosecution story, by showing the reason for his presence at the spot. According to him, on the date of the incident at noon he had proceeded to his pond after taking meal from his house. When he was returning from there, he heard much commotion near his house. Subsequently, when he reached near the house of one Hulla of his village, he found that the appellant was quarrelling with his father/the deceased. In the course of the said quarrel, the accused Ram Ratan inflicted sword blows upon his father/Ram Bhajan, who tried to save himself by running away, first towards the east and then towards north, but eventually fell down after being struck by a peg in front of the house of Hori Lal (PW-3). Thereafter, the accused after taking clothes from his house fled away towards the west of the village. Due to the said fatal sword injuries, Ram Bhajan died at the spot. At the time of the incident the witnesses Hori Lal (PW-3), Puttu Lal (PW-1), Shreeram, Murli and several other persons of the village had gathered at the place of occurrence.

24. In consonance with the testimony of the said witnesses (PW-1 and PW-2) and thereby corroborating the story of the prosecution, P.W.-3 Hori Lal has stated in his testimony that much before the date and time of the incident, at about 12.00 noon, he was present in his house and the deceased Ram Bhajan was thrashing paddy in front of the nearby house of neighbour Daya Ram. He stated that earlier also the deceased Ram Bhajan had given out some paddy to his son/informant Puttu Lal (PW-1). According to him, on the date, time and place of the occurrence, the deceased was telling the appellant to part with some paddy to his son Puttu Lal because earlier his younger son/appellant Ram Ratan used to take away his entire agricultural produce and no portion of it had ever been given to Puttu Lal (PW-1). When the deceased posed the aforesaid suggestion to the appellant, he replied to his father that if any portion of the paddy was given to his elder brother/informant then he would kill his father/deceased. But the deceased replied that he would certainly part with some paddy to him, saying that he, too, was his son. Whereupon, the appellant ran towards his house, brought a sword from there and inflicted one sword blow upon his father/Ram Bhajan. Consequently, the deceased with a view to save himself, ran helter and skelter, first towards the east and then after repeated sword blows, towards the north and while running he fell down, when a peg struck his leg, in front of the house of the witness (PW-3). In the course of this incident, they, the witnesses Daya Ram (PW-2) and Puttu Lal (PW-1) reached the spot. Soon, thereafter, the appellant fled away from the spot towards his house and from there he took something and then ran away towards the west of the village. Due to the said sword blows Ram Bhajan/deceased fell on the ground and died on the spot. According to him, when Ram Bhajan fell down, the appellant did not inflict any sword blow on him.

25. All these witnesses (PW-1 to PW-3) stood the test of cross-examination. We examined the entire direct ocular testimony of the three witnesses with due care and caution, which reflects that barring minor contradictions, their statements, by and large, are free from any major contradictions, embellishments or exaggerations.

26. On perusal of the site plan (Ext.Ka-11) prepared by the Investigating Officer (PW-4) it appears that the place of occurrence is in front of or near the houses of all the witnesses, therefore, their presence on the spot and witnessing the incident in question, is absolutely natural and probable. The testimony of all the ocular witnesses (P.W.-1 to P.W.-3) also appear to be natural and their statements are in consonance with the normal human conduct. There is no inconsistency in the inter-se evidence of the witnesses. Corroborating the entire prosecution documents in totality, their statements establish not only the immediate motive of the incident but also the date, time, place, nature of quarrel, the weapon used in crime, manner of assault, causing injuries by the appellant to the deceased as well as facts before, during and after the incident. The same holds true for the reason of the presence of the witnesses at the time of the occurrence and the nature of the injuries on the body of the deceased, which are in consonance with the more or less unrebutted medical evidence, as discussed above, and the site plan (Ext.Ka-11).

27. This is a case of patricide. The presence of all the witnesses at the place of occurrence and their witnessing the incident in question is proved beyond reasonable doubt by the prosecution. Notwithstanding the fact that there was some ill-will, regarding the distribution of the agricultural

produce of the deceased to the informant, between the appellant and the deceased prior to the incident, there was no occasion for the elder son of the deceased/witness Puttu Lal (PW-1) to falsely implicate his real younger brother/appellant for the murder of their father and let go the real culprits. Moreover, the other two witnesses (PW-2 and PW-3), against whom the defence was unable to show any animosity or ill-will, admittedly residing close to the place of occurrence and whose presence at the spot cannot be doubted, have also proved the complicity of the accused in this incident. All these witnesses appeared to be trustworthy witnesses. Their testimony are also found to be unshaken and credible.

28. In his statement P.W.-4 Sub Inspector Pheru Singh Yadav, the Investigating Officer, has proved the entire investigation proceedings. Corroborating the date and time of lodging of the First Information Report in this case by the informant Puttu Lal (PW-1) through his written report (Ext.Ka-1), he stated that the Head Moharrir Ram Das had prepared the chik no. 160 before him. He proved the said FIR/chik report (Ext.Ka-2) through secondary evidence. Similarly, he also proved and filed the copy of corresponding entry in the General Diary at report no. 16 of the date (Ext.Ka-3). During investigation he found that the body of the deceased lying in front of the house of Hori Lal (P.W.-3). According to him, he reached the spot on the same day at about 7.00 p.m., but due to prevailing darkness at the spot, he postponed the preparation of the inquest report. During the said night he remained there and recorded the statements of the eye witnesses Daya Ram (PW-2) and Hori Lal (PW-3), searched the house of the appellant and also prepared the memo for the same (Ext.Ka-4).

29. The next morning, the I.O. (PW-4) prepared the inquest report (Ext.Ka-5), Sketch of the dead body (Ext.Ka-6), Challan Nash (Ext.Ka-7) and after completing the necessary formalities, he sent the body of the deceased along with his mutilated left thumb, through Constable Ram Pal Singh and Constable Ram Pal Gupta for postmortem with the letter to CMO (Ext.Ka-9), along with other relevant papers and sample seal (Ext.Ka-8). Further, he recorded the statements of the witnesses of the inquest report, took samples of blood stained earth (Ext-1) and simple earth (Ext-2) and separately sealed them, after preparing the corresponding memo (Ext.Ka-10). Thereafter, he recorded the statement of the wife of Puttu Lal informant. On the pointing out of the witnesses, he prepared the site plan (Ext.Ka-11) and thereafter, recorded the statements of other witnesses. He received the postmortem report of the deceased (Ext.Ka-13) on 30.10.1982 and recorded the statements of the aforementioned Constables.

30. According to the said I.O. (PW-4), S.O. Dhanveer Singh had filed the charge-sheet (Ext.Ka-12) against the appellant. He also proved the charge-sheet dated 25.11.1982 (Ext.Ka-12). He had been cross-examined but in his cross-examination also, he proved the entire investigation proceedings. No material contradiction, omission or commission has been shown in his testimony which discredit the prosecution case or lead to the inference that the investigation in this case was defective, tainted or made in a perfunctory manner. He also proved that the mutilated left thumb of the deceased was found near the dead body and not in any other place.

31. Lastly, the prosecution had examined P.W.-5 Constable/52 CP Ram Pal, as a link evidence, who has proved that he along with Constable Ram Pal Gupta accompanied the Investigating Officer to the place of occurrence, situated at village Bamrauli. The very next day on 29.10.1982, the Investigating Officer handed over the sealed body of the deceased, along with the sample seal and other relevant papers in their custody for postmortem examination. They, in turn, handed over the body of the deceased in a sealed condition to the Doctor, who conducted the postmortem on that very day. According to him, the body was intact while in their custody and was identified by them before postmortem. They received a sealed bundle, two sealed envelopes alongwith sample seal from the said doctor after the said postmortem and they lodged the same in the concerned police station. This witness has not been cross-examined by the defence and therefore, his testimony is uncontroverted, which further corroborates the prosecution case as well as the investigation proceedings.

32. In the statement under section 313 Cr.P.C. the appellant has admitted that he and the witness Puttu Lal (PW-1) are real brothers/sons of the deceased Ram Bhajan, living separately and the deceased/his father was residing with him. Except for these two admissions, the appellant has denied the entire prosecution story and stated that he had been framed in this case due to enmity with regard to the landed property. However, it is surprising to note that he had neither specifically denied the factum of his father's (since deceased) unnatural death nor even shown any cause or explanation, as to how his father died, who was actually living with him; rather he tried to escape from the liability by stating only that he was falsely being implicated due to the enmity over agricultural land, without elaborating the nature and details of such prior enmity. Despite opportunity given no evidence had been adduced by the appellant in his defence.

33. On perusal of the FIR (Ext.Ka-2), we found that the distance between the place of occurrence and the police station is 6 kms.. The date and time of the incident is 28.10.1982 at about 3.00 p.m., therefore, it appears that the FIR was lodged promptly, on the same day at 5.20 p.m., by the elder son of the deceased/elder brother of the accused Puttu Lal (PW-1). It contains the name of the accused-appellant, the immediate motive for the murder, the nature of altercation/quarrel, the manner of assault, the weapon used in the incident, date, time and place of the occurrence, names of the witnesses who were present at the time of the incident and witnessed it, nature and number of blows inflicted by the appellant, the result of the said blows on the deceased, who fell down and died due to the said injuries then and there at the spot and also the fleeing away of the accused with the weapon of assault. Therefore, it contains the entire prosecution incident in detail.

34. Perusal of the record shows that the police machinery immediately moved towards the place of the incident and the investigation proceeding was started at 7.00 p.m., as stated by the Investigating Officer (PW-4). It is also stated by the Investigating Officer that due to the prevailing darkness, the preparation of the inquest report in this case was postponed till the morning of the next day, but he started recording the statements of the witnesses present there. His statement finds support in the inquest report (Ext.Ka-5) and other papers of the investigation proceeding as well as the testimony of all other witnesses examined in the trial, including the Doctor and the Postmortem

Report (Ext.Ka-13). The injuries found on the body of the deceased are in consonance with the inquest report (Ext.Ka-5) also.

35. Once it is found that the FIR was promptly lodged after the incident, by the witness Puttu Lal (PW-1), and that set in motion the police machinery which started investigation on the spot immediately thereafter, it must be held that the content of the FIR would reflect the first hand account of what actually happened on the spot, as has been held by the Apex Court in the decision of **State of Punjab Vs. Surza Ram, 1995 Cri. L.J. 4161**, wherein it was observed by the Supreme Court that the FIR, which was promptly lodged and which contained detail outline of the prosecution case clearly corroborates the eye-witnesses' account.

36. It is in the light of the prompt lodging of the FIR in the present case, which corroborates the version of the eye-witnesses' account, thereby supporting the prosecution case in totality. In view thereof, there appears no manipulation, ante-dating, ante-timing of the police or medical papers or any concoction therein. On careful examination of materials on record, we believe that the entire testimony of the eye witnesses, examined by the prosecution in this case, along with the medical and police papers, fully corroborates the prosecution story, which in turn appears that the prosecution has proved all the ingredients of the offence/charge framed against the accused-appellant and the possibility of false implication of the appellant is entirely ruled out.

37. Now, we deal with the arguments advanced by the learned counsel for the appellant.

38. It is contended by the learned counsel for the appellant that the eye witness account placed by the prosecution does not deserve to be accepted as these witnesses (PW-2 and PW-3) had a soft-cornor for the informant Puttu Lal (PW-1) and the latter, with an intention to usurp the entire property of his father/deceased, had falsely implicated the accused.

39. We are unable to accept the said argument advanced by the learned counsel for the appellant. It is a broad daylight murder in the centre of a village 'abadi', surrounded by the residence of the eye witnesses as well as other villagers. The front doors of their residence open towards the spot of the crime. Even in the statement under section 313 Cr.P.C. the accused-appellant had not stated any single instance of animosity or ill-will against the witnesses testified before the trial court. The witnesses Daya Ram (PW-2) and Hori Lal (PW-3) appear to be most probable, natural and independent witnesses. In their cross-examination no concrete material has been elicited by the defence which casts any doubt in their veracity or the prosecution case. No specific suggestion has been given to them regarding any enmity or ill-will against the accused-appellant. Their presence at the spot is very natural and probable. Their testimony is in consonance with natural human conduct. Being the nearest residents of the place of occurrence their presence and witnessing the entire incident cannot be doubted. Moreover, there is no specific or cogent suggestion by the defence as to how and why the witnesses (PW-2 and PW-3) had soft-corner towards the brother of the accused/Puttu Lal (PW-1) and were inimical to the appellant.

40. The principle of law has now been settled that the testimony of a witness cannot be discarded merely because the witness is a family member, relative, inimical or interested/partisan. In such a case, the court has to adopt a careful approach, in analyzing the evidence of such witnesses and if the testimony of the said witness is otherwise found credible, the accused can be convicted on the basis of the testimony of such witnesses. The above ratio of law has been laid down by the Apex Court in the cases of **Shyam Babu Vs. State of U.P., AIR 2012 SC 3311, Shyamal Ghosh Vs. State of WB, AIR 2012 SC 3539, Dhari & others Vs. State of U.P., AIR 2013 SC 308, Shanmugam and another Vs. State of TN (2013) 12 SCC 765** and **Nand Kumar Vs. State of Chhatishgarh 2015 Cri. L.J. 381.**

41. Therefore, it is not appreciable that they have deposed only to falsely implicate the accused for the simple reason that they are either a family member/inimical or having soft-corner for the informant. The testimony of the eye-witnesses is that they saw the incident at the place of occurrence and they narrated the entire prosecution story. On the analysis of the testimony of all the three witnesses (PW-1 to PW-3) with due care and caution, nothing has been found in their evidence which supports the contention of the defence, rather on the touchstone of credibility, the testimony of all the direct ocular witnesses are found to be of credence. Their names also find place in the FIR. The entire evidence of the witnesses are in consonance with the medical evidence as well as site plan. Their testimony are also in consonance with the statements recorded during investigation. Hence there is no force in the contention of the learned counsel for the appellant.

42. Further, the contention that any elder brother would depose against his younger sibling and wish to falsely implicate him with a view to usurp the entire property of his own father and spare the actual culprit is neither tenable and nor acceptable by any stretch of imagination. In these type of cases, it is usually noticed that the family members try to save their relative by advancing doubtful evidence to save him from the gallows. Moreover, in the cross-examination, Puttu Lal (PW-1) had specifically stated that he had got the agricultural land of his uncle which was given to him by his father and therefore, there was no occasion for him to falsely implicate the accused-appellant just to gain the father's property and spare the real culprit in this case of daylight murder.

43. The informant Puttu Lal (PW-1) and Hori Lal (PW-3) have specifically proved the immediate motive for murder, against which there is neither any explanation from the side of the accused nor is there any apparent explanation from the evidence on record. The said motive is quite natural and probable and it is quite reasonable to believe that the accused, who was usurping the entire agricultural produce of his father for a long time, would have felt annoyed when his father/deceased wanted him to part with some portion of it to his elder brother. The said witnesses not only witnessed the incident but were close neighbours, who also described the scene of crime, vividly. Being a daylight murder it cannot be a case of wrong identification of the real assailant and nonwitnessing by the close neighbours residing there, in whose presence the entire incident of murder was committed. Therefore, we are unable to accept the argument that the witnesses had shielded the real assailant and named the accused-appellant just to gain the property of the deceased for Puttu Lal (PW-1), by falsely implicating his brother.

44. It was next argued by the learned counsel for the appellant that the witness Puttu Lal (PW-1) had admitted in his statement that his father had taken his meal in the noon but at the time of postmortem examination his stomach was found empty and therefore, the possibility cannot be ruled out that the murder had been committed in the darkness of the night.

45. It is also argued by the learned counsel for the appellant that the presence of Puttu Lal at the time of the incident is quite doubtful because he was living separately and the appellant was living with his father/deceased. We do not agree with the said contention, because even from the cross-examination of Daya Ram (PW-2) and Hori Lal (PW-3), it has been proved that during the course of the incident the witnesses and other persons had assembled and raised an alarm and called out to Puttu Lal (PW-1) saying that the deceased was killed by the appellant, whereupon Puttu Lal (PW-1) reached the spot and chased the appellant along with others, but he could not be caught with the weapon of assault at the spot, therefore, we do not find force in the above arguments of the learned counsel for the appellant. There is no cross-examination regarding the point of variation of time of death to the doctor (PW-6). The incident is said to have taken place at about 3.00 p.m. and it is not surprising that by the time his murder was committed, the meal taken by him had been digested because the villagers take the meals in the early hours of the day. By carefully scanning the entire testimony of three direct ocular witnesses it is clearly established that the presence of the witnesses at the spot at the time of the incident and their witnessing the said incident cannot be doubted.

46. It was also contended by the learned counsel for the appellant that the evidence of witness Hori Lal (PW-3) appeared to be shaky because in his cross-examination he had stated that when the incident took place, he was inside his house and on hearing the hue and cry he came out and saw Ram Bhajan lying near the peg and Ram Ratan accused going towards the west. We do not find ourselves in agreement with the contention of the learned counsel for the appellant because the door of the house of witness Hori Lal opens towards the place of occurrence. Corroborating the immediate motive of the incident he had clearly stated in his statement that the accused had inflicted repeated sword blows to the deceased Ram Bhajan and emphatically denied the suggestion given by the defence about non-witnessing the incident in question, which clearly reflects that he had seen the entire incident and especially the accused inflicting repeated sword blows to the deceased. The minor discrepancies pointed out by the side of the appellant are quite natural, which makes the testimony of the witness more credible. Therefore, his testimony also proves the prosecution version and the charge of murder committed by the accused.

47. The evidence of a witness can not be read in piece-meal but it should be read in totality. Perusal of the statement of Hori Lal (PW-3) as a whole negates the above contention of the appellant. The Apex Court in the cases of **Ashok Kumar Choudhary Vs. State of Bihar, 2008 (61) ACC 972 and Dimpal Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239** has propounded that if the testimony of an eyewitness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then

the testimony of an eyewitness has to be accepted and acted upon. Distinctions between 'normal discrepancies' and 'material discrepancies' are that while 'normal discrepancies' do not corrode the credibility of a party's case, 'material discrepancies' do so.

48. It is further submitted by the learned counsel for the appellant that even though in this case the FIR and the police action were alleged to have been prompt, the weapon of assault used in the crime, i.e., the sword could not be recovered by the Investigating Officer despite the fact that the house of the appellant is situated close to the place of incident. We do not find any force in the said submission of the learned counsel for the appellant because the entire evidence on record clearly shows that the appellant, after committing the crime, fled away from the place of occurrence along with the said sword. The search memo of the house of the appellant (Ext.Ka-4) shows that the house of the appellant was searched by the police on the date of the incident itself in the presence of the witnesses but no incriminating material, weapon of assault/sword was recovered from his house. The record of this case pertaining to the court of Ist Additional Munsif Magistrate, Pilibhit reveals that the accused had ultimately surrendered before the court on 18.12.1982. Therefore, in the light of the above facts and circumstances, the conduct of the accused after committing the crime itself speaks volumes of his involvement in the incident. It is also apparent that there was no possibility of recovery of the weapon of assault, i.e., sword in this case. Merely, non-recovery of the weapon of offence/sword cannot relieve the appellant from the charge of murder in this appeal. The above contention of the learned counsel for the appellant is misconceived.

49. The learned counsel for the appellant further contended that the FIR and all the police papers prepared in this case were ante-dated and ante-timed. We do not subscribe to the view of the learned counsel for the appellant. As discussed above, we found that the first information report in this case was lodged very promptly by the elder brother of the appellant and the police machinery was set in motion thereafter, very promptly. The delay in inquest proceeding has been sufficiently explained by the Investigating Officer (PW-6) himself, and the inquest report (Ext.Ka-5) also contains the copy of FIR and crime number etc. Similarly, the unchallenged statement of P.W.-5 constable Ram Pal, who has proved the factum of receiving the sealed body of the deceased along with the papers etc. in his custody for handing it over to the doctor for postmortem also corroborates the testimony of the I.O. as well as the inquest report (Ext.Ka-5) and all the police papers prepared on 29.10.1982. It has also been proved by the said witnesses that the police party including the I.O. remained at the spot in the night. The statement of the doctor Sri A.K. Srivastava (P.W.-6) and the postmortem report (Ext.Ka-13) prepared by him also corroborate the fact that the FIR in this case was lodged very promptly. There is no evidence on record to indicate any suspicion about the promptly lodging of FIR or the delay in police and medical proceedings in this case. The direct ocular testimony of the witnesses (PW-1 to PW-3), all the police papers and medical evidence are in consonance. There is also no inter-se major contradiction between the testimony of the witnesses examined by the prosecution to establish the prosecution case, and hence, there is no force in the contention of the learned counsel for the appellant.

50. It is also argued by the learned counsel for the appellant that the investigation in this case is tainted and defective. In support of his contention the learned counsel only stated about the

delay in preparation of inquest report (Ext.Ka-5) and non-recovery of weapon of assault/sword. As we have discussed above, the delay in preparation of inquest report as well as non-recovery of weapon of assault/sword have sufficiently been explained by the prosecution; therefore, the argument of the learned counsel for the appellant is baseless.

51. Lastly, the learned counsel for the appellant has argued that if the case of the prosecution is found to be proved and conviction of the appellant maintained, even then as the homicide in this case has been caused by the appellant due to grave and sudden provocation given by the deceased, the only offence under section 304 IPC is likely to be proved, and hence the learned trial court has erred in convicting and sentencing the accused under section 302 IPC. To buttress his argument, the learned counsel for the appellant has placed reliance on the following decisions of the Apex Court:

(1) State of Rajasthan Vs. Ramesh, (2011) 3 SCC 685.

(2) Budhi Singh Vs. State of Himachal Pradesh, (2012) 13 SCC 663.

(3) K. Ravi Kumar Vs. State of Karnataka, (2015) 2 SCC 638.

52. We have gone through the aforementioned decisions submitted by the learned counsel for the appellant. The facts and circumstances in all these decisions entirely differ from this case. Therefore, the principles of law laid down in these decisions are not applicable to the facts and circumstances of the present case.

53. The word **Provocation** has been defined in the **Oxford Dictionary**, as an action, insult, etc. that is likely to provoke physical retaliation. The term **grave** only adds an element of virulent intensity to what is otherwise likely to provoke retaliation.

54. In the case of **Mancini Vs. Director for Public Prosecutor [1941] 3 All ER 272**, the word **provocation** and its applicability in crime has been defined as follows:-

*"it is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result, must be such as temporarily deprive the person provoked of the power of self-control as a result of which he commits the unlawful act which caused death. The test to be applicable is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in **Rex V. Lesbini** so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."*

55. Similarly in the decision of **R. Vs. Duffy [1949] 1 All ER 932,** the term **provocation** and its consequence has been explained as under:-

"The whole doctrine relating to provocation depends on the fact that it cause, or may causes, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

56. The legal connotation of **'Grave and sudden provocation' in P Ramanatha Aiyar's Concise Law Dictionary** is given as under:-

"Intensely stirring up a person to such a pitch of anger or hatred abruptly that he instantly loses control over himself and is led to do what he would not do if he could weigh or contemplate the nature or significance of his act. [S. 300, except. 1, IPC (45 of 1860)]; [S. 222, ill. (b), Cr. PC 1973 (2 of 1947)]."

The **'Grave and sudden provocation'** as provided in the Exception-I of Section 300 IPC is quoted herein below:

*"**Exception 1.--When culpable homicide is not murder**.--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:--

(First) --That the provocation is not sought or voluntarily pro-voked by the offender as an excuse for killing or doing harm to any person.

(Secondly) --That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exer-cise of the powers of such public servant.

(Thirdly) --That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

57. In the leading case of **K.M. Nanavati Vs. State of Maharashtra, 1962 (1) Cri. L.J. 521**, the Apex Court has provided four elements to test the **grave and sudden provocation** in a particular case, which are as follows:-

"(85) The Indian law, relevant to the present enquiry, may be stated thus:

(1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.

(2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to Section 300 of the Indian Penal Code.

(3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

(4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

58. In the case of **Vasanta Vs. State of Maharashtra, AIR 1983 SC 361(1)**, while dealing with a similar matter,. the Apex Court has rejected the contention of the appellant and observed as under:-

"It appears that there was some verbal altercation as a result of which the deceased had caught the hand of the accused, whereupon the accused assaulted the deceased with a knife with very great force according to medical evidence. In view of the medical evidence and injuries received by the deceased the case squarely falls within four corners of Section 302, IPC. Mr. Lalit, however, submits that the case falls under Section 304, Part 2, I.P.C. in view of serious altercations between the parties as held by the trial Court. We are, however, unable to agree with this contention because there is nothing to show that the altercation was of such a serious nature which could cause sudden provocation. Secondly, the nature of injury, namely, the stab on the chest which resulted in the fracture of the 6th rib and injured the heart and the lung and which according to the doctor was given with great force showed that it was most cruel and therefore the case squarely falls under Section 302, I.P.C. We are in complete agreement with the High Court that the offence falls under Section 302, IPC and the appellant was therefore, rightly convicted by the High Court."

59. In a similar nature case, as the case in hand, the Karnataka High Court in **State of Karnatak Vs. Surendra, 1995 Cri. L.J. 3824**, it has been categorically concluded as follows:-

"It cannot be said that the deceased gave him any provocation because after the quarrel the accused went back to his house and brought knife. So when he stabbed, there was no provocation of any sort by the deceased. The case, therefore, clearly falls under Section 302 IPC."

60. In a latest decision of **B. D. Khunte Vs. Union of India and others, 2015 Cri. L.J. 243**, the Apex Court has provided five ingredients for a case to fall under **Exception-1 to Section 300** of the IPC, which are quoted herein below:-

"What is critical for a case to fall under Exception 1 to Section 300, IPC is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder:

(1) The deceased must have given provocation to the accused.

(2) The provocation so given must have been grave.

(3) The provocation given by the deceased must have been sudden.

(4) The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and

(5) The offender must have killed the deceased or any other person by mistake or accident during the continuance of the deprivation of the power of self-control."

61. Bearing these principles in mind if we look at the facts of this case, we find that in the case in hand there was some verbal altercation and quarrel between the appellant and the deceased on the point of distribution of some part of the paddy to his son/elder brother of the appellant before the crime. In the said altercation, when the deceased refused to accept the obstinate stand of the appellant/his younger son and insisted on parting with some portion of the paddy to his elder son/Puttu Lal informant, the appellant was infuriated. Whereupon, the appellant went to his house and brought a deadly weapon/the sword from there and started inflicting repeated sword blows (as many as seven blows) several of which were dealt with very great force, according to medical evidence, to the deceased/his own father, which resulted in his instantaneous death. All these circumstances do not betray any signs of grave, leave alone grave and sudden provocation, to have disturbed the appellant's mental equilibrium or deprived him of self-control, which is an essential attribute of 'grave and sudden provocation' to qualify as a mitigating factor under Exception-I to Section 300 IPC.

62. Even if such nature of altercation/quarrel took place between the appellant/younger son and the deceased/father, as proved by the prosecution, we do not believe that it provoked the appellant to such an extent as to prompt him to fetch a deadly weapon/sword from his house and brutally kill his own father/deceased by inflicting repeated sword blows; rather it appears to be a case of self-created provocation by the appellant himself. Given the facts of the present case normally a reasonable man belonging to the same class of society as the accused, placed in the said situation in which the accused was placed, would not be so provoked as to lose his self-control for

committing the said offence. The conduct of the appellant during the quarrel when he went back to his house to fetch the sword clearly shows that the murder was a deliberate and calculated one.

63. Further, there was sufficient time for him to re-gain his self-control, even if he had not re-gained it earlier. Therefore, when the appellant inflicted repeated blows of sword to his father/deceased after returning from home, there was no fresh provocation of any sort by the deceased and it could not conceivably be a provocation for the murder, as emphasized in Exception-I to Section 300 of the IPC. We, therefore, hold that the facts of the case do not attract all the ingredients of the provisions of Exception-I to Section 300 of the IPC, as per the golden principles laid down by the Hon'ble Apex Court in the aforementioned decisions. In the final analysis of this point in question, the conviction of the appellant under section 302 of the Indian Penal Code and sentence of imprisonment for life passed by the trial court are correct. Hence the submission of the learned counsel for the appellant, contrary to it , cannot be accepted.

64. After careful examination of material on record and in view of the direct evidence of crime against the present appellant by the ocular testimony rendered by the highly credible prosecution witnesses, whose presence on the spot has been established and cannot be doubted, which in turn is in consonance with the medical and other prosecution evidence/documents available on record, we are of the opinion that the prosecution has been able to prove its case beyond all reasonable doubt and has been able to bring home the guilt of the accused-appellant by credible and trustworthy evidence. Therefore, the learned Special/Additional Sessions Judge has rightly believed the prosecution story and also rightly recorded the finding of guilt against the present appellant. Hence, we do not find any ground to differ from the finding of guilt recorded by the learned Special/Additional Sessions Judge. The judgement and order dated 24.5.1983 passed by the Special/Additional Sessions Judge, Pilibhit in S.T. No. 10 of 1983 (State Vs. Ram Ratan) arising out of Case Crime No. 217 of 1982, P.S. Bilsanda, District Pilibhit does not require any interference.

65. In view of the above, the appeal preferred by the appellant Ram Ratan lacks merit and is, accordingly, dismissed. The conviction and sentence awarded by the learned Special/Additional Sessions Judge against the accused-appellant Ram Ratan are confirmed. The accused/appellant Ram Ratan is directed to serve out the remaining part of the sentence awarded by the learned trial court in the impugned judgement. The accused-appellant Ram Ratan is on bail. He shall surrender before the trial court for serving out the sentence within 15 days from the date of this judgement, failing which the trial court shall ensure his arrest and shall send him to jail for serving out the remaining part of the sentence in accordance with law.

66. The copy of the judgement and entire record be transmitted back to the concerned trial court through Sessions Judge, Pilibhit for compliance within ten days. The concerned court will thereafter report the compliance to this Court within a month.

(2016) 9 ILRA 602
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 1408 Of 2014

Dharmendra **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Sunil Vashisth, Adesh Kumar, Ashish Singh, Brijesh Sahai, Rakesh Kumar Srivastava

Counsel for the Respondent:
Govt. Advocate

The instant appeal filed on behalf of accused-appellant is directed against the judgment and order dated 20.3.2014 passed by Shri J.K. Tiwari, Additional Sessions Judge, Court No.7, Meerut in S.T. No.331 of 2013 (State Vs. Dharmendra) whereby, the appellant has been convicted under Sections 376, 504, 506, IPC and sentenced to undergo rigorous imprisonment for a period of seven years with fine of Rs.5,000/-, rigorous imprisonment for a period of one year with fine of Rs.1,000/- and rigorous imprisonment for a period of three years with fine of Rs.2,000/- respectively. In default of payment of fine he has been directed to further undergo six months' additional imprisonment. All the sentences have been directed to run concurrently.

That on 20.9.2012 at 4.00 p.m. Ranveer gave a written report at police station Kharkhoda stating therein that on that day at 10.00 a.m. his minor daughter, hereinafter referred as victim, aged about 16 years had gone to the field to bring fodder. Dharmendra, a co-villager finding her alone in the field after showing country made pistol had raped her forcibly. At the alarm raised by her, his son Sumit aged about 14 years, who was taking Buggi to bring fodder from the field, reached there. At that Dharmendra had threatened him to kill him and asked him to remain silent and ran away. His son informed him. He had brought his daughter to lodge the FIR. Prior to that in view of sensitivity of the matter he approached the respectable persons of the village and father of the accused, but none came and father of Dharmendra had abused him and threatened to kill him and his family.

The findings recorded by the learned trial Judge are well substantiated from the record. Evidence has been rightly appreciated. Cogent reasons have been given in support of the findings of guilt. Appeal has no substance and deserves to be dismissed.

Appeal is dismissed. The appellant is in jail. He shall serve out his sentence. The period already undergone by him shall be adjusted in accordance with the provisions 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),
Krishnan Vs. State,AIR 2003 SC 2978],
Shri Narain Saha Vs. State of Tripura (2004) 7 SCC 775 ,
Santosh Mullya Vs.State of Karnataka, AIR 2010 SC 2247.
(State of West Bengal Vs. Mir Mohd. Umar, 2000 (41) ACC 298 SC).

(Delivered bv Hon'ble Pratyush Kumar, J.)

1. The instant appeal filed on behalf of accused-appellant is directed against the judgment and order dated 20.3.2014 passed by Shri J.K. Tiwari, Additional Sessions Judge, Court No.7, Meerut in S.T. No.331 of 2013 (State Vs. Dharmendra) whereby, the appellant has been convicted under Sections 376, 504, 506, IPC and sentenced to undergo rigorous imprisonment for a period of seven years with fine of Rs.5,000/-, rigorous imprisonment for a period of one year with fine of Rs.1,000/- and rigorous imprisonment for a period of three years with fine of Rs.2,000/- respectively. In default of payment of fine he has been directed to further undergo six months' additional imprisonment. All the sentences have been directed to run concurrently.

2. Heard Shri Rakesh Kumar Srivastava, learned counsel for the appellant, Shri Shailendra Awasthi, learned AGA for the State-Respondent and perused the record.

3. The facts giving rise to the present appeal may be summarised as under:-

4. That on 20.9.2012 at 4.00 p.m. Ranveer gave a written report at police station Kharkhoda stating therein that on that day at 10.00 a.m. his minor daughter, hereinafter referred as victim, aged about 16 years had gone to the field to bring fodder. Dharmendra, a co-villager finding her alone in the field after showing country made pistol had raped her forcibly. At the alarm raised by her, his son Sumit aged about 14 years, who was taking Buggi to bring fodder from the field, reached there. At that Dharmendra had threatened him to kill him and asked him to remain silent and ran away. His son informed him. He had brought his daughter to lodge the FIR. Prior to that in view of sensitivity of the matter he approached the respectable persons of the village and father of the accused, but none came and father of Dharmendra had abused him and threatened to kill him and his family.

5. At this check FIR was scribed. Case Crime No.563 of 2012 under Sections 376, 504, 506, IPC was registered at P.S. Kharkhoda and investigation was entrusted to S.I. Sanjay Singh, who started the investigation and recorded the statements of *inter alia* first informant and his son Sumit on the same day. Next day he inspected the spot, took into his possession clothes of the victim and recorded her statement. Statement of victim was also recorded under Section 164, Cr.P.C. After completing the investigation charge sheet was submitted.

6. The appellant stood for trial before the Court of Session, where he was charged under Sections 376, 504, 506, IPC, on his denial he was tried, convicted and sentenced as above. Feeling aggrieved the instant appeal has been preferred.

7. Learned counsel for the appellant in support of the appeal has submitted that no incident of rape had taken place and appellant was falsely implicated due to land dispute. This fact has been admitted by the victim, PW-1 in her cross examination. His second argument is that the victim at the relevant time was major, in support of this argument he has referred the medical evidence in the form of statement of Dr. Savita Vashisth, PW-4. His third argument is that there are discrepancies and contradictions in the evidence of prosecution specially the victim PW-1 in her examination-in-chief has stated that occurrence took place at 10.00 a.m. whereas during cross examination she says that at 10.00 a.m. she left her house to the field which took about half an hour. In this reference he further submits that in the examination-in-chief victim, PW-1 has claimed that she was alone when accused caught her and raped her, but during cross examination she has stated that her brother was with her. His fourth argument is that medical evidence does not support the prosecution version, no external mark of injury was found on her person nor internal examination reflected that the victim was raped.

8. On behalf of State-Respondent these arguments have been repelled. Learned AGA has submitted that enmity is double edged weapon. On its basis evidence of victim, PW-1 and Sumit, PW-3 cannot be discarded. He further submits that age of the victim has been opined by the doctor to be 17 years. She was a little mentally challenged person and she has categorically stated that rape was forcible, therefore, in the present case age of the victim is not material. Regarding contradictions he submits that these are minor and none of them touches the substratum of prosecution story and factum of rape.

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 entering into the merits of the respective argument I would like to place on record broad features of the evidence of the parties. They are summarized as under:-

12. **Victim, PW-1**, before administering oath and keeping in view her mental condition trial Judge had asked her questions to ensure that she realizes the sanctity of oath, thereafter administered the oath to her. She has reiterated the facts stated in the first information report. She has proved her statement recorded under Section 164, Cr.P.C., Exhibit Ka-1.

13. **Ranveer, PW-2** is the first informant and father of the victim. He has proved written report, Exhibit Ka-2, memo of sealing the clothes of the victim, Exhibit Ka-3. He has reiterated the facts mentioned in the first information report.

14. **Sumit, PW-3** is the brother of the victim. He has given eye witness account and supported the facts stated by his sister.

15. **Dr. Savita Vashisth, PW-4** had medically examined the victim on 20.9.2012 at 6.45 p.m. According to her, the victim was physically developed. During internal examination she found her hymen to be old torn. She has expressed her inability to give any opinion about commission of rape. She has proved medical examination report, Exhibit Ka-4.

16. **S.I. Sanjay Kumar, PW-5** is the Investigating Officer. He gave details of the steps taken in the course of investigation. He has proved site plan, Exhibit Ka-5 and charge sheet Exhibit Ka-6.

17. **Constable Surendra Singh, PW-6** is the scribe of check FIR. He has proved check FIR, Exhibit Ka-7, copy of the report of the General Diary, Exhibit Ka-8.

18. **Dr. M.P. Singh, PW-7** is the doctor, who on the basis of radiological examination determined the age of the victim to be 17 years. He has proved this report, Exhibit Ka-9.

19. **Dr. A.K. Jain, PW-8** is the Radiologist under whose supervision X-ray examination of the victim was conducted. He has identified X-ray plates, material Exhibit 1 & 2 and proved radiological report, Exhibit Ka-10.

20. Before the trial court case of the defence was of total denial on account of land dispute, which in brief is that grandfather of the victim had given 40 bigha land to his sister Phoolwati. Accused Dharmendra is real grandson of Phoolwati residing in the village of the first informant on the strength of property given by grandfather of the victim.

21. After close of prosecution evidence statement of the accused was recorded under Section 313, Cr.P.C. whereby he has denied the facts stated by the prosecution witnesses. According to him, he did not commit rape with the victim. She has deposed falsely on the pressure of her father. There was dispute regarding *gher* (place where cattle and grains are kept) between him and the first informant. According to him, first informant had occupied his *gher*.

22. In the defence on behalf of the appellant three witnesses were examined.

23. **Ajay Kumar, A.S.I., DW-1** has deposed that in the General Diary dated 20.9.2012 of P.S. Kharkhoda in report no.47 return of the victim after medical examination has not been entered. Thereafter, there is no entry to show that any witness was examined by the Investigating Officer.

24. **Momraj, DW-2** has deposed that first informant is his relative and accused Dharmendra is his nephew. Earlier accused used to live at Village Mahtampur. When he received land at Dhantaley (village where the first informant resides) he started to live there. Between the first informant and Dharmendra dispute arose on account of boundary of the fields. First informant had illegally occupied *gher* of the Dharmendra. Panchayat was held to resolve the dispute, but the first informant declined to vacate the *gher* and threatened to falsely implicate the accused. According to him, victim never goes to fields alone.

25. **Braham Singh, DW-3** is resident of Village Panauta. He has claimed himself to be member of the panchayat. According to him, dispute regarding land of Dharmendra occupied by the first informant could not be resolved in the panchayat and first informant had threatened to falsely implicate the appellant in a case of rape.

26. One witness Yogendra Sharma, CW-1 was examined by the trial court itself, who is clerk of the school where at the relevant time Sumit, PW-3 studied. According to him, on the day of occurrence he was absent from the school.

27. In the present appeal, as gathered from the statement of Dr. Savita Vashisth, PW-4, no mark of external injury nor any injury on the private parts of the victim were found, therefore, the medical evidence in the present case is inconclusive either to prove or disprove the truthfulness of the prosecution version.

28. So far as enmity is concerned, on behalf of the appellant my attention has been drawn towards the statement made by the victim, PW-1 whereat she has admitted that 40 bigha land were given by her grandfather to grandmother of the appellant and 80 bigha of land were given to Kundan, father of first informant Ranveer, PW-2. She has further admitted that her father had occupied *gher* of Phoolwati, grandmother of the appellant.

29. On behalf of Momraj, DW-2 and Braham Singh, DW-3 have been examined to show that a panchayat took place about dispute of *gher* of Phoolwati and father of the victim declined to accept the verdict of the panchayat and threatened the appellant to falsely implicate him in a false case of rape.

30. So far as enmity on account of agricultural land and *gher* is concerned, it is established, but I find evidence of Momraj, DW-2 and Braham Singh, DW-3 not worthy of reliance. Momraj, DW-2 is not resident of Dhantaley. His presence during panchayat has not been explained. He could not describe correctly where houses of first informant and the appellant are situated. Evidence of Braham Singh, DW-3 also does not inspire confidence. He is resident of another village. According to him, he was also called for panchayat, but according to him, he was not aware about the dispute. According to him, he only knew Jagmal, who had died. For these reasons, I find evidence of defence on the point of panchayat and threat extended by the first informant to be not substantiated.

31. In reference to determination of age though argument has been advanced that victim was major. Since plea of consenting party has not been raised and victim is little mentally challenged person, her consent, if any, would not confer any benefit to the appellant, therefore, age of the victim bears no significance in the present case.

32. The main thrust of the argument advanced on behalf of the appellant is about the appreciation of evidence of statement of the victim, PW-1 and Sumit, PW-3. At this juncture I would like to refresh my mind about some principles prescribing the manner in which evidence should be appreciated.

33. The Hon'ble Apex Court in the case of **Krishnan Vs. State, AIR 2003 SC 2978** in reference to appreciation of eye witness account has observed that it would require a careful independent assessment and evaluation for their credibility which should not be adversely

prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

34. Keeping in view of these principles in mind I have gone through the statement of the victim, PW-1. Learned trial Judge before administering her oath has put some questions to satisfy about her understanding about the sanctity of oath. After recording his satisfaction oath was administered and her statement was recorded. On behalf of the appellant first objection has been raised that after medical examination she did not return to the police station, therefore, Investigating Officer had no opportunity to record her statement on that day. Learned counsel for the appellant had made reference to the evidence of A.S.I. Ajay Kumar, DW-1, who has made this statement that on 20.9.2012 after medical examination return of the victim has not been entered in the General Diary. I do not find this ground to be relevant at all because in the General Diary only entry and exit of police personnel are entered as also registration of case or coming of first informant and the injured. It is not expected that in the General Diary entry would be made that after medical examination injured or victim returned to the police station or not, therefore, first ground is without substance.

35. The second argument is that there are contradictions in the statement of victim, PW-1. These contradictions have been referred by me hereinbefore. They do not touch the substratum of prosecution version. The Hon'ble Apex Court in the case of **Shri Narain Saha Vs. State of Tripura (2004) 7 SCC 775** has held that minor discrepancies in evidence are of no consequence.

36. Third ground is that evidence of victim is not corroborated from the medical evidence. As held in **Krishnan's case (supra)** while assessing intrinsic value of the statement of a witness such factors are not to be taken into account. More so in a case of rape uncorroborated testimony of the victim, if found reliable, is sufficient to sustain the conviction vide **Santosh Mullya Vs. State of Karnataka, AIR 2010 SC 2247**. In view of the legal position, third argument is also rejected.

37. Fourth argument is that the Investigating Officer did not send clothes of the victim for scientific examination or he found Chari (green fodder) disturbed at the place of occurrence is also of no significance. The Hon'ble Apex Court has held that lapses of the Investigating Officer would not be fatal for prosecution where ocular testimony is found credible and cogent **(State of West Bengal Vs. Mir Mohd. Umar, 2000 (41) ACC 298 SC)**.

38. Victim is the natural and probable witness of the rape. She has given satisfactory answers to the questions put to her during cross examination. Whether her answer to any question would be favourable for the prosecution or for the defence does not bear any significance to her. She has frankly admitted dispute regarding *gher*. She has frankly admitted that she had bitten the

appellant with her teeth out of anger. She does not worship the God. After going through her statement I found her testimony to be worthy of reliance and it inspires confidence of the Court.

39. The statement of the victim, PW-1 is corroborated by the statement of Sumit, PW-3, brother of the victim. First during trial defence took the plea that on that day he was at his school, but this plea stands negated by the statement of Yogendra Sharma, CW-1, clerk of Janhit Inter College where Sumit was studying at the relevant time. On the basis of original attendance register he has deposed that on 20.9.2012 Sumit was absent from his class. Extract of the original attendance register has been proved by him and photocopy thereof duly verified by the witness is available on record as Exhibit Ka-11. The witness has given reasons for his presence on the spot. He is natural and probable witness. He has faced the test of cross examination successfully. His testimony also inspires confidence of the court.

40. In this way prosecution has adduced the victim, PW-1 herself, who has supported the charge of rape by the appellant and her testimony is duly corroborated by the statement of Sumit, PW-3. Testimonies of both these are trustworthy, reliable and they inspire confidence of the Court. The arguments questioning their veracity are without substance, hence, they are rejected.

41. No other argument has been raised on behalf of the appellant. The findings recorded by the learned trial Judge are well substantiated from the record. Evidence has been rightly appreciated. Cogent reasons have been given in support of the findings of guilt. Appeal has no substance and deserves to be dismissed.

42. Appeal is dismissed. The appellant is in jail. He shall serve out his sentence. The period already undergone by him shall be adjusted in accordance with the provisions contained in Section 428, Cr.P.C.

43. Office is directed to communicate this decision to the court concerned forthwith and to send back the lower court's record.

(2016) 9 ILRA 610
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Revision No.- 1976 Of 2015

Durvasa Dwivedi ...Revisionist
Versus
State of U.P. & Anr. ...Opposite parties

Counsel for the Revisionist:
Sanjay Kumar Singh, C.K.Mishra, D.S.Mishra, Sailesh Pandey

Counsel for Opposite Parties:
Govt. Advocate, Daya Shankar Mishra, Prabhakant Singh, Shailesh Pandey,

This revision has been preferred against the judgment and order dated 5.5.2015 passed by the Sessions Judge, Mirzapur in Criminal Appeal No. 18 of 2015 (Shubham Pandey Vs. State of U.P.) whereby the order dated 20.3.2015 passed by Juvenile Justice Board rejecting the bail of juvenile, Shubham Pandey has been set aside and the juvenile, Shubham Pandey was released on bail.

This Court in the case of Amit Kumar Vs. State of UP, 2010 (71) ACC 209 (Alld) has expressed the similar view and has granted bail to the juvenile offender in heinous offence and held that seriousness of offence is no ground to reject the bail to a juvenile.
In this case, there is nothing either on record or in the report of the Probation Officer that after the release the revisionist would come in association with any known criminal or his release would expose him to moral, physical or psychological danger. In the post-mortem report of the two deceased, the cause of death were shock and hemorrhage as a result of gun shot injuries which were assigned to be caused by co-accused Gian Chandra Pandey, father of juvenile. The role assigned to the juvenile is only to cause incised wounds to the injured as well as to the deceased which was not opined as fatal. It is definitely not an aggravating factor which shows the depraved and perverse mind set, as such this court is of the opinion that granting bail to such juvenile would not defeat the end of justice.

the impugned order is liable to be confirmed.

Held: Para-

Case Law discussed:

Monu @ Moni @ Rahul @ Rohit Vs. State of U.P. [2011 (74) ACC 353],
Om Prakash Vs. State of Rajasthan and another [2012 (77) ACC 654],
Smt. Rajni Bhati Vs. State of U.P. and another) [2016 (95) ACC 552],
Virendra Vs. State of U.P. [2014 (6) ADJ 694],
Parag Bhati (Juvenile) through Legal Guardian Mother Smt. Rajni Bhati Vs. State of U.P. and another) [2016 (95) ACC 552] ,

Feroz alias Bhola Vs. State, (LAWS) (DLH) 2005-3-106,
Master Niku Chaubey Vs. State, 2006 (2) JCC 720; Delhi High Court,
Vijendra Kumar Mali v State of U.P. 2003 (1)JIC 103,
Amit Kumar Vs. State of UP, 2010 (71) ACC 209 (Alld),

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. This revision has been preferred against the judgment and order dated 5.5.2015 passed by the Sessions Judge, Mirzapur in Criminal Appeal No. 18 of 2015 (Shubham Pandey Vs. State of U.P.) whereby the order dated 20.3.2015 passed by Juvenile Justice Board rejecting the bail of juvenile, Shubham Pandey has been set aside and the juvenile, Shubham Pandey was released on bail.

2. Admittedly, opposite party no. 2, Shubham Pandey is adjudged juvenile, aged about 17 years and 29 days and special provisions are there for the bail of juvenile.

3. Brief facts of the case are that on 11.12.2014 at about 10:30 A.M., while the informant, Durvasa Dwivedi and his brother Mrityunjay Dwivedi, Dhananjay and Shiv Shankar Giri were escorting the pilgrims towards Maa Vindhyawasini Mandir, Gyan Chandra Pandey (accused/father of O.P. No. 2) Shubham Pandey, O.P. No. 2 obstructed them and alleged that it is they, who will carry out the pilgrimage and not the informant. On this, the accused persons abused the informant, to which they were desisted from doing so, but in the process both Gyan Chandra Pandey armed with a DBBL gun and Shubham Pandey, O.P. No. 2 armed with bhunjali (sharp cutting weapon) inflicted fire arm and bhunjali injuries at the brothers of the informant, i.e. Mrityunjay, Shiv Shankar Giri and Dhananjay, to which Mrityunjay and Shiv Shankar succumbed to injuries. The first information report about the aforesaid double murder case against the opposite party no. 2 and his father was lodged promptly by the revisionist on the same day on 11.12.2014 at 1:45 AM at the P.S. Vindhyachal, District Mirzapur as Case Crime No. 1206 of 2014 under Sections 307, 302 IPC and Section 7 of Criminal Law Amendment Act.

4. The Juvenile Justice Board on 20.3.2015 rejected the bail application of opposite party no. 2 primarily on the ground that the alleged offence involved a double murder in broad-daylight and in case opposite party no. 2 is released on bail, he is likely to abscond and also obstruct fair investigation. The Board also declined to place reliance on the report of the D.P.O., as it had not taken into consideration the entire facts and circumstances of the case, but the order of the Board has been interfered with under the impugned order dated 5.5.2015, whereby order of the Board dated 20.3.2015 has been set aside and opposite party no. 2 has been directed to be enlarged on bail but in the instant revision the operation of the Session's Judge order releasing the juvenile was stayed by interim order of this Court dated 1.6.2015.

5. Heard Sri Sanjay Kumar Singh, learned counsel for the revisionist, Sri Daya Shankar Mishra and Sri P.K. Singh, learned counsels for opposite party no. 2 and the learned AGA for the State-respondents.

6. Learned counsel for the revisionist contends that opposite party no. 2 is accused along with his father of double murder committed by them in day-light near Vindhwasni Temple. Manner of the murder has been done reflect the mature mind of the opposite party, therefore, protection under Juvenile Justice Act is not for such accused who commits heinous crime. Granting relaxation of being juvenile would certainly defeat the end of justice because blanket liberty has not been granted to the juvenile in all cases. It is further contended that depravity of mind of opposite party no. 2 is very much manifest. Such person cannot be allowed to succeed so as to dupe the course of justice in heinous offences. In this regard, learned counsel for the revisionist has relied upon a judgment of this Court of another Bench in the case of **Monu @ Moni @ Rahul @ Rohit Vs. State of U.P.** [2011 (74) ACC 353] in which it has held that observation of the Board is that his association is with unwanted persons and there is no control over him of his widowed mother. Moreover, no male relative there to keep control over the revisionist. In these circumstances, bail of the revisionist will defeat the end of justice.

7. Learned counsel for the revisionist has again relied on the case of **Om Prakash Vs. State of Rajasthan and another** *[2012 (77) ACC 654]* in which the Hon'ble Apex Court observed that Juvenile Justice Act which is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting trial and treatment of heinous offences. This would clearly be treated as an effort to weaken the justice dispensation system and hence cannot be encouraged. Again the learned counsel relied upon a judgment of the Hon'ble Apex Court in the case of **Virendra Vs. State of U.P.** *[2014 (6) ADJ 694]* in which it has held that in view of the Juvenile Justice Act exposure of juvenile to moral, physical and psychological danger made a ground to refuse bail. Bail can also be refused on ground that release would defeat ends of justice. However, ends of justice not defined under the Act but anything that militates against justice would result in defeating ends of justice. The Hon'ble Apex Court in the case of **Parag Bhati (Juvenile) through Legal Guardian Mother Smt. Rajni Bhati Vs. State of U.P. and another)** *[2016 (95) ACC 552]* has held that accused involved in grave and serious offence which he committed and gave effect to it in a well planned manner reflecting his maturity of mind rather than innocence. Plea of juvenility of accused more in nature of shield to dodge or dupe arms of law.

8. Per contra, learned AGA contends that in this case two persons have lost his life as a result of ante-mortem gun shot injuries inflicted by co-accused Gian Chandra Pandey, father of the opposite party no. 2. The injury inflicted by the delinquent juvenile are not fatal because in the post-mortem of two deceased the cause of death were due to ante-mortem fire arm injuries assigned to father of juvenile. The injury caused by bhunjali seems to have caused them no serious injury but nature of the crime shows the criminal maintainability of the juvenile.

9. Sri Daya Shankar Mishra, learned counsel for the opposite party no. 2 has contended that District Probation Officer has reported that the juvenile is the student of 12th class of which Social and Economic Status is common and his conduct is reported as good. There is no criminal antecedent reported against the credit of the juvenile but require proper control for which his mother

has also filed an affidavit to take care of his juvenile son. Learned counsel for the opposite party no. 2 submitted that it is natural instinct to accompany his father during altercation and there is no serious injuries said to be caused by the juvenile. His role come within the sphere of offence under Sections 324 which is bailable.

10. If we go by the statutory mandate, bail in case of a juvenile in conflict with law, is a general rule whereas refusal is an exception. Such refusal has also to be in consonance with the grounds mentioned in Section 12, which is reproduced below:

12. Bail of juvenile.- *(1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is 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 supervision of a Probation Officer or under the care of any fit institution or fit person) but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.*

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer incharge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

11. Delhi High Court in **Mohd. Feroz alias Bhola Vs. State, (LAWS) (DLH) 2005-3-106**, after referring to section 12 of Juvenile Justice (Care and Protection of Children) Act, 2000, has held as under:

"The aforesaid Section makes it mandatory for a person to be released if such person is apparently a juvenile unless of course, there are reasonable ground for believing that the release of such person is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. No such fears have been raised on the part of the prosecution. The learned counsel for the State, however, submitted that the petitioner is accused of directly committing the murder of the deceased by use of a knife and he should be shown no mercy. This is not a question of mercy. The provision is mandatory and stipulates that such a person who is apparently a juvenile "shall" be released on bail notwithstanding anything contained in the Code of Criminal Procedure. 1973 or in any other law for the time being in force subject only to the condition mentioned above in respect of which no fears have been raised by the prosecution."

12. In **Master Niku Chaubey Vs. State, 2006 (2) JCC 720**; Delhi High Court held that the nature of the offence is not a consideration for grant of bail, to the juvenile. The only considerations are those spelt out by Section 12, which requires bail to be granted unless the court feels that the release of the juvenile is likely to bring him into association of any known criminal or expose him to moral, physical or

psychological danger or that his release would defeat the ends of justice. It has been also held that seriousness of the allegations or gravity of the charges are not relevant in the case of a juvenile accused's request for bail.

13. In the case of **Vijendra Kumar Mali v State of U.P. 2003 (1) JIC 103** this Court has held as under:

"This Court in a number of judgments has categorically held that bail to the juvenile can only be refused if anyone of the grounds existed. So far as the ground of gravity is concerned, it is not covered under the above provisions of the Act. If the bail application of the juvenile was to be considered under the provisions of the Code of Criminal Procedure, there would have been absolutely no necessity for the enactment of the aforesaid Act. The language of Section 12 of the Act itself lays down that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, the juvenile accused shall be released. Not only this, the Parliament re-considered the entire matter and repealed the old Act of 1986 by introduced the new Act No. 56 of 2000, raising the age from 16 to 18 years. This has been done keeping in view the welfare of the child so that even after committing an offence a child may not become a hardened criminal but he may reform himself."

14. This Court in the case of **Amit Kumar Vs. State of UP, 2010 (71) ACC 209 (Alld)** has expressed the similar view and has granted bail to the juvenile offender in heinous offence and held that seriousness of offence is no ground to reject the bail to a juvenile.

15. In this case, there is nothing either on record or in the report of the Probation Officer that after the release the revisionist would come in association with any known criminal or his release would expose him to moral, physical or psychological danger. In the post-mortem report of the two deceased, the cause of death were shock and hemorrhage as a result of gun shot injuries which were assigned to be caused by co-accused Gian Chandra Pandey, father of juvenile. The role assigned to the juvenile is only to cause incised wounds to the injured as well as to the deceased which was not opined as fatal. It is definitely not an aggravating factor which shows the depraved and perverse mind set, as such this court is of the opinion that granting bail to such juvenile would not defeat the end of justice.

16. Taking in view the entire spectrum of facts and circumstances, materials available on record and legal position, I do not find any error or illegality in the impugned order dated 5.5.2015 passed by the Sessions Judge, Mirzapur and as such the impugned order is liable to be confirmed.

17. Accordingly, the revision is dismissed. The interim order, if any, is vacated. There is no order for cost.

(2016) 9 ILRA 615
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 2511 Of 2005

Manoj Alias Munna Patel **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Manish Tiwary, A.K. Awasthi, Rang Nath Pandey (A.C), Sunil Kumar Yadav,

Counsel for the Respondent:
Govt. Advocate, Arvind Kumar,

This criminal appeal has been filed by the appellant Manoj @ Munna Patel against the judgment dated 21.04.2005 and order dated 25.04.2005 passed by Additional District & Sessions Judge, Court No.3, Varanasi in S.T. No. 444 of 2004 convicting the appellant under Sections 302 and 323 IPC and sentencing him to imprisonment for life and a fine of Rs. 50,000/- under Section 302 IPC and one year rigorious imprisonment and a fine of Rs. 1,000/- under Section 323 IPC and in default of payment of fine awarded under both the counts three years additional rigorous imprisonment. The Additional District & Sessions Judge, Court No.3 Varanasi directed that both the sentences shall run concurrently and the amount of fine deposited by the appellant shall be paid to the heirs of the deceased as compensation.

Briefly stated, the facts of this case are that on the basis of written report (Ex. Ka-1) given by PW-1 Prem Chandra Patel, son of Ram Lal Patel, r/o Ramna at P.S. Lanka, District Varanasi on 07.02.2004 at about 12.40 p.m., case crime no. 56 of 2004, under Sections 302/323 IPC was registered against the appellant. The complainant in his written complaint alleged that while he alongwith his father Ram Lal Patel brother Suresh Chandra Patel and Ghanshyam Singh, Gram Pradhan of the village was pulling out grass from the field of Chhotey Lal and their grand father Mani Ram Patel was sitting at some distance from them, his cousin brother Manoj @ Munna Patel suddenly appeared at the place of incident and wielded repeated blows with his spade on the neck of his grand father and immediately ran away from the place of incident. His grand father died instantaneously while running away from the place of incident, the accused Manoj @ Munna Patel also assaulted his younger brother Harish Chandra with spade causing injuries to him.

We have very carefully examined the submissions made by the learned counsel for the parties and scanned the entire lower court record. Appellant Manoj @ Munna Patel was tried by learned Additional District & Sessions Judge, Court No.3 for having committed the murder of Maniram, the grand father of the complainant Prem Chandra Patel, PW-1.

In view of the foregoing discussion, the prosecution in our opinion has succeeded in proving the charges framed against the appellant beyond all shadows of reasonable doubt and that the trial court has not

committed any illegality or infirmity in convicting and sentencing the appellant under Sections 302 and 323 IPC.

This appeal which is devoid of any merit is dismissed.

Held: Para-

Case Law discussed:

In Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; (2010 AIR SCW 3707), State of U.P. v. Naresh and others (2011) 4 SCC 324.

(Delivered by Hon'ble B. K. Narayana, J.)

1. Heard Dr. C.P. Upadhyay, learned counsel for the appellant and A.N. Mulla, learned AGA for the State assisted by Sri Saghir Ahmad, learned AGA, J.K. Upadhyay, learned AGA, Sri Hasan Abidi and Sri Irfan Chaudhary, learned brief holders for the State.

2. This criminal appeal has been filed by the appellant Manoj @ Munna Patel against the judgment dated 21.04.2005 and order dated 25.04.2005 passed by Additional District & Sessions Judge, Court No.3, Varanasi in S.T. No. 444 of 2004 convicting the appellant under Sections 302 and 323 IPC and sentencing him to imprisonment for life and a fine of Rs. 50,000/- under Section 302 IPC and one year rigorious imprisonment and a fine of Rs. 1,000/- under Section 323 IPC and in default of payment of fine awarded under both the counts three years additional rigorous imprisonment. The Additional District & Sessions Judge, Court No.3 Varanasi directed that both the sentences shall run concurrently and the amount of fine deposited by the appellant shall be paid to the heirs of the deceased as compensation.

3. Briefly stated, the facts of this case are that on the basis of written report (Ex. Ka-1) given by PW-1 Prem Chandra Patel, son of Ram Lal Patel, r/o Ramna at P.S. Lanka, District Varanasi on 07.02.2004 at about 12.40 p.m., case crime no. 56 of 2004, under Sections 302/323 IPC was registered against the appellant. The complainant in his written complaint alleged that while he alongwith his father Ram Lal Patel brother Suresh Chandra Patel and Ghanshyam Singh, Gram Pradhan of the village was pulling out grass from the field of Chhotey Lal and their grand father Mani Ram Patel was sitting at some distance from them, his cousin brother Manoj @ Munna Patel suddenly appeared at the place of incident and wielded repeated blows with his spade on the neck of his grand father and immediately ran away from the place of incident. His grand father died instantaneously while running away from the place of incident, the accused Manoj @ Munna Patel also assaulted his younger brother Harish Chandra with spade causing injuries to him. After the registeration of the FIR PW-6, SHO Ajit Singh Chauhan, P.S. Lakna himself assumed the investigation of the case and reached the place of incident and prepared site plan Ex.Ka-7 and other documents, namely, police form 13, police form no. 379, letter addressed to CMO Ex. Ka- 8, 9 and 10 respectively and got the inquest report Ex.Ka-2 prepared on his instructions. He also collected blood stained and plain earth from the place of incident and prepared its recovery memo Ex.Ka-4

and obtained the signatures of both the witnesses thereon and thereafter dispatched the cadevar of the deceased with constables Sitaram and Jai Singh for post mortem.

4. The post mortem of the dead body of the deceased was conducted on 07.02.2004 at about 4.30 p.m. at B.H.U. by PW-5 Dr. A.K. Pradhan, who prepared his post mortem report Ex.Ka-6. Injuries of Mani Ram Patel, brother of complainant were examined by Dr. Arvind Kumar on 07.02.2004 at about 4.30 p.m. at Shiv Prakash Gupta Hospital Varanasi. The Investigating Officer after completing the investigation of the case submitted charge sheet Ex. Ka-11 under Section 302/323 IPC against the accused before the C.J.M., Varanasi. Since the offences enumerated in the charge sheet were triable by the Court of Sessions, the C.J.M., Varanasi vide his order dated 28.06.2004 committed the case for the trial of the accused to the Court of Sessions where it was registered as S.T. No. 440 of 2004 and from there it was made over to the court of Additional District & Sessions Judge, Court No.3 Varanasi. Charge was framed against the appellant under Section 302/323 IPC. The appellant pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined PW-1 Prem Chandra Patel, PW-2 Suresh Chandra Patel, PW-3 Ghanshyam Patel, as eye witnesses of the incident and formal witnesses PW-4 Rajesh Kumar Singh, PW-5 Dr. A.K.Pradhan, PW-6 Ajit Singh Chauhan and PW-7 Constable Bhadai Ram. In his statement recorded under Section 313 Cr.P.C. the appellant denied the entire prosecution case and further stated that families of the appellant and the complainant Harish Chandra and deceased Mani Ram were residing in the same house. The place of incident was at a distance of about one km. from their house in Village Narottampur. The parties were litigating before the Consolidation Authorities since 1993 and the appellant being the only earning member in his family, he was falsely implicated in the present case by the complainant with the sole object of breaking the back bone of the appellant's family financially. The appellant neither examined any defense witnesses nor filed any documentary evidence on record.

6. Learned Additional District & Sessions Judge, Court No.3, Varanasi after considering the submissions made by him by learned counsel for the parties and scrutinizing the evidence on record convicted the appellant under Section 302/323 IPC and awarded him the aforesaid sentences.

7. It has been submitted by learned counsel for the appellant that considering the distance between the place of incident and the promptness with which FIR of the occurrence appears to have been lodged by PW-1, unequivocally indicates that the incident had taken much before the time shown in the FIR and none had seen the same and the FIR was lodged when the dead body of the deceased was found, after due deliberations and consultation on the advise of the police personnel falsely implicating the appellants and the same is apparently ante timed. He next submitted that in view of the irreconcilable contradictions and inconsistencies in the testimonies of the three eye witnesses of the occurrence examined on behalf of the prosecution with regard to the manner in which the deceased had been assaulted and the medical evidence on record which does not corroborate the prosecution version vis a vis the manner of assault, the appellants conviction on the basis of the evidence of PW-1, PW-2 and PW-3 is not justified at all. According to PW-5 Dr. A.K.Pradhan who had conducted the post mortem of the dead body of the deceased, the injuries

found on the dead body of the deceased could have been caused by a sharp cutting weapon alone and spade not being a sharp cutting weapon and the prosecution also having also failed to produce the injured witness Harish Chandra who would have been the star witness of the occurrence and to lead any cogent evidence for proving that the blood stained spade which was recovered from the place of incident was used in committing the murder of the deceased, it cannot be said that the prosecution has proved its case against the appellant beyond all reasonable doubt and hence the conviction of the appellant recorded by the trial court and the sentence awarded to him cannot be sustained and are liable to be set aside.

8. Per contra Sri Sagir Ahmad, learned AGA submitted that the prosecution case stands fully proved from the evidence of PW-1 Prem Chandra Patel, PW-2 Harish Chandra Pate and PW-3 Ghanshyam Patel l who were present on the spot at the time of occurrence had witnessed the incident. The finding of guilt recorded by trial court is based upon cogent evidece and sentence awarded to the accused appellant is supported by relevant considerations and the impugned judgment which does not suffer from any infirmity, perversity or illegality does not require any interference by this Court. Thus this appeal which lacks merit is liable to be dismissed.

9. We have very carefully examined the submissions made by the learned counsel for the parties and scanned the entire lower court record. Appellant Manoj @ Munna Patel was tried by learned Additional District & Sessions Judge, Court No.3 for having committed the murder of Maniram, the grand father of the complainant Prem Chandra Patel, PW-1.

10. The only question which arises for consideration before us is that whether the prosecution has been able to prove its case against the appellant beyond all reasonable doubts or not.

11. In order to ascertain whether the prosecution has been successfull in proving its case beyond all shadows of reasonable doubts or not, the court has to examine the following issues :-

(I) FIR :- Whether the FIR is ante timed.

(II) Time of occurrence :- Whether the time coincides with medical evidence.

(III) Place of occurrence.

(IV) Manner of occurrence.

(V) Motive:- Whether the motive or the guiding force behind the occurrence was of such a strong character so as to pursuade to commits such heinous offence like murder in the case.

(VI) Credibility of witnesses.

12. Now we proceed to test the facts of the present case and the evidence on record on the touch stone of the aforesaid issues:-

(I) FIR - The first issue relates to credibility of the FIR. So far as the credibility of the FIR in this case is concerned, learned counsel for the appellant has questioned its reliability by inviting our attention to the time of occurrence mentioned in the FIR and the distance between the place of incident and the police station and the time at which the FIR was registered. The occurrence in this case is alleged to have taken place at 11.30 p.m. on 07.02.2004 in the field of one Chhotey Lal in village Narrottampur, District Varanasi. The written complaint of the incident Ex. Ka-1 was scribed by PW-1 complainant Prem Chandra Patel himself and given at P.S. Lanka which is admittedly at a distant of 5 kms. from the place of incident, on the same date at 12.40 p.m.

13. Advancing his arguments in this regard further learned counsel for the appellant learned counsel for the appellant invited our attention to the examination in chief of PW-1 Prem Chandra Patel in which he has deposed that the written report of the incident was scribed by PW-1 himself and given at the police Station by him where he had gone along with Harish Chandra, younger brother of his grand father. Learned counsel for the appellant next referred to the cross examination of PW-1 (pages nos. 12 and 13 of the paper book) in which he had stated that after the incident he along with the other persons present on the spot had chased the accused for about 25-30 feet and then returned back to the place where the dead body of Mani Ram was lying on the ground. He had stayed at the place of incident for about half an hour and thereafter he had gone to his house with Harish Chandra and remained there for about 10-15 minutes during which period he had scribed the written report himself and thereafter he had gone to P.S. Lanka along with Harish Chandra ona Scooter, registeration number whereof was UP65 N0537 and he had reached the police station Lanka at between 12.40 p.m.-1.00 p.m. where he had met a police officer. He had remained at the police station for 20-25 minutes and thereafter he had returned back to his house leaving behind Harish Chandra at the police station.

14. Learned counsel for the appellant also took us through the cross examinations of PW-3 Ghanshyam Patel (page 23 and 24 of the paper book) in which he has stated that he had put his signature on the inquest report at 1.00 p.m.. The Investigating Officer of this case Ajit Singh Chauhan had arrived at the crime scene at about 12.00 noon and the entire proceeding was completed by 2.00- 230 p.m.

15. However we are unable to agree with the contention of the learned counsel for the appellant that the FIR in this case is ante timed on the basis of the submissions made by him.

16. Time of his arrival at the P.S. stated by PW-1 in his examination in chief is not the exact time but estimated and variation of few minutes on either side is quite natural and justifiable. The FIR cannot be termed as ante-time simply because PW-3 has deposed in his cross examination that the I.O. of the case had arrived at the place of incident at about 12 noon and PW-3 had signed the inquest report at about 1.00 p.m. and entire paper work on the spot was completed by 2.00-2.30 p.m. for the simple reason that on page 23 of paper book, PW-3 in his cross examination has

categorically stated that he did not remember the time at which he had signed the inquest report. Thus the time of his signing the inquest report, arrival of the Investigating Officer at the place of incident and the time taken by the police in completing the necessary paper work on the spot as stated by PW-3, in his cross examination is the estimated time and not exact and accurate. According to the evidence of PW-3 the entire proceeding on the spot was completed by 2-2.30 p.m.. From the perusal of the inquest report Ex. Ka-2 it follows that the inquest had begun at 2.00 p.m. and the entire proceeding was completed at 3.20 p.m., hence there is no material discrepancy with regard to the time at which PW-1 had reached the police station and the time during which necessary paper work on the spot was completed by the police in the testimonies of PW-1 and PW-2. The discrepancies in the depositions of PW-1, PW-2 and PW-3 pointed out by the learned counsel for the appellant appear to be normal discrepancies. The discrepancies are due to normal error of observation and normal errors of memoray due to lapse of time and not material discrepancies.

17. The fact that written report of the incident Ex. Ka-1 was given by PW-1 at P.S. Lanka on 07.02.2004 is proved from the testimony of PW-4 Rajesh Kumar who has deposed before the trial court that on the basis of the written compliant given by PW-1 Prem Chandra Patel, chick FIR-Ex.Ka-5 was prepared by him at Chick No. 31 of 2004 and registered as case crime no. 56 of 2004 under Sections 302 and 323 IPC.

18. More over there is evidence of PW-7 Constable 1138 Bhadai Ram who had deposed before the trial court that on the date of the incident he was posted at P.S. Lanka and he had prepared the necessary G.D.entry vide Rapat No. 36 on 07.02.2004 at about 12.40 p.m. and proved the same as Ex. Ka-12. Thus in view of the evidence of PW-4 Rajesh Kumar and PW-7 Bhadai Ram, we are afraid that we cannot accept the contention of the learned counsel for the appellant that the FIR in this case is ante time.

19. The issues relating to the time of occurrence, place of occurrence, manner of occurrence, motive and credibility of witnesses are being taken up together.

20. Time of occurrence as mentioned in the FIR has been seriously disputed by the learned counsel for the appellant by submitting that the medical evidence on record does not corroborate the time of incident mentioned in the FIR.

21. According to the FIR the incident had taken place at about 12.30 p.m. on 07.02.2004. The post mortem of the dead body of the deceased was conducted by Dr. A.K.Pradhan on the same day at about 4.30 p.m.

"Cause of death according to the post mortem report Ex. Ka-6 is stated to be total decapicitation of head."

22. Learned counsel for the appellant has invited our attention to the cross examination of PW-5 Dr. A.K.Pradhan (page 27 of the paper book) in which he had stated that in order to fix the

time of death, the presence rigor mortis and other documents forwarded to the doctor who conducts the post mortem are taken into consideration. During winter season rigor mortis sets in early on the dead body and remains present for a considerably longer period than during the summer season.

23. The deceased had died on 07.02.2004 during winter season. At the time of the post mortem, rigor mortis was present on the whole body of the deceased meaning thereby that rigor mortis had developed from the head of the deceased upto his heel. During winter season rigor mortis remains present for 18-24 hours and after death, it takes about 4-6 hours for the rigor mortis to set in, about 12 hours for the rigor mortis to develop from head to feet and it remains present for 18-24 hours.

24. Learned counsel for the petitioner has also invited our attention to the post mortem report of the deceased and submitted that according to the post mortem report about 500 gms. undigested food (bread and rice) was found in the stomach of the deceased which total falsifies the time of the incident mentioned in the FIR. He then referred to the cross examination of PW-5 in which he had opined that it was possible that the deceased had died on 06.02.2004 between 9.10 p.m. and the food contents found in the stomach of the deceased may have been consumed by him four hours before.

25. Relying upon the cross examination of PW-5, learned counsel for the appellant has stated that the post mortem of the deceased was conducted on 07.02.2004 at about 4.40 p.m. and at the time of the post mortem rigor mortis had developed over whole of the body of the deceased and considering the fact that, even if it is assumed that the rigor mortis had set in after four hours of the occurrence, as the incident in question had taken place during winter it must have taken at least about eight hours for the rigor mortis to set in over the whole body of the deceased coupled with the presence of 500 gms. of undigested food in the deceased's stomach, then the time of incident mentioned in the FIR stands totally belied as in view of the medical evidence of the deceased could not have died after 2.40 a.m.

26. We however are not unable to agree with the contention of the learned counsel for the appellant, in view of the setted legal position that in case of conflict between the ocular testimony and medical evidence, it is the ocular evidence which will prevail unless it is proved that the ocular testimony is unreliable, untrustworthy and uncredible which does not appear to be so in the present case. The doctor had noted three identifiable ante mortem injuries on the dead body of the deceased together complete decapitation of head (three separateed injuries iidentifiable)". All the three eye witnesses have stated in their evidence in unison that the accused had weilded three blows on the deceased. More over PW-5 Dr. A.K.Pradhan has categorically stated on page -2 of his examination in chief that it was possible that the deceased had died on 07.02.2004 at about 11.30 a.m. due to the injuries inflicted on his neck which further could have been caused by an assault made by spade and the injuries so inflicted upon the deceased were sufficient to cause instantaneous death. Thus we do not find inany material in consistencies or discrepancies between the eye witness account of the incident and the medical evidence on record with regard to the time of occurrenc mentioned in the FIR.

27. Learned counsel for the appellant has not made any submissions challenging the correctness of the place of incident as disclosed in the FIR and in the testimonies of the prosecution witnesses, hence we find that the prosecution has fully succeeded in proving that the occurrence had taken place in the field of Chhotey in village Narrottampur.

28. So far as the issue relating to the manner of occurrence is concerned, learned counsel for the appellant has stated that there are glaring inconsistencies and contradictions in the testimonies of the three eye witnesses of the occurrence with regard to the manner in which the deceased had been allegedly assaulted by appellant and that the injuries found on the dead body of the deceased could not have been caused by the blood stained axe which was allegedly recovered from the place of the incident.

29. In order to examine the aforesaid challenge we will have to delve into the evidence of the three eye witnesses, namely, PW-1 Prem Chandra Patel, PW-2 Suresh Chandra Patel and PW-3 Ghanshyam Patel on the point of manner of assault. PW-1 Prem Chandra Patel has stated that while his father Ram Lal Patel, his brother Suresh Chandra Patel and Ghanshyam Singh, Pradhan of the village were pulling out grass from the field of one Chhotey Lal at some distance from the place where Maniram his grand father was standing, the appellant Manoj Patel his cousin brother, suddenly appeared at the place of occurrence with a spade in his hand and wielded repeated blows on the neck of his grand father with the intention of causing his death and thereafter ran away from the place of incident leaving behind the spade. On page-12 of his cross examination, PW-1 stated that the appellant had struck the first blow at the deceased from behind on his neck causing injury on his neck. After receiving the first blow Maniram had fallen on the ground and while he was lying with his back on the ground, the appelalnt had then wielded two more blows to the deceased and in all he had struck the deceased thrice.

30. PW-2 Suresh Chandra Patel stated more or less the same facts in his examination in chief which were stated by PW-1 in his examination in chief, PW-2, however, he in his cross examination (page-17 of the paper book) deposed that when the appellant reached near Maniram he was cutting grass with his face towards the west. On reaching near Maniram the appellant uttered something to him, which he could not hear as the face of the Maniram was not visible to him and he was further not in a position to state whether the deceased had replied to the appellant or not. Although initially Maniram was standing with his face towards west, but when the appellant addressed him, he turned his face towards the appellant and at that point of time the appellant struck a blow with his spade on the neck of the deceased. At the time of the assault the distance between the appellant and the Maniram was about one foot. He further deposed that he had seen the appellant wielding the first blow on the deceased and thereafter he pushed him as a result he fell on the ground on his back then the appellant assaulted him again with his spade. The appellant had wielded three blows and all the three blows were struck while Maniram was lying on the ground. He further stated that when the appellant pushed Maniram he fell on the ground. Deceased Maniram was neither squating on the ground nor cutting grass. Similarly PW-3 Ghanshyam though corroborated the prosecution case as spelt out in the FIR in his examination in chief but he in his cross examination (page-23 of the paper book) deposed that at the first instance he had seen the

appellant coming from the side of chak road and after noticing him he had resumed his work of cutting grass and when he saw the appellant next he was abusing Maniram and assaulting him. He had seen the appellant wielding three blows on the deceased. At the time when the appellant had assaulted the deceased Maniram, he was sitting and the first blow was wielded by the appellant with his spade on the deceased from behind on his back, whereafter he had fallen on the ground with his back against his ground. The second and third blows were wielded by him on the neck of the Maniram, while he was lying on the ground with his face towards sky. Thus the contradictions pointed out by the learned counsel for the appelant in the testimonies of PW-1, PW-2 and PW-3 with regard to the manner of assault are that while according to PW-1 the first blow was struck by the appellant on the neck of the deceased from behind where after the deceased fell and lay with his back against the ground and the remaining two blows were struck to him by the appellant thereafter but according to the PW-2, the first blow was wielded by the appellant to the deceased while he was facing him and thereafter the appellant had forcibly made the deceased lie on the ground and struck three blows on him in that position. According to PW-1 at the time of the assault, the deceased was standing on the ground while according to the PW-2 the assault was made while the deceased was sitting on the ground and cutting the grass. On the other hand PW-3 deposed that the first blow was wielded by the appellant from behind while the deceased Maniram was sitting causing injury on his back side whereafter he had fallen and while he was lying with his back on the ground the appellant had stuck two more blows on his neck from the front.

31. PW-5 Dr. A.K.Pradhan who had conducted the post mortem of the dead body of the deceased found follwing injuries on the dead body.

"Ante mortem injury- Complete decapitation of head at lvel of C2, C3 and C5 with multiple time sharp weapon (unilateral number of three) injuries ligated with minor skin tag positionally (three separateed injuries iidentifiable)". He in his cross examination stated that none of the injuries found on the dead body of the deceased could have been caused if the blows were wielded to the deceased in a sitting position. He further stated that the head of the deceased was attached with the body of the deceased by a shred of skin in the back of the neck. The deceased had not been wielded any blow from behind. Thus on the basis of the aforesaid contradictions in the evidence of the three eye witnesses PW-1, PW-2 and PW-3 with regard to the manner in which the deceased was assaulted and the firm opinion of the doctor who had conducted the post mortem of the dead body of the deceased PW-5 Dr. A.K.Pradhan that none of the injuries were found on the dead body of the deceased could have been caused either from behind or while the deceased was sitting. Learned counsel for the appellant strenously urged that it was extremely doubtful that PW-1, PW-2 and PW-3 had seen the occurrence.

32. We are however, unable to agree with the contention of learned counsel for the appellant, the contradictions pointed out by the learned counsel for the appellant in the evidence of the three eye witnesses with regard to the manner in which he was assaulted are minor contradiction and the same do not effect the core of the prosecution case. All the three eye witnesses have stated in unison that the deceased was assaulted by the appellant thrice with a spade while he was cutting grass in the field of chhotey at about 11.30 p.m. on 07.02.2004, we do not find any reason to

disbelieve their evidence which appears to be unimpeachable, worthy of credit and wholly reliable and canot be discarded, in view of the opinion of PW-5, Dr. A.K.Pradhan.

33. The three witnesses of fact examined on behalf of the prosecution, namely, PW-1 Prem Chandra, PW-2 Suresh Paten and PW-3 Ghanshyam Patel have corroborated the prosecution case as spelt out in the FIR on all material aspects. Although there is little discrepancy in their evidence with regard to the position of the deceased at the time he was assaulted by the appellant, whether the appellant assaulted him in a standing position or when he fell down on the ground or whether the first blow was struck from behind or while the deceased was standing in front of the accused, however in our opinion this is minor discrepancies and it does not erode otherwise reliable case of the prosecution based on the testimony of the eye witnesses. The evidence of the three eye witnesses is substantive in nature while the evidence of Dr. A.K.Pradhan, PW-5 has corroborative value alone and the eye witness account which fully supports the prosecution case as spelt out in the FIR which was lodged promptly, cannot be disbelieved by relying upon medical evidence.

34. As far as the motive for the appellant to commit the murder of deceased is concerned, PW-1 in his examination in chief has categorically deposed that the appellant had became inemical towards his deceased Maniram, his grand father after he had won the case between the parties in respect of agricultural property situate in village Narrotampur Khurd from the court of Deputy Director of Consolidation. Pendency of litigation between the parties is admitted to the defense also. Thus it cannot be said that the appellant had no motive to commit the murder of the deceased.

35. Even if the prosecution failed to prove the motive for committing the crime the same will not be of any help to the appellant as it is settled law that in a case of direct evidence motive has little relevance and the entire prosecution case cannot be discarded, even if the prosecution fails to establish motive beyond doubt. There is no doubt that in case of direct evidence, the prosecution is not obliged to prove the motive but the qualitiy of the evidence must be such so as to inspire confidence. In the present case, the three eye witnesses have fully proved that Maniram was assaulted by the appellant with spade in broad day light and that he had weilded three blows on the deceased with his spade and caused his instantaneous death.

36. Credibility of the witnesses has been assailed by learned cousnel for the appellant on the ground that of the three eye witnesses PW-1 and PW-1 who are grand son and brother of the deceased are highly interested and partisan witnesses and as far as PW-3 Ghanshyam Patel is concerned, his presence at the place of incident is extremely doubtful as he is a chance witness and hence no reliance can be placed on the testimonies of PW-1, 2 and 3 for the purpose convicting the appellant. We do not find any substance in the aforesaid submissions on the learned counsel for the appellant in the presence of PW-1, PW-2 and PW-3 at the place of incident appears to be quite natural. They are not chance witness. Merely because PW-1 and PW-2 are close relatives of the deceased, their testimony is not liable to be disbelieved. The aforesaid aspect has been examined by the Apex Court in several cases.

"35. On the point of interested witnesses, the Hon'ble Supreme Court in ***State of U.P. v. Jagdeo, 2003 Cri.L.J. 844 (S.C.)*** *observed that only on the ground of interested or related witnesses,*

their evidence cannot be discarded. Most of the times eye witnesses happen to be family members or close associates because unless a crime is committed near a public place, strangers are not likely to be present at the time of occurrence.

36. In ***Mst. Dalbir Kaur v. State of Punjab, 1976 Cr.L.J. 418 (S.C.)*** *following observations were made:-*

(i) Interested witness:- Relatives who are natural witnesses are not interested witnesses and their testimony can be relied upon. The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused is somehow or the other is convicted either because he had some animus with the accused or for some other reason. In the reported case the incident took place at mid night inside the house, the only natural witnesses who could be present to see the assault were the persons present in the house at that time. No outsider can be expected to have come at that time because the attack was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness.

(ii) Witness gained over by accused not examined by the prosecution- held withholding or keeping back of witnesses is not unfair and adverse inference cannot be drawn. There is no duty on the prosecution to examine witnesses who might have been gained over by accused and even if those witnesses are not produced by the prosecution, there is nothing to stop accused from applying to the court for examining such witnesses.

(iii) witness who gives details with absolute accuracy is trustworthy.

38. Regarding evidentiary value of testimony of the interested or relatives witnesses, Hon'ble Supreme Court in ***Mano Dutt and another v. State of U.P. 2012 (77) ACC 209****, has observed in paragraph no.19 referring to the case of* ***Namdeo v. State of Maharashtra (2007) 14 SCC 150*** *that this Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with law.*

40. Hon'ble Supreme Court in ***Waman and others v. State of Maharashtra 2011 Crl.L.J. 4827*** *has observed in paragraph no.9 which reads as follows:*

"In ***Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; (2010 AIR SCW 3707)****, this Court held that mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eye-witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed toward the accused. After saying so, this Court held that if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same."*

41. It has been further observed in Waman (supra) that relationship cannot be a factor to affect the credibility of a witness. The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the court has to analyse evidence of related witnesses carefully to find out whether it is cogent and credible. The same view has been reiterated in ***State of U.P. v. Naresh and others (2011) 4 SCC 324****."*

37. We have very carefully scrutinized the statement of PW-1, PW-2 and PW-3 and we have noticed that despite being subjected to gruelling cross examination by the defense they have corroborated the prosecution case, on all the material particulars and the defense has not able to elicit anything from them which may even remotely create any doubt with regard to the veracity of the facts deposed by them. A suggestion was made by the defense that since appellant was the only earning member of his family and the parties are closely related to each other and litigating before the consolidation authorities, the appellant was falsely implicated in the present case by PW-1 with the object of breaking the financial back bone of the appellant's family as he was sole earning member in his family but we find that the defence has failed to substantiate the aforesaid aspect of the matter.

38. It has also been argued by the learned counsel for the appellant that the failure of the prosecution to produce the injured witness Harish Chandra who would have been the best witness to give a correct and accurate account of the occurrence leads only to one inference that if he was produced he would not have supported the prosecution case as spelt out in the FIR and to nominate the appellant as accused. In our opinion the prosecution case stands fully proved from the evidence of PW-1, PW-2 and PW-3 whose presence at the place of occurrence at the time of incident cannot be doubted. Mere omission on the part of the prosecution to examine the injured witness, in our opinion will not effect the core of the prosecution case rendering it unreliable, in view of the observations made by the Hon'ble Apex Court in the case of **Mst. Dalbir Kaur Kaur (supra)** which we have already noted herein above.

39. We also do not find any reason why the complainant PW-1 will falsely implicate the appellant in the murder of his grand father and in the process allow the real culprit to go escort free and to disbelieve the evidence of PW-1, PW-2 and PW-3 which is unimpeachable and inspires confidence.

40. In view of the foregoing discussion, the prosecution in our opinion has succeeded in proving the charges framed against the appellant beyond all shadows of reasonable doubt and that the trial court has not committed any illegality or infirmity in convicting and sentencing the appellant under Sections 302 and 323 IPC.

41. This appeal which is devoid of any merit is dismissed.

42. There shall however be no order as to costs.

(2016) 9 ILRA 627
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE RAGHVENDRA KUMAR J.

Criminal Appeal No.- 3206 Of 1982

Drigpal & Ors. **...Appellants**
Versus
State **...Respondent**

Counsel for the Appellants:
K.P. Shukla, A.K. Dwivedi, Ram Kishor Gupta

Counsel for the Respondent:
D.G.A.

Under assail in this criminal appeal is the judgment and order dated 7.12.1982 passed by Sessions Judge, Hamirpur in Sessions Trial No.218 of 1981 (State Vs. Drigpal Singh & others) u/s 148, 302/149 IPC, P. S. Kharela, District-Hamirpur whereby accused-appellants have been convicted u/s 148 and 302/149 IPC and sentenced each of them to 2 years R. I. For the offence u/s 148 IPC and imprisonment for life to each of them for the offence u/s 302/149 IPC. Both the sentences were ordered to run concurrently. Being aggrieved by the aforesaid judgment and order, the instant appeal is before this Court.

According to the prosecution, Shivnath Singh and Mulayam Singh were real brothers and they were living separately in their own houses. About five year ago, one Dharam Singh was murdered in which Raja Bhaiyya was challaned and subsequently, he was convicted and is languishing in jail undergoing the sentence. The widow of Dharam Singh is grief stricken and is living in her own house. Her devar Drigpal Singh in order to take revenge of the murder of his brother and to satisfy his sister-in-law (bhabhi) was trying to commit the murder. Informant Tej Singh had purchased a cow and visited the place of the deceased Mardan Singh to make the payment of balance amount of the cow along with one Balkishun Bhurji. He was informed that Mardan Singh had gone to enjoy the fair and his younger brother had gone on his routine labour work. The informant Tej Singh stayed at the house of deceased. The mother of deceased and his younger brother and sister came out of the house. Mardan Singh directed the informant to make the payment to his mother.

At about 2 pm he saw that Drigpal Singh equipped with gun, Maiku equipped with farsa and one other accused equipped with farsa and two other accused persons equipped with ballam came in front of the house of deceased Mardan. At that time Mardan was sitting on an earthen wall, he rose from the wall and raised alarm. In the meantime, Drigpal discharged a fire shot at him and on his exhortation other accused persons, started assault. While accused Drigpal Singh discharged the second fire shot, deceased Mardan Singh fell down. Other accused persons assaulted him with farsa and ballam.

On the basis of aforesaid discussions, we are of the opinion that the findings of conviction recorded by the learned Court below are well founded on the materials available on record and no error has been commited by the learned Court below in appreciating the evidence and in recording the findings of conviction against the

accused-appellants. There apepars no justification to interfere with the findings of conviction recorded by the learned Court below.

In view of aforesaid reasons, the judgment and order dated 7.12.1982 passed by the learned Court below convicting and sentencing the accused persons-appellants as mentioned above, is hereby affirmed.

This appeal is bereft of merits and is, accordingly, dismissed.

Held: Para-

Case Law discussed:

Padam Singh Vs. State of U.P. reported in 2000 (1) SCC 621,
Rama & others vs. State of Rajasthan reported in 2002 (4) SCC 571,
Majjal Vs. State of Haryana, 2013 (6) SCC 798,
Kamlesh Prabhudas Tanna and Anr V. State of Gujarat reported in 2014 Cr.L J 443,
Rana Partap and Ors. Vs. State of Haryana, AIR 1983 SC 680,
Baby and Ors. Vs. Circle Inspector of Police, Adimaly in Criminal Appeal No.952 of 2010,
State of Rajasthan Vs. Chandgi Ram and Ors., (2014) 12 SCC 596,
Shivasharanappa v. State of Karnataka, (2013) 5 SCC 705,
Rajkumar vs. State of Madhya Pradesh, (2014) 5 Supreme Court Cases 353,
State of M. P. V. Ramesh, (2011) 4 SCC 786,
Shiv Ram and Anr. Vs State of U.P. reported in 1998 1 SCC Pg 149,
Appabhai and another vs. State of Gujarat, AIR 1988 SC Pg 696,
Sunil Kundu and Another vs. State of Jharkhand reported In 2013 (4) SCC 422,
Sadhu Saran Singh v. State of U. P, (2016) 4 SCC357,

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

1. Heard Sri K. P. Shukla and Sri A. K. Dwivedi, learned counsel for the appellants and Sri Chandrajeet Yadav, learned Additional Government Advocate for the State of U. P.

2. Under assail in this criminal appeal is the judgment and order dated 7.12.1982 passed by Sessions Judge, Hamirpur in Sessions Trial No.218 of 1981 (**State Vs. Drigpal Singh & others**) u/s 148, 302/149 IPC, P. S. Kharela, District-Hamirpur whereby accused-appellants have been convicted u/s 148 and 302/149 IPC and sentenced each of them to 2 years R. I. for the offence u/s 148 IPC and imprisonment for life to each of them for the offence u/s 302/149 IPC. Both the sentences were ordered to run concurrently. Being aggrieved by the aforesaid judgment and order, the instant appeal is before this Court.

3. Vide order dated 8.5.2012 the appeal filed on behalf of appellant Gyasi @ Gayadin has been abated due to his death.

4. Briefly stated the prosecution story is as following :-

According to the prosecution, Shivnath Singh and Mulayam Singh were real brothers and they were living separately in their own houses. About five year ago, one Dharam Singh was murdered in which Raja Bhaiyya was challaned and subsequently, he was convicted and is languishing in jail undergoing the sentence. The widow of Dharam Singh is grief stricken and is living in her own house. Her devar Drigpal Singh in order to take revenge of the murder of his brother and to satisfy his sister-in-law (bhabhi) was trying to commit the murder. Informant Tej Singh had purchased a cow and visited the place of the deceased Mardan Singh to make the payment of balance amount of the cow along with one Balkishun Bhurji. He was informed that Mardan Singh had gone to enjoy the fair and his younger brother had gone on his routine labour work. The informant Tej Singh stayed at the house of deceased. The mother of deceased and his younger brother and sister came out of the house. Mardan Singh directed the informant to make the payment to his mother.

At about 2 pm he saw that Drigpal Singh equipped with gun, Maiku equipped with farsa and one other accused equipped with farsa and two other accused persons equipped with ballam came in front of the house of deceased Mardan. At that time Mardan was sitting on an earthen wall, he rose from the wall and raised alarm. In the meantime, Drigpal discharged a fire shot at him and on his exhortation other accused persons, started assault. While accused Drigpal Singh discharged the second fire shot, deceased Mardan Singh fell down. Other accused persons assaulted him with farsa and ballam. The family members of deceased raised alarm but none came to their rescue. Accused-appellant Drigpal Singh continously extended threat of life with warning that if anyone would come to rescue then he would have to loose his life.

Accused persons left the place saying that deceased Hari Singh is to be murdered. Hari Singh was working on a 'bandha' as labour. The informant and family members of deceased also followed the accused persons secretly to the place where Hari Singh was working as a labour. At 2.30 pm Hari Singh was surrounded and was murdered by the accused persons. Thereafter the accused persons along with others left the place. Accused Gyasi, Maiku were equipped with farsa and Prahlad and Govind Singh were equipped with ballam and Drigpal Singh was equipped with gun.

5. After registration of FIR, the investigation proceeded in accordance with law.

6.The inquest report of deceased Mardan Singh and Hari Singh was prepared. After documentation the corpuses of deceased were sent for autopsy in a sealed condition. The recovery memo of empty cartridge recovered from the spot and the blood stained soil and ordinary soil and a pair of shoes, lungi was prepared. The items recovered by the I. O. were sent to Government Chemical Analyst, who noted blood stains on the shirt of deceased Hari Singh. The report of Serologist is available on record. After collecting the material during the course of investigation the police report u/s 173 (2) Cr. P. C. was filed in the shape of charge sheet.

7. After complying with the statutory legal procedure the case was committed to the Court of Sessions.

The trial Court after hearing both the sides and the material placed before it framed the charge. The accused persons have taken a defence that one Dharam Singh was murdered by Raja Bhaiyya and out of enmity Drigpal Singh and others have been falsely implicated and they are innocent.

8. In order to substantiate the allegations, the prosecution has examined Dr. G. D. Pandey as PW-1, who conducted autopsy on 19.1.1981 at about 2.30 pm upon the corpus of Hari Singh aged about 18 years and noted that rigor mortis had passed of from the upper limbs but was present on the lower limbs. Abdomen was slightly distended. The stomach contained 6 ozs. of semi digested food. Gases and faecal matters were found in large intestine.

Following ante mortem injuries on the person of Hari Singh were found :-

(i) Incised wound 14 cm x 2 cm x bone deep in left side of face, below left ear, starting form mid of cheek upto back of neck, horizontally placed. Fracture of underneath left mandibular bone.

(ii) Incised wound 13 cm x 6 cm at middle of neck, starting from front going upto back on left, horizontally placed. Skin muscles, great vessels of neck, oesophagus, trachea and cervical vertebra from 4th to 6th in communicated fracture and cut.

(iii) Incised wound 11 cm x 3 cm in left supraclavicular fossa upside down depth upto muscles.

(iv) Stab wound 5 cm x 1 cm x 4 ½ cm in left border of sternum at upper end, direction downwards and towards right above ribs and below sc tissues.

(v) Incised wound 10 cm x 9 cm x bone deep in right shoulder joint, fracture of right humerous at neck.

(vi) Multiple gun shot wounds of entry in back at thorasic region covering 10 cm x 8 cm area x muscle deep, size varying from 1 cm x 1 cm to ½ cm x ½ cm, margins black.

(vii) Abrasion 6 cm x 3 cm in right great trochanter.

Injury no.(i), (ii), (iii) and (v) might have been caused by a weapon like pharsa, injury no.(iv) by weapon like ballam, injury no.(vi) by a fire arm and injury no.(vii) by friction against some hard object. PW-1 has mentioned the cause of death of deceased Hari Singh due to shock and haemorrhage as a result of ante mortem injuries. He has further opined that the ante mortem injuries were sufficient to cause death of deceased in ordinary course of nature. He has proved the autopsy report as Ext Ka 1.

At about 3.30 pm on the same day, he conducted post mortem examination on the dead body of deceased Mardan Singh, aged about 22 years and noted that rigor mortis had passed

on from the upper limbs but was present on the lower limbs and the abdomen was slightly distended. The stomach contained about 8 ozs of semi digested food and the large intestine contained gases and faecal matter.

Following ante mortem injuries on the body of Mardan Singh were noted:-

(i) Gun shot wound of entry 5 cm x 3 cm in centre of right shoulder blade. Margins lacerated and blackened. Wounds traverses, shoulder blade intercostal musculature fracturing underneath ribs, pleura, lung and finally coming out of anterior chest wall leading to three wounds of exit at right side of chest one at 2 cm left to right nipple (2 ½ cm x 1 cm) and two in 4th to 6th intercostal space in anterior axillary line each measuring 1 cm x ½ cm lying 3 ½ cm apart. Four pellets recovered from anterior chest wall were sealed. Plenty of black material seen in pathway. Fracture of 4 th rib in anterior chest wall.

(ii) Multiple gun shot wounds muscle deep in area 30 cm x 23 cm in back with abrasion measuring from 1 cm x 1 cm to ½ cm x ½ cm, margins blackened. No wound of exit.

(iii) Gun shot wound 2 cm x 1 cm x muscle deep, margins black in centre of right upper arm. No exit wound outer aspect.

(iv) Gun shot wound 1 ½ cm x 1 cm x muscle deep in right upper arm, below deltoid at middle. No exit.

(v) Incised wound 4 cm x 3 cm x bone deep in right fore arm inner aspect, anterior and above wrist joint.

(vi) Incised wound 13 cm x 3 cm x bone deep in left iliac crest.

(vii) Incised wound 13 cm x 3 cm x bone deep in right knee joint, outer aspect.

(viii) Incised wound 8 cm x 2 ½ cm x bone deep in right temporal region, underlying bone having depressed fracture. Clots over membranes seen.

(ix) Incised wound 14 cm x 10 cm in left side of neck. Skin muscles, great vessels of neck, trachea, oesophagus and cervical vertebrae from 3rd to 6th crushed and cut.

(x) Incised wound 5 cm x 2 cm x bone deep, horizontal above left ear.

(xi) Incised wound 6 cm x 3 cm x bone deep, left shoulder, front to back over acromian process.

(xii) Incised wound 1 cm x ½ cm x muscle deep in left calf outer aspect below knee joint

Injury no.(i), (ii), (iii) and (iv) were caused by some fire arm and injury no.(v), (vi), (vii), (viii), (ix), (x), (xi) and (xii) by some sharp edged weapon, which may be even pharsa. PW-1 has mentioned the cause of death of deceased Mardan Singh due to shock and haemorrhage as a result of ante mortem injuries. He has further opined that the ante mortem injuries were sufficient to cause death of deceased in ordinary course of nature. He has proved the execution of post mortem examination report as Ext Ka 2.

9. The prosecution has further examined PW-2 Tej Singh (informant), PW-3 Bal Kishan, PW-4 Vinod, PW-5 Phoola Rani (widow of Mulayam Singh), PW-6 S. I. Satya Narayain Singh, PW -7 I. O. Ram Acchaibar.

10. PW- 2 to PW-5 are the witnesses of fact.

11. PW-6, who is a police officer, has proved the execution of Chik FIR and relevant entries in the G. D. and has conducted the investigation, examined the witnesses and filed charge sheet against the acccused persons Drigpal, Maiku and Gyasi @ Gayadin and submited final report against Prahlad and Govind.

12. PW-7 Ram Acchaibar has conducted the inquest proceedings and after due documentation sealed the dead body of deceased persons for post mortem examination and proved the execution of documents.

13. C. W. Om Prakash Dubey, a police official has been examined as a Court witness, who has proved the execution of one N. C. R. u/s 498 IPC lodged against the deceased Mardan Singh. PW-6 & 7 are the formal witnesses. Their testimonies is confined to their roles during the course of investigation. The prosecution has closed the prosecution evidence.

14. After closure of prosecution evidence, all the incriminating materials and all the circumstances appearing during the course of trial was placed before the accused persons-appellants by way of their examination u/s 313 Cr. P. C. and the accused-appellant Drigpal has stated the facts to be wrong and has stated that his brother was murdered. The prosecution was lodged, and out of the said enmity the witnesses have deposed against them.

15. Appellant Maiku has also denied the prosecution version saying it to be wrong and stated that he had deposed in the murder case of Dharam Singh against accused Raja Bhaiyya and out of enmity the witnesses have deposed against him. Accused-appellant Gyasi @ Gayadin has also denied the prosecution version and stated that out of enmity with the police the prosecution was lodged and the witnesses have deposed at the instance of police.

16. The accused-appellants have not examined anyone on oath before the Court in defence.

17. After scrutinizing and appreciating the evidence available on record, the learned Court below vide its judgment and order dated 7.12.1982 recorded the findings of conviction against accused-appellants, hence this appeal.

18. It has been submitted by the learned counsel for accused-appellant that the murder of Dharam Singh was committed by one Raja Bhaiyya out of said enmity the accused persons have been roped in for commission of murder of Mardan Singh and Hari Singh. Further contention is that the testimony of informant Tej Singh PW 2, the eye witness is not of worth reliance since he being a chance witness. He is favourite of police officials and has been a witness is many other cases on behalf of the police and he had deposed too, as such, his testimony as an independent witness is not reliable.

Further contention is that the testimony of PW 3 Bal Kishan has not been relied by the trial Court.

He is not an eye witness. Further submission is that PW 4 Vinod who is brother of deceased is a small child. A primary examination was conducted by the Court and his statement was recorded. For want of administration of oath his statement cannot be relied upon.

The next contention is that PW 5 Smt. Phoola Rani is the mother of deceased persons who is a highly interested and related witness. Her testimony has been assailed on the ground that after assault of Mardan Singh she did not take care to see the injured deceased Mardan Singh and followed the accused persons-appellants by hiding themselves from a different route to the place of incident where assault of Hari Singh was committed. After assault of Hari Singh she also did not take care to know whether Hari Singh was aliver or not.

Further contention is that the FIR was registered against deceased Mardan Singh for the offence u/s 498 IPC, which was lodged by one complainant Ram Krishna.

Further contention is that from the testimony of prosecution witnesses it is evident that accused persons namely Prahlad and Govind, who were assigned ballam have not participated in the assault whereas one of the ante mortem injury noted by the doctor on the person of deceased Hari Singh was in the nature of stab wound. The prosecution has not given any explanation with respect to the injury of stab wound. There is also no mention of assault of deceased Hari Singh in the FIR by fire arm.

Further contention is that if the accused Drigpal wanted to take revenge the murder of his brother, he could have safely implicated the deceased Mardan Singh and Hari Singh.

Further contention is that the I. O. has not conducted the investigation fairly. He has not even taken the dhoti and bangles in his custody from the room. Further submission is that the I. O. has not taken any steps for recovery of the weapon of assault.

Further contention is that the motive of false implication is clear because one of the appeallant Maiku had deposed against Raja Bhaiyya who has been convicted and is incarcerating in connection with the murder of Dharam Singh, who was brother of appellant Drigpal Singh.

Further contention is that both the deceased persons were womanizer and against one of the deceased a FIR was also lodged for the offence u/s 498 IPC.

Further contention is that the murder has been committed some times in the night by someone else and the accused persons have been falsely implicated on the pretext of enmity. Further contention is that the FIR is ante timed. The murder might have takenplace in the night and the FIR has been lodged showing the incident to be a broad day light.

19. Learned A. G. A. has submitted that it is an incident of broad day light murder. The case is based on direct evidence. There is coherence and consistency in the testimony of witnesses of fact, PW-2, PW-3, PW-4 and PW-5 with respect to date, time, place and manner of assault as well as by whom the assault has been committed. Further contention is that it is a case based on direct evidence hence, the motive is not of much significance. Further contention is that the incident has taken place on 17.1.1981 between 2 to 2.30 pm whereas the FIR of the incident had been lodged on the same day at 4.30 pm . Thus, the FIR is prompt.

In reply to the submission of defence, it has been submitted by the learned A. G. A. that since no adult male member was left hence the FIR of the crime was lodged by PW-2. Further contention is that PW-2 was related to the deceased and even if he be treated as a chance witness he has been put to a lengthy cross-examination for adjudging veracity of his testimony and the witness remained intact throughout his cross-examination. He being the eye witness cannot be discarded mere on the score of levelling him as a chance witness.

20. Further contention is that even if the PW 3 has not been relied upon by the trial Court it would not be an impediment for the Appellate Court to appreciate his testimony as per the established legal norms.

21. The mother of deceased PW 5 Phoola Rani's conduct has been assailed that she did not respond like mother. The argument of the defence cannot be sustained.

Further contention is that the factum of lodging of FIR against Mardan Singh u/s 498 IPC for argument sake is taken to be true it is not of any avail since the offence u/s 498 IPC being a non cognizable offence.

22. Further contention is that mere not taking of the bangles and dhoti into possession by the I. O. would not amount to defective investigation. Further contention is that no recovery of farsa has been made and the farsa of different shapes and sizes are prevalent in the society. In absence of the recovery of weapon of assault mere on the score of non explanation of the stab wound to

deceased Hari Singh would not be sufficient ground to discard the entire prosecution version. Farsa of a particular shape may cause the injury in the nature of stab wound.

23. Further submission is that the accused-appellant Drigpal Singh was not even major at the time of murder of his brother. Moreso, deceased Mardan Singh and Hari Singh were also minors at the relevant time, therefore, the deceased were not implicated in the murder of Dharam Singh.

24. Further submission is that the child witness is not a tutored witness and is a reliable witness.

25. Hon'ble the Apex Court has been pleased to lay down the guidelines for High Court for exercising Appellate jurisdiction in criminal side while deciding criminal appeals from time to time. The Hon'ble Apex Court has propounded the following principles in **Padam Singh Vs. State of U.P.** reported in **2000 (1) SCC 621** which is quoted here :

"it is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

26. Further guidelines have been issued by the Hon'ble Apex Court in case of **Rama & others vs. State of Rajasthan** reported in **2002 (4) SCC 571** which is as under:

"It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

27. The guidelines have been issued by three Judges Bench of the Hon'ble Apex Court in case of **Majjal Vs. State of Haryana, 2013 (6) SCC 798** which is as under:

"It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on

record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which to to the root of the matter."

28. The aforesaid observations have been quoted by the Hon'ble Apex Court in a very recent judgment in the case of **Kamlesh Prabhudas Tanna and Anr V. State of Gujarat** reported in **2014 Cr.LJ 443.**

29. Keeping in view the propositions cited above, the Court is to scrutinize the evidence available before it and to draw the inference accordingly, bearing in mind the presumption of innocence of accused unless otherwise is established from evidence available on record without being influenced by the findings of conviction recorded by learned trial court.

30. It has been contended on behalf of the appellants that the murder of Dharam Singh (i.e. the brother of appellant Drigpal Singh) was committed by Raja Bhaiyya in which the appellant Maiku was one of the witnesses and after the trial Raja Bhaiyya was convicted and sentenced and is presently languishing in jail. Because of aforesaid enmity, the accused-appellants have been falsely implicated. Even if, for argument sake the plea of false implication on the score of enmity is presumed, enmity is a double edged weapon. Out of enmity, the chances of false implication cannot be ruled out, but at the same time enmity may be an important factor for committing murder.

The evidence has been led to the effect that to satisfy her sister-in-law, who was grief stricken because of the murder of Dharam Singh, her husband, the offence is alleged to have been committed by the accused-appellants.

The plea of enmity taken by the appellant can be interpreted either way. Hence, the Court is expected to analyze the evidence carefully to draw an inference about the complicity of the accused-appellants without being swayed by the plea of enmity on the basis of the material available on record.

31. It has been contended on behalf of the accused-appellants that the testimony of PW 2 Tej Singh being a chance witness cannot be relied upon until his presence is established to be natural. The matter of consideration of testimony of a chance witness has been considered by the Hon'ble Apex Court time and again. In the case of **Rana Partap and Ors. vs. State of Haryana, AIR 1983 SC 680** at paragraph 3, the Hon'ble Apex Court has held as under:

"3. There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do

not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that that they are mere chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses' even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."

32. Further the principle of appreciation of evidence of a chance witness has been dealt by Hon'ble the Apex Court in the case of **Baby and Ors. vs. Circle Inspector of Police, Adimaly in Criminal Appeal no.952 of 2010** decided on 26.7.2016 and it has been propounded that it is a well settled legal principle that the evidence of a chance witness cannot be brushed aside simply because he is a chance witness, but his presence at the place of occurrence must be satisfactorily explained by the prosecution so as to make his testimony free from doubt and thus, reliable.

33. From the above proposition of law, it can safely be discerned that the concept of a chance witness has been borrowed from other country. The principle is not strictu sensu and is not attracted in the context of our country. More so, the Hon'ble Apex Court has given an illustrative example of a chance witness being a natural witness in the ruling cited above. The Hon'ble Apex Court has further put a safeguard for appreciating the evidence of a chance witness. The evidence of PW 2, who is alleged to be the eye witness as well as a chance witness, is to be scrutinized and appreciated further bearing in mind the above principles of law.

34. So far as the contention relating to PW 3 Bal Kishan is concerned, it is vehemently been contended that the testimony of PW 3 has been discarded by the trial Court and he is not an eye witness. It is noteworthy that the witness being a prosecution witness has been cross-examined by the defence counsel, though the witness was not declared hostile.

35. It has time and again been enunciated by the Hon'ble Apex Court that while exercising the appellate jurisdiction, the High Court is required to appraise the evidence afresh without being influenced by the inference drawn by the trial Court. As such, there is no impediment for us to appraise the evidence of PW 3 Bal Kishan afresh. What is required is that the Appellate Court is expected to carefully scrutinize the testimony of PW 3 and to identify the portions of evidence, which in its estimation is found to be credible and trustworthy. Mere the witness not being relied by the trial Court, would not put any legal embargo upon the Appellate Court to consider the evidence in accordance with the established principles of evidence. The argument in this behalf cannot be sustained.

36. The testimony of PW 4 Vinod, who is a child witness, has been assailed on the ground that his statement was recorded by the trial Court without administering oath to him. As such, his testimony cannot be relied upon.

37. The principle of appreciation of a child witness has been considered by the Hon'ble Apex Court on several occasions. In the case of **State of Rajasthan vs. Chandgi Ram and Ors., (2014) 12 SCC 596**, at paragraph 14 the Hon'ble Apex Court has discussed this aspect relying upon the decision in the case of **Shivasharanappa v. State of Karnataka, (2013) 5 SCC 705**, as follows :

"17. Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of the witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, apply to a child witness, who is competent and whose version is reliable."

38. The aspect of appreciation of a child witness was also considered by the Hon'ble Apex Court in the case of **Rajkumar vs. State of Madhya Pradesh, (2014) 5 Supreme Court Cases 353**. The relevant paragraph 19, which deals with the approval of principle enunciated in the case of **State of M. P. v. Ramesh, (2011) 4 SCC 786** is being reproduced hereinunder :-

"14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to shows that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

39. From the above propositions of law, it can safely be deduced that the testimony of a child witness can be relied upon if it is found to be credible, reliable, trustworthy and inspiring confidence. Bearing the basic principles of appreciation of evidence, the testimony of child witness PW 4 Vinod, would be discussed in the later part of the judgment.

40. The testimony of PW 5 Smt. Phoola Rani has been assailed on the ground that being the mother, she is a highly interested witness and her testimony cannot be relied upon. The matter relating to appreciation of interested or related witness has time and again been considered by the Hon'ble Apex Court.

41. Great emphasis has been laid by learned counsel for the appellants that in this case, the incident is alleged to have taken place in broad day light but not even a single independent witness has been cited as a witness. While appreciating the evidence, the Court cannot ignore the ground realities because in the present day world, people avoid to become a witness of a case and we would not have to travel a long way to seek reasons for this apathy of the public. They simply wanted to avoid enmity of the accused persons. Reference may be made on this point and the pronouncement of Hon'ble Apex Court in the case of **Shiv Ram and Anr. vs State of U.P. reported in 1998 1 SCC Pg 149** has considered this aspect and was of the view that nowadays it is a common tendency that no outsider would like to get involve in a criminal case much less in the crime of present magnitude. Therefore it is quite natural that no independent witness will come forward to assist the prosecution. It is well settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased persons but what is required in such situation is that the Court must scrutinize the evidence of such witnesses with utmost care and caution.

42. In another case **Appabhai and another vs. State of Gujarat, AIR 1988 SC Pg 696**, Hon'ble Apex Court observed that 'Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused.

43. From the above proposition of law, an inference can be drawn that in appreciation of evidence of a related or an interested witness, the Court has been enjoined with an onerous duty to scrutinize the testimony of such witness with utmost caution and care and after such scrutiny if it inspires confidence and found to be reliable then there is no legal impediment in placing reliance upon the testimony of such witness. The law has also been crystallized to the effect that mere on the ground of a witness being related or interested, his testimony cannot be discarded.

44. Bearing the above propositions in mind the testimony of PW 5 would be discussed in the later part.

45. The next contention of learned counsel for the appellant is that there was a FIR against Mardan Singh and PW 4 Vinod has also admitted this fact and the I. O. has taken the possession of dhoti, but has not taken the possession of bangles etc, thus, the case comes under defective investigation and the learned counsel for the appellant has placed reliance upon the case of **Sunil Kundu and Another vs. State of Jharkhand reported in 2013 (4) SCC 422** wherein it has been held as follows:

"This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored."

46. The principle of law, thus, is clear from the above proposition that the irregularities amounting to defective investigation would have oblique impact upon the prosecution version, if it goes to the root of prosecution case. Simple irregularities amounting to defective investigation, which does not goes to the root of the prosecution case, would be not of much consequence.

47. So far as the FIR u/s 498 IPC is concerned, mere lodging of the FIR is of no significance since offence u/s 498 IPC is a non cognizable offence and even if for argument sake the allegations made therein are taken to be true, it would have the effect of assailing the conduct of deceased Mardan Singh.

48. It has further been submitted that the injury in the nature of stab wound has not been explained and the persons who have been assigned ballam namely Prahlad and Govind have not participated in the commission of offence as is evident from the testimonies of prosecution witnesses. Learned A. G. A. has submitted that farsa of different shapes and sizes are prevalent in different parts of the country, which is alleged to be the weapon of assault and more so, farsa has not been recovered. Until farsa would have been recovered, no definite inference can be drawn about the use of farsa in causing the stab wound.

Even if it is presumed that the injury in the nature of stab wound has not been explained, it would not be sufficient to hold that no such incident has taken place. The evidence of Pws finds support from medical evidence except the stab wound.

49. The next contention is that the weapon has not been recovered by the I. O. and it creates doubt upon the prosecution version. It is a case of direct evidence, if the complicity of appellants is established from the evidence on record, the non recovery of weapon of assault would have no oblique impact.

50. It has been conteded that if the revenge was to be taken by appellant Drigpal, he could have safely implicated the deceased person in the murder of his brother Dharam Singh. Learned A. G. A. has submitted that Drigpal and deceased persons were minor at the time of murder of Dharam Singh, brother of appellant Drigpal and no useful purpose could have been solved, hence, the submission of the counsel for the appellant does not appeal to reason.

51. It has been submitted that the murder has been committed in the night and the FIR is ante timed and the deceased persons being womanizers which was the cause of their murder and the complainant of offence u/s 498 IPC did not lodge any prosecution against the deceased by instituting the complaint and the complainant could have been the most aggrieved person. When

she did not lodge the prosecution by instituting a complaint, hence, the womanizing being the cause of murder cannot be sustained.

52. It is a case of direct evidence and it is a broad day light murder. The incident took place on 17.1.1981 between 2 to 2.30 pm and the FIR has been lodged at 4.30 pm on the same day. The FIR appears to be prompt.

53. It is a settled principle of law that a prompt FIR rules out the chances of concoction. The object of insisting upon a prompt FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of actual culprits and the part played by them, the weapons, if any, used as also the names of the witnesses, if any. The prompt FIR, thus, rules out the concoction, exaggeration and deliberations, if any.

54. In view of aforesaid principles, the argument that the FIR was ante timed and the murder was committed sometimes in the night do not appeal to reason. Bearing the aforesaid basic principles of law discussed above, the testimonies of witnesses of fact is being appreciated.

55. PW 2 Tej Singh has categorically explained his presence at the place of occurrence and has also stated the purpose for which he visited the place of deceased Mardan Singh. Even after payment of amount due for the purchase of cow, to mother of the deceased, he was given a light refreshment outside the house. Nothing appears unnatural in this regard which establishes his presence as well.

56. PW 2 has categorically stated about the place where Mardan Singh was sitting. He has deposed about the presence of PW 4 and PW 5 as well as the sister of the deceased Mardan Singh on the open piece of land where they were sitting and the light refreshment was served to him. He has assigned the fire arm weapon to Drigpal and farsa to appellants Maiku and Gyasi. Ballam has been assigned to Prahlad and Govind. He has deposed that appellant Drigpal discharged a shot from his fire arm whereas appellants Maiku and Gyasi assaulted deceased Mardan Singh by farsa. The place of murder of Mardan and his brother Hari Singh being different and at some distance as well has also been deposed by him. PW 2 along with PW 4 and PW 5 secretly followed the appellants while they were on the way for commission of murder of Hari Singh and he (PW 2) along with PW 4 & PW 5, witnessed the murder of deceased Hari Singh. He has also assigned the use of fire arm and the farsa respectively to accused-appellants Drigpal, Maiku and Gyasi. This witness has been put to a lengthy cross-examination. The purpose of cross-examination is to test the veracity of a witness. The witness has categorically denied the involvement of accused Prahlad and Govind, who were assigned the ballam. Nothing could be elicited from this witness by way of examination in the shape of admission, which may create any doubt upon his testimony. The testimony of PW 2 remained consistent throughout the examination-in-chief and in the cross-examination.

57. The testimony of PW 2 has also been assailed on the ground that he had close connection with police and has been witness on behalf of police in several cases.

Even if, for argument sake it is taken to be true, then the requirement of law would be to scrutinize the testimony of this witness cautiously.

58. The defence has failed to bring to our notice any material contradiction in the examination-in-chief and cross-examination of the witnesses so as to discredit the testimony of PW 2. On critical appraisal of the testimony of PW 2, we do not find any material discrepancy, which may be sufficient to discard his testimony.

59. The presence of the witness on the spot was with a purpose and his presence could not be shaken by way of cross-examination and more so, the statement that he being a chance witness, the principles of appreciation of a chance witness has already been dealt above. There is complete consistency in the entire testimony of PW 2. His testimony does not disclose any material contradiction on the point of time, date, place, manner and the weapon used in commission of the offence as well as the complicity of the accused persons-appellants in the alleged crime. This witness has fully supported the prosecution story set up by way of FIR. PW 2 was cross-examined at two occasions. Even if, discrepancies in the testimony of PW 2 are presumed, those are of natural and of trivial nature keeping in view PW 2 was not cross-examined at one stretch on the date of which his examination-in-chief was recorded. Such discrepancies or variations for argument sake, if any, in examination-in-chief and cross-examination even if taken to be true, being natural and trivial in nature do not have any bearing on the credibility of the witness.

60. It has also been argued that PW 2 being the relative of deceased, hence, he is a highly interested witness. The testimony of this witness has been scrutinized on the basis of principles discussed above and is found to be reliable.

61. Over all appraisal of PW 3 Bal Kishan clearly supports the testimony of PW 2 and speaks about the role and weapon assigned to the accused-appellants. This witness has also stated about the time, date, place and manner of commission of offence and the use of weapon assigned to accused-appellants. He has also not assigned any role to accused Prahlad and Govind, who were equipped with ballam. Even if, for argument sake, the testimony of this witness is discarded, even then the testimonies of PW 4 and PW 5 remains on record for scrutiny.

62. PW 4 Vinod is the real brother of deceased and he has categorically stated about his presence at the place of occurrence, which appears to be natural. He has deposed about the date, time and place of occurrence and the involvement of accused-appellants and the weapons assigned to them and the manner in which they had committed the offence. This witness has been put to a lengthy cross-examination. His age at the time of examination-in-chief was between 10-12 years.

63. Non administration of oath to this witness, would not mean that the statement given by the witness should be outrightly thrown away from the record. In such circumstance, the burden is cast upon the Court to appreciate the statement of a child witness in the light of testimony of other witnesses and the Court has to see as to whether the statement given by the child witness is in

coherence with the testimony of other witnesses with respect to the date, time, place and manner of assault and by whom and with which weapon, the offence was committed.

64. The Court should bear in mind the capability, the power of understanding of the child witness, who is aged about 10-12 years. The witness was subjected to cross-examination to adjudge the veracity of his statement. The witness has categorically denied the involvement of accused Govind and Prahlad, who were assigned ballam. There is complete consistency in the statement of PW 4 with the story of FIR. There is no material contradiction with respect to time, date and place of occurrence and also with the manner in which the appellants have committed the murder and the weapons they have used in commission of the murder of his two brothers Mardan Singh and Hari Singh.

65. If the witness would have been tutored, then he could have safely not made any admission about a lady being present in their home or about the kidnapping of a lady by the deceased. On critical appraisal of the testimony of this witness, we are of the firm opinion that there are no material contradictions on the point of involvement of the accused persons-appellants and the weapon assigned to them as well as the time, date, place and manner of occurrenc. Even if, some variations appearing in the deposition, are taken to be true, these variations appear to be natural and do not raise a question mark on the veracity of the statement made by him.

66. PW 5 Phoola Rani is the mother of deceased. She has also disclosed the purpose for which PW 2 visited her place and made payment to the balance amount of the cow to her. She has also stated the purpose for which PW 2 visited her place on the date of incident. She has deposed that firstly, Drigpal discharged a shot at deceased Mardan Singh. She has categorically assigined the weapon of assault to all the accused persons namely, Drigpal, Maiku, Gyasi, Prahlad and Govind. Fire arm to Drigpal, farsa to Maiku and Gyasi, ballam to Prahlad and Govind. She has stated that after commission of murder of Mardan Singh, accused persons-appellants proceeded towards Hari Singh, by saying that he would not be spared. PW 2, PW 4 and PW 5 secretly followed the assailants, who committed the murder of Hari Singh at bandha. She has categorically stated that Drigpal fired upon Hari Singh and other accused persons assaulted him by means of the weapons, which were in their hands. This witness has been put to a lengthy cross-examination. She has categorically denied in her cross-examination about the involvement of accused Prahlad and Govind, who were respectively assigned the ballam. She has categorically admitted in her examination-in-chief and the cross-examination about the part played by Drigpal, Maiku and Gyasi in the commission of offence with the weapons assigned to them on the date, time and place of incident. Even after a detalied cross-examination on behalf of accused-appellants, nothing could be extracted by way of cross-examination from this witness, which may be termed as admission in contradiction to the story set up in the FIR or in contradiction to the statement in examination-in-chief by the witness.

67. The principle of appreciation of a related or an interested witness has already been discussed above. After critical appraisal, we find that the testimony of PW 5 is in complete coherence with the story set up in the FIR as well as the deposition made by PW 2 and PW 4 with

respect to the date, time, place and manner of murder of Mardan Singh and Hari Singh at two different places with the use of weapons assigned to them.

68. On critical appraisal of the story set up in the FIR and the statement made by PW 2, PW 4 and PW 5, there is complete coherence about the date, time, place, manner of commission of offence, the weapons used therein and the complicity of the appellants.

69. Now it appears expedient that the testimonies of witnesses of fact, who are alleged to be eye witnesses, should be tested on the touchstone of the medical evidence. PW 1 G. D. Pandey is the doctor, who conducted the autopsy on the persons of deceased Mardan Singh and Hari Singh. The injuries found on the persons of Mardan Singh and Hari Singh discloses the injury in the nature of gun shot wound and incised wound. The witnesses of the fact has also stated that both the deceased have sustained the injuries by fire arm, which was caused by Drigpal Singh by use of fire arm and the incised wound by use of farsa assigned to Maiku and Gyasi. The doctor has categorically opined that the injuries in the nature of incised would may be caused by farsa, which fortifies the testimony of witnesses of facts.

70. The reason and purpose assigned by PW 2 for the visit to the place of deceased Mardan Singh finds complete corroboration from the testimony of PW 4 Vinod and PW 5 Smt. Phoola. The appraisal of evidence of PW 2, 4 and 5 proves the presence of PW 2 on the place of occurrence to be natural with purpose.

71. The next limb of argument is that the independent witness has not been examined. All the witnesses of fact are related witness. The aspect of non-examination of an independent witness has recently been considered by the Supreme Court in the case of **Sadhu Saran Singh v. State of U. P, (2016) 4 SCC 357**. The relevant para is being reproduced hereinbelow:

"21.(vi) As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilized people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy."

72. From the principle enunciated by the Hon'ble Apex Court it can safely be said that mere absence of an independent witness would not have the effect of derailment of the entire prosecution case. The psychology of the public at large has changed to a greater extent and no one wants to afford the annoyance of other side by being a witness. Mere on the score of absence of an independent witness the entire prosecution cannot be discarded or disbelieved.

73. On critical appraisal of the testimony of PW 2, PW 4 and PW 5, who are alleged to be related and interested witness, we find inter se complete coherence in their testimonies with respect to the date, time, place and manner of occurrence and by whom as well as with what weapon, the crime has been committed. The testimonies of these witnesses corroborates the story disclosed in the FIR. The FIR is to be appreciated bearing in mind that it is not supposed to be the encyclopaedia and it is not expected to contain all the minute details. Even if, for agrument sake there is any ommission in the FIR, it would not materially affect the prosecution case. Time and again the Hon'ble Apex Court has stated that the FIR is not supposed to be a substantive piece of evidence and it is used only for the purpose of corroboration and contradiction. Any ommission would not adversely affect the prosecution case.

74.On the basis of aforesaid discussions, we are of the opinion that the findings of conviction recorded by the learned Court below are well founded on the materials available on record and no error has been commited by the learned Court below in appreciating the evidence and in recording the findings of conviction against the accused-appellants. There apepars no justification to interfere with the findings of conviction recorded by the learned Court below.

75. In view of aforesaid reasons, the judgment and order dated 7.12.1982 passed by the learned Court below convicting and sentencing the accused persons-appellants as mentioned above, is hereby affirmed.

76. This appeal is bereft of merits and is, accordingly, dismissed.

77. Let the lower Court's record be transmitted back to the Court concerned forthwith along with a copy of this judgment for necessary compliance.

(2016) 9 ILRA 646
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2016

BEFORE

THE HON'BLE V. K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 5113 Of 2013

Zafar M. Naiyer Advocate ...Petitioner
Versus
U.P. Bar Council & Anr. ...Respondents

Counsel for the Petitioner:
Himansu Mishra, S.K. Upadhyay, Tarun Agarwal

Counsel for the Respondents:
SC, Anoop Trivedi, Sunita Sharma, V.C. Srivastava

Brief background of the case, as is emanating from the record in question, is that in reference of Nazool Plot No. 31 situated at Thornhill Road having an area of 8082.53 square meter, a small chunk of the said area measuring 229.09 square meter bearing plot no. 31-A and B was sold by Narayan Das Pahuja to Smt. Kanchan Khare on 1.12.2000. In reference of the same large area of the land in question by another sale-deed dated 4/5.10.2001 Narayan Das Pahuja sold 40.205 square meter of land of plot no. 31-A and B part, Thornhill Road, Allahabad and internal page 9 of the said sale deed in question following boundaries have been mentioned:
Sale deed dated 4/5.10.2001 in favour of Kanchan Khare for 40.205 square meter
East- One wide passage on which purchaser shall have independent uninterrupted facility of passage for use by purchaser.
West- Plot of Kanchan Khare
North- Plot of Kanchan Khare
South- Plot No. 31-A Part on which 20 feet wide road which connects Thornhill Road.

Once such is the factual situation before us that entire matter pertaining to the property in question, as to whether petitioner has got any right or not to use the said passage and to place the gate therein is engaging the attention of Civil Court and as to whether the gate has rightly been constructed or not is engaging the attention of this Court and U.P. State Bar Council as in the complaint it has been mentioned that at the point of time when gate in question has been constructed 15 to 20 advocates had assembled in favour of petitioner, who also appear to be practising advocates and, accordingly, petitioner has committed misconduct of grabbing the passage by erecting gate at one end of passage and erecting wall on the other end.

Accepted position is that petitioner has not committed any professional misconduct and the allegation, that is coming forward, is that he has not at all acted in consonance with the higher standard and has grabbed the passage in question. The question is once there is a dispute in reference of property in question and there are allegation and counter allegation coming forward, then all these issues should be decided by the competent Civil Court and once the said

Court proceeds to decide the issues and therein it is found on the basis of evidence that an incumbent has misused its privilege as an Advocate, then, thereafter, in case, any action is required to be undertaken, same can be undertaken, in accordance with law, but till the said issues are not answered by competent court and there is no misconduct on professional front and petitioner has been agitating for his rights, then initiation of proceedings by U.P. State Bar Council cannot be subscribed by us, in the peculiar facts and circumstances of the case at this stage. We would have appreciated the stand of U.P. State Bar Council, if after acquiring knowledge of the fact of the background of the litigation that it was primarily dispute for right of passage and property, that U.P. State Bar Council would defer the matter till verdict comes from the competent court, but here most surprisingly U.P. State Bar Council has not taken such a stand and has been insisting upon to proceed with the matter as incidentally issue of other misconduct was also involved. In view of this, in our considered opinion ongoing proceedings would be abuse of the process for the simple reason that U.P. State Bar Council certainly will not take upon itself to decide the property dispute i.e. the main dispute and the incidental matter that has been referred to U.P. State Bar Council is purely dependent on the main issue as to whether petitioner has exclusive right to the passage and erect the gate, accordingly, the proceedings in question are quashed, at this stage. However, we make it clear that quashing of these proceedings will not at all come in the way of parties to pursue their rights before the appropriate forum and after final adjudication is done by Courts, then in case any misconduct is reflected, the same can be perused as per law.

Writ petition is allowed, accordingly.

Held: Para-

Case Law discussed:
Bar Council of Maharashtra Vs. M.V. Dabholkar & Ors., (1975) 2 SCC 702,
(1976) 2 SCC 291, Bar Council of Maharashtra Vs.M.V. Dabholkar,
Nandlal Khodidas Barot Vs. Bar Council of Gujarat & Ors., 1980 (Supp.) SCC 318,
Noratanmal Chouraria Vs. M.R. Murli and Another, 2004 (5) SCC 689,
'M' an Advocate, Hikamat Ali Khan Vs. Ishwar Prasad Arya as well as N.G. Dastane Vs. Shrikant S. Shivde,
Associated Provincial Picture Houses Ltd. Us. Wednesbury Corp., (1947) 2 All ER 680 (CA),
Council of Civil Service Unions Vs. Minister for the Civil Services, 1984 (3) All ER. 935,
Union of India & Anr. Vs. G. Ganayutham, (1997) 7 SCC 463,
Delhi Administration Vs. Gurdip Singh Uban & Ors., (2000) 7 SCC 296,

(Delivered by Hon'ble V.K. Shukla J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Zafar M. Naiyer, a designated Senior Advocate of this Court, is before this Court, assailing the validity of the proceedings, so undertaken by the U.P. State Bar Council, in reference of complaint dated 7.12.2012 filed by one Sunil Nangia, opposite party no. 2.

2. Brief background of the case, as is emanating from the record in question, is that in reference of Nazool Plot No. 31situated at Thornhill Road having an area of 8082.53 square meter, a small chunk of the said area measuring 229.09 square meter bearing plot no. 31-A and B was sold

by Narayan Das Pahuja to Smt. Kanchan Khare on 1.12.2000. In reference of the same large area of the land in question by another sale-deed dated 4/5.10.2001 Narayan Das Pahuja sold 40.205 square meter of land of plot no. 31-A and B part, Thornhill Road, Allahabad and internal page 9 of the said sale deed in question following boundaries have been mentioned:

Sale deed dated 4/5.10.2001 in favour of Kanchan Khare for 40.205 square meter

East- One wide passage on which purchaser shall have independent uninterrupted facility of passage for use by purchaser.

West- Plot of Kanchan Khare

North- Plot of Kanchan Khare

South- Plot No. 31-A Part on which 20 feet wide road which connects Thornhill Road.

3. In reference of the same large area of the land in question by third sale-deed dated 4.6.2002 Dinesh Pahuja s/o Narayan Das Pahuja sold an area of 10.776 square meter of land to Smt. Kanchan Khare. In the body of the writ petition the respective boundaries as given in the sale deed in question as far as petitioner is concerned he has purchased the aforesaid land from Smt. Kanchan Khare vide registered sale deed dated 24.7.2010 and therein following mention has been made;

Sale deed dated 24.7.2010

East- A wide passage where purchaser shall have independent uninterrupted exclusive right of user.

West- Part of plot no. 31-A

North- Part of plot no. 31-A

South- 2 ½ feet road widening and thereafter 25 feet road.

4. By an instrument of sale deed dated 17.2.2001 Narayan Das Pahuja sold bungalow no. 3 of Site No. 31-A Civil Station Road Allahabad (area 513-67 square meters) having a covered area 211.8 square meter and open area of the land measuring 301.876 square meter the boundaries are of the sale deed are given below;

Sale deed dated 17.2.2001 N.D. Pahuja Vs. P.N. Nangia

Boundaries of the sale deed dated 17.2.2001 executed by Narayan Das Pahuja in favour of P.N. Nangia and Sunil Nangia in respect of bungalow no. 3 situated at site no. 31-A Civil Station Road, Thornhill Road, Allahabad for an area of 513.676 square meter in which covered area 211.8 square meter and an open land of 301.876 square meters.

East- Bunglow of Sri S. Gupta

West- Road size 20 feet wide upto length enclosed in map.

North- Open land of seller.

South- Open land of first party.

5. Vide sale deed dated 18.3.2005 Chitra Pahuja widow of Narayan Das Pahuja sold 444.77 square meter of land of plot no. 23 to Sudarshan Promoters and Builders through its partner Sri Shrawan Das Hotwani. Boundaries of the said sale deed are enumerated as follows;

Sale deed dated 18.3.2005

Boundaries of the sale deed dated 18.3.2005 executed by Smt. Chitra Pahuja widow of Narayan Das Pahuja in favour of Sudarshan Promoters & Developers through his partner Shrawan Das Hotwani relating to plot no. 31 A (part) area of 444.77 square meter at page 13 of the sale deed.

East- Houses of others

West- Part of 31-A and plot of Kanchan Khare

North- 24 feet wide public road for entry, exit and free hold premises no. 31-A plot number 23, Civil Station, Thornhill Road.

South- Bungalow no. 3 and 9 feet wide passage on which 3rd party shall have uninterrupted independent right of passage as shown in the map.

6. Petitioner claims that after the purchase of the house in question as is envisaged under U.P. Urban Planning and Development Act, 1973 plan in question was sanctioned by the Allahabad Development Authority and therein private passage has been shown. Petitioner submits that with the said private passage in question Sunil Nangia has got no concern but unnecessarily claim was being set-up by him in reference to the said property in question and, accordingly, he has proceeded to make a complaint in reference of the said passage in question. Petitioner submits that this passage has been bone of the contention inter-se parties and this much is also reflected that execution proceedings were ongoing as Sunil Nangia has come up with the specific case that in a suit, that has been so filed, the sale deed executed in favour of Smt. Kanchan Khare has been

declared to be null and void and, accordingly, petitioner has got no right over the passage in question.

7. Petitioner, on the other hand, has been claiming his right over the passage in question and this much fact has also come forward that in execution proceedings petitioner has entered appearance and has objected to the same on 16.11.2012. The claim of Sunil Nangia has been that in spite of the fact that petitioner has got no concern with the property in question, even then on account of his profound influence and in active collusion of other advocates a gate in question has been installed and in this regard complaint has been made and on the said complaint the Allahabad Development Authority has proceeded to pass order in his favour and, in view of this, as petitioner has proceeded to misuse his privilege as a lawyer, accordingly, complaint to the State Bar Council has been made. This much is reflected from the record in question that the State Bar Council, in its turn, has proceeded to entertain the said complaint in question and, accordingly, vide resolution dated 2142 of 2012 has passed the following resolution:

"Read the complaint of Sri Sunil Nangia against Sri Zafar M. Naiyer, Advocate.

The Bar Council of U.P. has perused the contents of the complaint and has reason to belief that the Advocate concerned is prima facie guilty of professional misconduct/other misconduct. Accordingly it is resolved that the complaint, is therefore, referred to the Disciplinary Committee for disposal, according to law."

8. Accordingly, State Bar Council has referred the matter to the Disciplinary Committee and, thereafter, petitioner has appeared before the Disciplinary Committee and, thereafter, petitioner is before this Court with the grievance that the entire proceedings are nullity for the reason that private disputes cannot be subject matter of enquiry by the U.P. State Bar Council.

9. On the presentation of the writ petition in question this Court proceeded to entertain the writ petition in question and passed the following order;

"The petitioner is Senior Advocate. His grievance is that on a complaint lodged by the respondent no. 2 with the respondent no. 1 (Uttar Pradesh Bar Council), action has been initiated against the petitioner. The submission of the learned counsel for the petitioner is that the complaint is with regard to the civil dispute and has nothing to do with any professional conduct of the petitioner and as such, the complaint with the Bar Council and the action taken on such complaint is wholly unjustified.

In our view, the matter requires consideration.

Issue notice to the respondents fixing a date immediately after six weeks.

All the respondents may file counter affidavit by the next date.

Considering the facts and circumstances of this case and keeping in view the aforesaid submissions of the learned counsel for the petitioner, it is directed that the proceedings of Disciplinary Case No. 365 of 2012 pending before the respondent no. 1 shall remain stayed."

10. Against the order passed by this Court, this much is reflected that U.P. State Bar Council has proceeded to file special leave to appeal No. 27547 of 2013 and Apex Court in its turn refused to entertain the said special leave to appeal and as pleadings before this Court was complete, following order was passed;

" It has been submitted by the learned counsel that the pleadings are over in the High Court. In view of the said fact, we desire that the High Court should decide the writ petition pending before it, preferably within two months from today.

The Special Leave Petition is, accordingly, disposed of."

11. Counter and rejoinder affidavits have been filed both on behalf of U.P. State Bar Council as well the private incumbent, who has proceeded to make complaint and rebuttal has also been filed to the same and, thereafter, present matter has been taken up for final hearing and disposal.

12. Sri Umesh Narayan Sharma, Senior Advocate, has submitted before this Court that private dispute in question pertaining to the property cannot be settled and specially when matters are pending/engaging the attention of Court of competent jurisdiction, in view of this, the complaint, that has been made before the U.P. State Bar Council ought not to have been entertained in mechanical manner, as it has been done in the present case and, as such,this Court should intervene in the facts of the case as a Senior Advocate of this Court should not be left to suffer harassment and victimization though by a statutory body, who is proceeding to exercise statutory powers, and in the present case entire exercise would be an exercise in futility and, accordingly, writ petition deserves to be allowed.

13. Sri Rakesh Pande, Advocate, has submitted that on its face value there is a typical dispute pertaining to the property in question and here additionally in the present case conduct of an Advocate of this Court is also involved in reference to the said property dispute and, accordingly, U.P. State Bar Council is right at the point of time when it has proceeded to take cognizance of the matter and has referred the matter before the Disciplinary Committee and whatever issues are being raised by the petitioner can be very well raised before the Disciplinary Committee and, as the Advocate Act is a self contained act there are various forums provided for against the final action, so taken, in view of this, at this interlocutory stage of proceedings when merely petitioner has been asked to show cause, no interference be made by this Court.

14. Sri V.C. Srivastava, Advocate, appearing with Smt. Sunita Sharma, Advocate, submitted before this Court that a deliberate, wilful and designed attempt has been made by the petitioner to grab the property in question without any authority of law and the conduct that has

been shown by a practising advocate, is not befitting to a member of noble profession, required to be maintained by the petitioner, in view of this, U.P. State Bar Council has rightly proceeded to take cognizance in the matter and till date no final decision has been taken, as such, once the proceedings are in mid way no interference be made by this Court, as has been so requested by the petitioner.

15. After respective arguments have been advanced the factual situation that is so emerging in the present case is that both the petitioner Zafar M. Naiyer as well as Sunil Nangia have proceeded to purchase the property in question out of big chunk of land situated at Thornhill Road having an area of 8082.53 square meters which was leased out in favour of G.R. Garden on 21.12.1912 and the Garden has further transferred the rights to Sri Prithvi Nath and on his death his wife Jagat Rani and daughters Kamla Kaul and Vimla Raina became the lessees. Kamla Kaul died in 1980 leaving behind sons Ravi Kaul, Vikram Kaul and a daughter Rajni Saxena. Likewise Smt. Kamla Kaul died living G.S. Raina as son and Mala Tankha as daughter and on account of partition in the year 1984 pursuant to the decree in suit no. 1975 the property in question devolved upon the aforesaid heirs and they nominated Narayan Das Pahuja, who has secured free hold rights after making payment as per the government policy and it is Narayan Das Pahuja who has proceeded to carve out various plots and sold them in different parcels to different individuals. Based on the same transaction has been made in favour of Kanchan Khare and in favour of Sunil Nangia. This much is also reflected from the record in question that in reference of Kanchan Khare suit in question has been filed and the said suit in question has been decreed on 23.3.2016 wherein sale deed dated 4.10.2001 has been declared to be invalid.

16. Counsel representing Sunil Nangia was asked by us to give full details of pending proceedings in Courts qua the property in question. Details furnished are that against the order dated 23.3.2006 passed by Judge, Small Causes in O.S. No. 655 of 2005 (P.N. Nangia Vs. Smt. Kanchan Khare), appeal has been filed by Smt. Kanchan Khare and same has been informed to be pending. Petitioner in his turn has moved an application under Order IX Rule 13 of CPC for setting aside order dated 23.3.2016 and same is also pending and engaging attention of the concerned Court. Not only this against the order dated 16.9.2013 passed by the Allahabad Development Authority for removal of encroachment over passage, petitioner has preferred writ petition No. 55017 of 2013, Zafar M. Naiyar Vs. State of U.P. & others. It has been informed by parties that there is an interim order.

17. Record in question reflects that execution proceedings have been undertaken and in the said execution proceedings the complainant Sunil Nangia has proceeded to make a complaint as to in what way and manner the decree in question has been flouted and breached and this much is reflected from the record that Judge, Small Causes, Allahabad, on 7.12.2013 has proceeded to pass an order mentioning therein that decree holder has concealed the true facts in the Court and impleaded those who were not the party in the original suit and they cannot be proceeded with in execution proceedings. Thus all these facts clearly go to show and substantiate that the parties to the dispute are litigating over the property in question, that has been shown as passage in the sale deed in question.

18. The entire dispute is with reference to the passage in question qua which in the sale deed mention has been made that purchaser shall have independent uninterrupted facility of passage for use by purchaser. It is in reference of this portion that the entire dispute is on and the issue is before the competent civil court. The issue is once the matter is pending and engaging the attention of civil court as well as in reference of construction in question the matter is pending before this Court, was U.P. State Bar Council in its turn right in proceeding to entertain the matter and refer the matter, as has been done in the present case, to the Disciplinary Committee.

19. Before we proceed further, the relevant statutory provisions are being looked into. The Advocates Act, 1961 was introduced to amend and consolidate the law relating to legal practitioners and to provide for constitution of Bar Council of India and State Bar Council.

20. Chapter V of the Act relates to the Conduct of Advocates. Chapter V contains sections 35 to 44. Sub-section (1) of Section 35 on the interpretation of which in the light of the facts on record, hinges the fate of this writ petition, may be noted.

"35. Punishment of advocates for misconduct-

(1) Where on receipt of a complaint or otherwise, a State Bar Council has reason to believe that any advocate on its roll, has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee."

21. Section 35 states that where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct that inquiry to be made by another disciplinary committee of the State Bar Council. The disciplinary committee of a State Bar Council shall fix a date for the hearing of the case and shall cause a notice to be given to the advocate concerned and to the Advocate- General of the State. The disciplinary committee of the State Bar Council may make any of the following orders namely, (a) dismiss the complaint, or where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed, (b) reprimand the advocate, (c) suspend the advocate for such period as it may deem fit, (d) remove the name of the advocate from the state roll of advocates.

22. Section 36 speaks of disciplinary powers of the Bar Council of India and provides that where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any advocate whose name is not entered on any State roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The disciplinary committee of the Bar Council of India may either of its own motion or on a report by any State Bar Council or on an application made to it by any person interested, withdraw for inquiry before itself any proceeding for disciplinary action against any advocate pending before the disciplinary committee of any State Bar Council and dispose of the same.

23. Section 37 speaks of appeal to the Bar Council of India. This section states that any person aggrieved by an order of the disciplinary committee of a State Bar Council or the Advocate-General of the state may, within sixty days of the date of communication of the order, prefer an appeal to the Bar Council of India.

24. Section 38 provides for appeal to the Supreme Court. Section 38 states that any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under section 36 or section 37 or the Attorney-General of India or the Advocate-General of the State, as the case may be, may prefer an appeal to the Supreme Court.

25. Section 49 of the Act provides that the Bar Council of India may make rules for discharging its functions under the Act and in particular such rules may prescribe inter alia the standards of professional conduct and etiquette to be observed by advocates. The Bar Council of India in exercise of the rule making power under section 49(c) of the Act on 10 and l l July, 1954, approved the rules of standards of professional conduct and etiquette. The standards of professional conduct and etiquette are described in five sections. The first section deals with duty of advocates to the Court. The second section speaks of duty of advocates to the clients. The third section consists of rules regarding duty of advocates to opponent. The fourth section prescribes duties of advocates to colleagues. The fifth section lays down restrictions on advocates on other employments.

26. Said statutory provision has been subject matter of consideration/interpretation by the Courts time and again. Seven Judges Constitution Bench of the Apex Court in the case of ***Bar Council of Maharashtra Vs. M.V. Dabholkar & Ors.*, (1975) 2 SCC 702**, after analysis of Chapter V of the Advocates Act relating to conduct of the advocates, has observed in paragraph 24 of the report as under.

"24. The scheme and the provisions of the Act indicate that the constitution of State Bar Councils and Bar Council of India is for one of the principal purposes to see that the standards of professional conduct and etiquette laid down by the Bar Council of India are observed and preserved. The Bar Councils therefore entertain cases of misconduct against advocates. The Bar Councils are to safeguard the rights, privilege and interests of advocates. The Bar Council is a body corporate. The disciplinary committees are constituted by the Bar Council. The Bar Council is not the same body as its disciplinary committee. One of the principal functions of the Bar Council in regard to standards of professional conduct and etiquette of advocates is to receive complaints against advocates and if the Bar Council has reason to believe that any advocate has been guilty of professional or other misconduct it shall refer the case for disposal to its disciplinary committee. The Bar Council of a State may also of its own motion if it has reason to believe that any advocate has been guilty of professional or other misconduct it shall refer the case for disposal to its disciplinary committee. It is apparent that a State Bar Council not only receives a complaint but is required to apply its mind to find out whether there is any reason to believe that any advocate has been guilty of professional or other misconduct. The Bar Council of a State acts on that reasoned belief. The Bar Council has a very important part to play, first, in the reception of complaints,

second, in forming reasonable belief of guilt of professional or other misconduct and finally in making reference of the case to its disciplinary committee. The initiation of the proceeding before the disciplinary committee is by the Bar Council of a State. A most significant feature is that no litigant an no member of the public can straightaway commence disciplinary proceedings against an advocate. It is the Bar Council of a State which initiates the disciplinary proceedings."

Again in paragraph 31 of the report, it has been held as under.

"31. ..... The Bar Council acts as the protector of the purity and dignity of the profession. Third, the function of the Bar Council in entertaining complaints against advocates is when the Bar Council has reasonable belief that there is a prima facie case of misconduct that a disciplinary committee is entrusted with such inquiry. ....."

27. In the above noted case before the Apex Court, the issue was with respect to maintainability of an appeal by the Bar Council as an aggrieved person under the Act. Another Bench of Apex Court while deciding the merits of the said case reported in **(1976) 2 SCC 291, *Bar Council of Maharashtra Vs. M.V. Dabholkar***, the question as to what would amount to satisfaction of the requirement of reason to believe, answered the issue as under.

"..... The requirement of 'reason to believe' cannot be converted into a formalised procedural roadblock, it being essentially a barrier against frivolous enquiries. It is implicit in the resolution of the Bar Council, when it says that it has considered the complaint and decided to refer the matter to the disciplinary committee, that it had reason to believe, as prescribed by the statute."

28. In view of the aforesaid exposition of law by the Apex Court, the least required is that there should be a resolution that Bar Council had considered the complaint and finding that there was a prima facie case, the matter is being referred to a disciplinary committee.

29. Once again matter came up before the Apex Court in the case of ***Nandlal Khodidas Barot Vs. Bar Council of Gujarat & Ors.*, 1980 (Supp.) SCC 318**. In the said case, the Bar Council of Gujarat passed a resolution referring several complaints against different advocates to the disciplinary committee of the Bar Council. The resolution which was under consideration before the Apex Court, reads as under.

"Resolved that the following complaints be and are hereby referred to the Disciplinary Committee of the Bar Council."

30. Apex Court in the said case taking into account the resolution mentioned that resolution does not even say that State Bar Council had considered the complaint and found that there was prima facie case. It was held that the reference by the State Bar Council was incompetent and that being so the proceedings before the Disciplinary Committee of Bar Council of Gujarat and transfer to Bar Council of India were invalid.

31. Apex Court in the case of ***Noratanmal Chouraria Vs. M.R. Murli and another*, 2004 (5) SCC 689**, has construed the word 'misconduct' and has also proceeded to construe the word 'misconduct' in the context of Section 35 of the Advocates Act. The relevant paragraphs 7 to 13 are as follows;

"7. Misconduct has not been defined in the Advocates Act, 1961. Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute conduct and indiscipline, which, however, is wide enough to include wrongful omission or commission whether done or omitted to be done intentionally or unintentionally. It means, "improper behaviour intentional wrong doing or deliberate violation of a rule of standard or behaviour":

8. Misconduct is said to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand; it is a violation of definite law.

9. In Delhi Cloth & General Mills Co. Ltd. vs. Its Workmen reported in (1969) 2 LLJ 755, Shah, J. stated that misconduct spreads over a wide and hazy spectrum of industrial activity; the most seriously subversive conducts rendering an employee wholly unfit for employment to mere technical default covered thereby.

10. This Court in State of Punjab and Others vs. Ram Singh Ex. Constable, reported in 1992 (4) SCC 54, noticed:-

"5. Misconduct has been defined in Black's Law Dictionary, sixth Edition at Page 999 thus:-

"A Transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour, it synonyms are misdemeanor, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness".

Misconduct in offence has been defined as :-

"Any unlawful behaviour by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly and failure to act in the face of an affirmative duty to act".

P.Ramanath Aiyar's Law Lexicon, Reprint Edition 1987 at Page 821 defines 'misconduct thus:-

"The term misconduct implies a wrongful intention, and not a mere error of judgment, Misconduct is not necessarily the same thing as conduct involving moral turpitude. The

word misconduct is a relative term, and has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskillfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public official, by which the right of party have been affected."

Thus it could be seen that the word 'misconduct' though not capable of precise of definition, on reflection receives its conotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-manner and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

[See also Probodh Kumar Bhowmick Vs. University of Calcutta (1994 (2) Calcutta Law Journal 456 and B.C. Chaturvedi Vs. Union of India [1995 (6) SCC 749].

11. Section 35 of the Advocates Act, however, refers to imposition of punishment for professional or other misconduct. A member of legal profession which is a noble one is expected to maintain a standard in dignified and determined manner. The standard required to be maintained by the member of the legal profession must be commensurate with the nobility thereof. A Lawyer is obligated to observe those norms which make him worthy of the confidence of the community in him as an officer of the court. This Court in Bar Council, Maharashtra V. M.V.Dabholkar [AIR 1976 SCC 242] observed:-

"The high moral tone and the considerable public service the bar is associated with and its key role in the developmental and dispute-processing activities and, above all, in the building up of a just society and constitutional order has earned for it a monopoly to practise law and an autonomy to regulate its own internal discipline."

12. Although the power of the Bar Council is not limited, the thrust of charge must be such which would necessitate initiation of disciplinary proceedings. A professional or other misconduct committed by a member of the profession should ordinarily be judged qua profession. To determine the quantum of punishment which may be imposed on an advocate, the test of

proportionality shall be applied which would also depend upon the nature of the acts complained of. No universal rule thus can be laid down as regard initiation of a proceeding for misconduct of a member of the profession.

13. In 'M' an Advocate (supra), however, this court emphasized the requirement of maintaining a high standard stating:-

"As has been laid down by this Court in the matter of 'G', a Senior Advocate of the Supreme Court (A) (supra) the Court, in dealing with cases of professional misconduct is "not concerned with ordinary legal rights, but with the special and rigid rules of professional conduct expected of and applied to a specially privileged class of persons who, because of their privileged status, are subject to certain disabilities which do not attach to their men and which do not attach even to them in a non-professional character ...he (a legal practitioner) is bound to conduct himself in a manner befitting the high and honourable professional to whose privileges he has so long been admitted; and if he departs from the high standards which that professional has set for itself and demands of him in professional matters, he is liable to disciplinary action."

32. In the said case before the Apex Court in the case of ***Noratanmal Chouraria (supra)*** Disciplinary Committee has considered the conduct of applicant therein in order to judge as to whether the acts on the part of the respondents amount to misconduct in following terms;

"14. The disciplinary committee of the Bar Council of India is a statutory body. At the first instance the duty to arrive at a finding of facts in respect of complaint made against a member of the legal profession is upon it. This court although enjoys extensive and wide jurisdiction under Section 38 of the Act, the opinion of the Bar Council shall carry great weight. The appellant herein had lodged complaint with the State Bar Council on 5.3.1995 in relation to the 3 incidents allegedly occurred on 8.10.1993, 26.10.1993 and 1.3.1995.

15. The Disciplinary Committee had considered the conduct of the appellant herein in order to judge as to whether the acts on the part of the respondents amount to misconduct.

16. There was absolutely no reason as to why the appellant did not make any complaint to the State Bar Council immediately of the incidents which took place on 8.10.1993 and 26.10.1993. If his contention to the effect that in relation to the incident dated 26.10.1993 he had lodged a first information report there was absolutely no reason as to why he did not pursue the same seriously. It is, as has been noticed by the Bar Council of India, accepted that the police filed final forms but despite the same the appellant did not file any protest petition or initiate any other proceeding before criminal court. In relation to the incident dated 1.3.1995 which allegedly took place inside the court room it was expected of the appellant or his advocate, who is said to be a retired district judge, to bring the same to the notice of the court. Even in relation to the incidents allegedly occurred on 8.10.1993 and 26.10.1993 no complaint was made before the presiding officer of the court. No proceeding was initiated in relation to the purported incident on 1.3.1995.

17. Can in the aforementioned fact situation, the findings of the Bar Council, be said to be so irrational meriting interference by this court is the question? We are of the opinion that it is not. We may further place on record that on a querry made by us to Mr. Upadhyay as to whether any other incident had taken place after 1.3.1995, the learned counsel categorically stated that no such incident had thereafter taken place. We are, therefore, of the opinion that the matter need not be pursued further. "

33. Apex Court, thereafter, has considered the case law in the case of ***'M' an Advocate, Hikamat Ali Khan Vs. Ishwar Prasad Arya as well as N.G. Dastane Vs. Shrikant S. Shivde*** and, thereafter, has concluded that no case has been made out for interfering with the impugned order.

34. On the parameters of the provisions, quoted above, and the judgements of the Apex Court, this much is clear that as far as petitioner is concerned he is a member of legal profession which is a noble one and is expected to maintain a standard in dignified and determined manner. The standard required to be maintained by the member of the legal profession has to be commensurate with the nobility thereof. A Lawyer is obligated to observe those norms which make him worthy of the confidence of the community in him as an officer of the court and further the thrust of charge must be such which would necessitate initiation of disciplinary proceedings. A professional or other misconduct committed by a member of the profession should ordinarily be judged qua profession.

35. The parameters of the Court's power of judicial review has also been subject matter of consideration.

36. The famous "Wednesbury Case" ***Associated Provincial Picture Houses Ltd. Us. Wednesbury Corp.*****, (1947) 2 All ER 680 (CA)** is considered to be landmark in so far as the basic principles relating to judicial review of administrative or statutory direction are concerned. We quote a passage from the judgement of Lord Greene which is as follows:-

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his consideration matters, which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority..... In another, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

37. The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in ***Council of Civil Service Unions Vs. Minister for the Civil Services*, 1984 (3) All ER. 935**, (commonly known as CCSU case) as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in this case:-

".....Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community."

38. Lord Diplock explained "irrationality" as follows:-

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

39. In ***Union of India & Anr. Vs. G. Ganayutham*, (1997) 7 SCC 463**, the Apex Court after referring to the aforesaid two cases namely Wednesbury case and CCSU case held as follows:-

"We are of the view that even in our country-in cases not involving fundamental freedoms-the role of our courts/tribunals in administrative law is purely secondary and while applying Wednesbury and CCSU principles to test the validity of executive action or of administrative action taken in exercise of statutory powers, the Courts and tribunals in our country can only go into the matter, as a secondary reviewing Court to find out if the executive or the administrator in their primary roles have arrived at a reasonable decision on the material before them in the light of Wednesbury and CCSU tests. The choice of the options available is for the authority;the court/tribunal cannot substitute its view as to what is reasonable."

40. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering the justice with mercy, the Court has to be very conscious that it has to do justice in exact conformity to some obligatory law for the reason that human actions are found to be just or unjust as they are in conformity with or in opposition to the law. In ***Delhi Administration Vs. Gurdip Singh Uban & Ors., (2000) 7 SCC 296***, the Apex Court observed as under:-

"The words 'justice' and 'injustice', in our view, are sometimes loosely used and have different meanings to different persons, particularly to those arrayed on opposite sides.....Justice Cardozo said, "The web is tangled and obscure, shot through with a multitude of shades and colours, the skeins irregular and broken. Many hues that seem to be simple, are found, when analysed, to be a complex and uncertain blend. Justice itself, which we are wont to appeal to as a test as well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards or even to describe them, have never wholly succeeded." (Selected Writings of Cardozo, PP 223-24; Fallon Publications, 1947)"

41. Therefore, justice has to be done to both the parties and the case cannot be considered only taking into consideration the interest of one party.

42. On the parameters, that has been settled by the Apex Court, it may be true that whatever defence is being sought to be raised by the petitioner before this Court, the same can be very well raised before the Disciplinary Committee who can always consider the same, in the facts of the case, as to whether the proceedings, that are being undertaken against the petitioner are correct or not and in consonance with the provisions as are contained under the Advocates Act but here what we find from the record in question is that on complaint being made U.P. State Bar Council has proceeded to take cognizance of the same and has proceeded to refer the matter to the Disciplinary Committee. In normal course of business the Disciplinary Committee has the authority to take the decision followed by right to appeal but here once the entire material is on record should we permit the proceedings to continue or should we proceed to quash the proceedings in question, in the peculiar facts of the case, that has so emerged. What we find that accepted position is that the decree that has been so passed ex-parte in the execution proceedings, that has been so undertaken, request has been made for demolition of construction and site be restored and blockade of road be removed. In the said proceedings objections have been put in by the petitioner and, thereafter, the Executing Court has found favour with the version of petitioner and objection of petitioner against execution of decree has been accepted by the Executing Court. Appeal has already been filed by Smt. Kanchan Khare against the ex-parte decree passed. Petitioner's application for setting aside ex-parte decree under Order IX Rule 13 of CPC is pending and engaging the attention of Civil Court. Coupled with this in reference to the gate being illegally constructed, complaint has been made and Allahabad Development Authority has proceeded to pass order and same has been subjected to challenge before this Court and therein interim order has been passed.

43. Once such is the factual situation before us that entire matter pertaining to the property in question, as to whether petitioner has got any right or not to use the said passage and to place the gate therein is engaging the attention of Civil Court and as to whether the gate has rightly been constructed or not is engaging the attention of this Court and U.P. State Bar Council as in the complaint it has been mentioned that at the point of time when gate in question has been constructed 15 to 20 advocates had assembled in favour of petitioner, who also appear to be practising advocates and, accordingly, petitioner has committed misconduct of grabbing the passage by erecting gate at one end of passage and erecting wall on the other end.

44. Accepted position is that petitioner has not committed any professional misconduct and the allegation, that is coming forward, is that he has not at all acted in consonance with the higher standard and has grabbed the passage in question. The question is once there is a dispute in reference of property in question and there are allegation and counter allegation coming forward, then all these issues should be decided by the competent Civil Court and once the said Court proceeds to decide the issues and therein it is found on the basis of evidence that an incumbent has misused its privilege as an Advocate, then, thereafter, in case, any action is required to be undertaken, same can be undertaken, in accordance with law, but till the said issues are not answered by competent court and there is no misconduct on professional front and petitioner has been agitating for his rights, then initiation of proceedings by U.P. State Bar Council cannot be subscribed by us, in the peculiar facts and circumstances of the case at this stage. We would have appreciated the stand of U.P. State Bar Council, if after acquiring knowledge of the fact of the background of the litigation that it was primarily dispute for right of passage and property, that U.P. State Bar Council would defer the matter till verdict comes from the competent court, but here most surprisingly U.P. State Bar Council has not taken such a stand and has been insisting upon to proceed with the matter as incidentally issue of other misconduct was also involved. In view of this, in our considered opinion ongoing proceedings would be abuse of the process for the simple reason that U.P. State Bar Council certainly will not take upon itself to decide the property dispute i.e. the main dispute and the incidental matter that has been referred to U.P. State Bar Council is purely dependent on the main issue as to whether petitioner has exclusive right to the passage and erect the gate, accordingly, the proceedings in question are quashed, at this stage. However, we make it clear that quashing of these proceedings will not at all come in the way of parties to pursue their rights before the appropriate forum and after final adjudication is done by Courts, then in case any misconduct is reflected, the same can be perused as per law.

45. Writ petition is ***allowed***, accordingly.

(2016) 9 ILRA 663
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 5543 Of 2004

Suheil **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
R.P. Singh, S.N. Jaishal, Sushma Yadav

Counsel for the Respondent:
Govt. Advocate

This criminal appeal has been preferred by appellant Suheil against the judgment and order of conviction dated 25.08.2004 passed by the Additional Sessions Judge, FTC No.1, Ghazipur, in Sessions Trial No.84 of 2003, State Vs. Suheil, arising out of Case Crime No.487 of 2002 under Sections 302, 506 IPC and Sessions Trial No.85 of 2003 arising out of Case Crime No.616 of 2002 under Section 25 Arms Act, Police Station Bhanwarkol, District Ghazipur whereby the appellant has been sentenced to life imprisonment coupled with fine Rs.5000/- under Section 302 IPC, in default of payment of fine, one year additional rigorous imprisonment, two years rigorous imprisonment coupled with fine Rs.500/- under Section 506(2) IPC, in default of payment of fine, three months' additional rigorous imprisonment and three years rigorous imprisonment coupled with fine Rs.500/- under Section 25 Arms Act, in default, three months' additional rigorous imprisonment. All the sentences were directed to run concurrently.

The accused-appellant Suheil was opposing this marriage arrangement and one month prior to the occurrence, he had threatened that in case they (informant's side) came to solemnize marriage they should also bring shroud with them. Since father-in-law of the first informant was interested in solemnization of marriage, therefore, he in order to participate in the marriage ceremony arrived on the spot on 23.10.2002. In the intervening night of 23/24.10.2002 after taking dinner, the first informant's father-in-law Majid along with first informant's sons namely Ali Akbar and Ali Sarver, both aged about 9 and 6 years, respectively were sleeping on the Takhat (wooden cot) in the hut, whereas, the other relatives were sleeping on Takhat (wooden cots) beside them. It was around mid-night when some noise was heard by the first informant on which she woke up and saw the accused-appellant Suheil son of Noorjahan in the illuminated light of lantern and moonlit night, passing by side of her father-in-law's bed/Takhat, having Tamancha (country-made pistol) in his hand. The first informant intercepted him whereupon he threatened her. Thereafter, the first informant and other persons arrived on the spot i.e. near the first informant's father-in-law Majid then they saw Majid dead on Takhat (wooden cot). The report was lodged for taking appropriate action.

In our opinion even if we accept the aforesaid contention of the learned counsel for the appellant the prosecution case is not liable to be discarded on the aforesaid ground in view of the fact that the prosecution

has not come up with a case that the deceased was sleeping in a particular posture when he was shot. Even otherwise the discrepancy between the ocular testimony and the medical evidence pointed out by the learned counsel for the appellant is not of such a degree or irreconcilable so as to render the entire prosecution case unreliable and incredible. The prosecution has come up with a categorical case that the appellant had shot the deceased Majeed while he was sleeping on a wooden table with his grand sons. According to the post mortem report of the deceased one gun shot wound of entry on the left side of the deceased's chest along with a corresponding gun shot wound of exit on right side of chest were found on his dead body. The post mortem report of the deceased in fact corroborates the crux of the prosecution theory that the appellant had shot the deceased with his firearm and in view of the above, the eye witness account of the incident given by PW-2 is not liable to be discarded only on the ground that the prosecution has not been able to prove by any evidence that the deceased was sleeping in the same posture as testified by PW-8 in his evidence when he was shot.

In view of the foregoing discussion, we do not find any reason to interfere with the recorded conviction of the appellant under Sections 302, 506(2) IPC and Section 25 of the Arms Act and sentence awarded to him by the trial court vide impugned judgment and order dated 25.08.2016. This appeal lacks merit and is accordingly dismissed.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. This criminal appeal has been preferred by appellant Suheil against the judgment and order of conviction dated 25.08.2004 passed by the Additional Sessions Judge, FTC No.1, Ghazipur, in Sessions Trial No.84 of 2003, State Vs. Suheil, arising out of Case Crime No.487 of 2002 under Sections 302, 506 IPC and Sessions Trial No.85 of 2003 arising out of Case Crime No.616 of 2002 under Section 25 Arms Act, Police Station Bhanwarkol, District Ghazipur whereby the appellant has been sentenced to life imprisonment coupled with fine Rs.5000/- under Section 302 IPC, in default of payment of fine, one year additional rigorous imprisonment, two years rigorous imprisonment coupled with fine Rs.500/- under Section 506(2) IPC, in default of payment of fine, three months' additional rigorous imprisonment and three years rigorous imprisonment coupled with fine Rs.500/- under Section 25 Arms Act, in default, three months' additional rigorous imprisonment. All the sentences were directed to run concurrently.

2. Heard Sri Satyadheer Singh Jadaun, learned counsel for the appellant, Sri Saghir Ahmad assisted by Sri J.K. Upadhyay and Kumari Meena, learned AGAs for the State and perused the record.

3. The facts of this case as unfolded in the first information report appear to be; that the first informant, Smt. Maimun Nisha wife of Harun Hussain, resident of village Dehari, Police Station Rajpur, District Baxar, State of Bihar, lodged a written report with Police Station Bhanwarkol, District Ghazipur on 24.10.2002 at 06:15 a.m. regarding the occurrence which took place in the

night intervening 23/24.10.2002 to the effect that her father-in-law Majid son of Aziz arranged marriage of his relative namely Zubair resident of Machchati, Police Station Bhanwarkol, District Ghazipur with the daughter of Gafoor, resident of Chakiya, Police Station Genhara, District Ghazipur.

4. The accused-appellant Suheil was opposing this marriage arrangement and one month prior to the occurrence, he had threatened that in case they (informant's side) came to solemnize marriage they should also bring shroud with them. Since father-in-law of the first informant was interested in solemnization of marriage, therefore, he in order to participate in the marriage ceremony arrived on the spot on 23.10.2002. In the intervening night of 23/24.10.2002 after taking dinner, the first informant's father-in-law Majid along with first informant's sons namely Ali Akbar and Ali Sarver, both aged about 9 and 6 years, respectively were sleeping on the Takhat (wooden cot) in the hut, whereas, the other relatives were sleeping on Takhat (wooden cots) beside them. It was around mid-night when some noise was heard by the first informant on which she woke up and saw the accused-appellant Suheil son of Noorjahan in the illuminated light of lantern and moonlit night, passing by side of her father-in-law's bed/Takhat, having Tamancha (country-made pistol) in his hand. The first informant intercepted him whereupon he threatened her. Thereafter, the first informant and other persons arrived on the spot i.e. near the first informant's father-in-law Majid then they saw Majid dead on Takhat (wooden cot). The report was lodged for taking appropriate action. This written report is Ext. Ka-1 on the record.

5. Contents of written report were taken down in Check FIR at Case Crime No.487 of 2002 under Sections 302, 506 IPC, Police Station Bhanwarkol, District Ghazipur on 24.10.2002 at 06:15 a.m. Check FIR is Ext. Ka-5.

6. Entries so made led to registration of case against the accused-appellant under Sections 302, 506 IPC at Police Station Bhanwarkol, District Ghazipur, in the relevant general diary which is Ext. Ka-6 on record.

7. Thereafter investigation of the case ensued. Investigation was taken over by the Investigating Officer Dhananjay Mishra PW-8. He in order to complete investigation proceeded to the spot where he collected blood stained and simple soil, blood stained wood of Takhat (wooden cot), besides taking the other things like Kathari (small thin mattress), pillow and empty cartridge from the spot and prepared memo of the same, which is Ext. Ka-8. The Investigating Officer also prepared recovery memo of lantern and handed over the same to Noorjehan son of Buddha in custody which is Ext. Ka-9 on record.

8. Record further reflects that during course of investigation, on 10.12.2002 Tamancha (country-made pistol) allegedly used in commission of offence by the accused-appellant was recovered at his pointing out. Recovery memo of the same was prepared by the Investigating Officer which is Ext. Ka-18.

9. Thereafter, inquest report of the deceased Majid was prepared by the Investigating Officer. Inquest report reveals that process commenced at 8:00 a.m. and ended at 10:00 a.m. on 24.10.2002. Inquest report is Ext. Ka-10. In the opinion of-inquest witnesses-it was thought proper to send the dead body for post mortem examination so that cause of death could be ascertained properly. Therefore, relevant papers with regard thereto were prepared. In this context, relevant papers are Exts. Ka-11, 12, 13, 14 and 16, respectively and the dead body of the deceased Majid was sent for post mortem examination.

10. The post mortem examination on the cadaver of deceased Majid was conducted by Dr. V.J.P. Sinha, PW-6 in the mortuary at Ghazipur on 24.10.2002 at 5:00 p.m. wherein following ante mortem injuries were noted:

1. Gunshot wound of entry left side of chest (lacerated wound) oval shape 1.5 cm x 1 cm x 10 cm cavity deep, collar latuel to nipple left abrasion present around injury, underlying bone fractured. Margins inverted.

2. Gunshot wound of exit on right side of chest (lacerated wound), 4.5 cm x 3 cm. Margins everted, 6 cm latuel to right nipple, underlying bone fractured.

Cause of death was opined to be shock and haemorrhage as a result of anti mortem gunshot injuries. Duration was stated to be half a day. This post mortem examination report is Ext. Ka-4.

11. Record further reflects that during course of investigation, Investigating Officer, Dhananjay Mishra PW-8 prepared site plan which is Ext. Ka-22. After completing investigation, Investigating Officer Dhananjay Mishra PW-8 filed charge sheet against the accused-appellant at Case Crime No.487 of 2002 under Sections 302, 506 IPC. Charge sheet is Ext. Ka-17.

12. Record further reveals that Dhananjay Mishra, PW-8, Investigating Officer of this case also lodged first information report regarding recovery of 'Tamancha' (country-made pistol) made at the pointing out of the accused-appellant on 10.12.2002 and a case was registered at Case Crime No.616 of 2002 under Section 25 Arms Act, Police Station Bhanwarkol, District Ghazipur. This FIR is Ext. Ka-2. The case under aforesaid Section of Arms Act was investigated into by the Investigating Officer-Virendra Singh- PW-9 who recorded statement of various prosecution witnesses and also proved relevant papers as well as site plan regarding recovery of Tamancha (country-made pistol) which is Ext. Ka-19 on record. He submitted charge sheet (under Section 3/25 Arms Act) against the accused-appellant which is Ext. Ka-21.

13. Thereafter the case of the appellant was committed to the court of Sessions from where it was made over for trial to the learned Additional Sessions Judge, FTC No.1, Ghazipur, who heard the appellant on point of charge and after recording his satisfaction regarding prima facie case for framing charge under Section 302, 506 IPC and 25 Arms Act, framed charge under the aforesaid

sections of IPC and Arms Act respectively. Charges were read over and explained to the appellant who abjured charges and opted for trial.

14. Consequently, the prosecution was asked to adduce its testimony, whereupon the prosecution produced in all nine witnesses. Brief reference of whom is as hereunder:

Maimun Nisha PW-1 is the first informant while Ali Akbar PW-2, claims himself to have witnessed the incident and they were present on the spot at the time of occurrence. Similarly, Sakelu PW-3 has also claimed himself to be an eyewitness of occurrence. Apart from above witnesses of fact, formal witnesses namely; Mahendra Yadav PW-4 who had sent dead body of Majid for post mortem examination to the mortuary proved the aforesaid fact, Ajay Kumar Singh PW-5 who had made relevant entries in the concerned Check FIR in Case Crime No.616 of 2002 under Section 25 Arms Act and general diary and has proved the same as Exhibit Ka-3. Dr. V.J.P. Sinha PW-6 who had conducted post mortem examination on dead body of the deceased Majid on 24.10.2002 proved the post mortem examination report Ext. Ka-4, Constable R.S. Yadav PW-7 proved Check FIR and relevant G.D. entry concerning Case Crime No.487 of 2002. Dhananjay Mishra PW-8, the Investigating Officer disclosed various steps taken by him in completing investigation and proved the charge sheet filed by him against the accused-appellant, and Virendra Singh PW-9 the Investigating Officer pertaining to the case registered under Section 25 Arms Act at Case Crime No.616 of 2002 in the evidence detailed various steps which he took in completing the investigation and filing charge sheet against the accused-appellant for offence under Case Crime No.616 of 2002 as Ext. Ka-21.

15. Thereafter, evidence for the prosecution was closed and statement of the appellant was recorded under Section 313 Cr.P.C. wherein he has termed his implication in this case false and has stated that he has been roped in, in this case on account of enmity. The defence did not lead any evidence, whatsoever.

16. Learned trial court after hearing both the sides on merit and considering the material on record passed the aforesaid judgment and order of conviction.

Consequently, this appeal.

17. Learned counsel for the appellant submitted that the presence of PW-1 and PW-3 at the place of incident is not proved and hence the conviction of the appellant on the basis of the sole testimony of the child witness PW-2 Ali Akbar cannot be sustained. He further submitted that a perusal of the facts stated by PW-2 in his evidence itself it transpires that he is tutored, that apart there are irreconcilable contradictions on material points in his testimony, he cannot be termed as reliable witness and his testimony was liable to be thrown out rather than being made basis for the appellant's conviction. He also submitted that the incident having taken place in the midnight and the prosecution having failed to prove by any cogent evidence existence of any source of light at the place of incident which would have enabled PW-2 to witness the incident and identify the

accused, no reliance can be placed on the testimony of PW-2. Motive suggested by the prosecution for the appellant to commit the murder of the deceased Majeed has also not been established.

18. It is also submitted that in view of irreconcilable inconsistencies in the medical evidence vis-a-vis the ocular testimony, it cannot be said that the incident had taken place in the manner as spelt out in the FIR and in the testimony of PW-2.

19. He next submitted that such being the state of evidence of the prosecution, the conviction of the appellant recorded by the trial court and the sentence awarded to him cannot be sustained.

20. Per contra Sri Saghir Ahmad, learned AGA submitted that even if, it is assumed for the sake of the argument that PW-1 and PW-3 had not witnessed the incident, the presence of the PW-2 at the place of the incident at the time of the occurrence cannot be doubted even for a moment. The prosecution case stands fully proved from the unimpeachable testimony of the child witness PW-2, who was found by the learned trial court to be competent to depose after examining him at some length. The contradictions/inconsistencies in his testimonies, if any, are natural and not material or of such nature so as to effect the core of the prosecution story rendering it unreliable. He next submitted that since the conviction of the appellant recorded by the trial court is based upon cogent evidence and the sentence awarded to him is supported by relevant considerations, the impugned judgement and order require no interference by this Court.

21. We have heard learned counsel for the parties and have very carefully scanned the entire lower court record.

22. The sole question which arise for our consideration in this appeal is whether the prosecution have been able to prove its case beyond all reasonable doubt against the appellant or not.

23. Before we proceed further in this case, it would be appropriate to take note of contents of the first information report, perusal whereof, reflects that the incident allegedly took place in the intervening night of 23/24.10.2002 and the appellant after midnight arrived on the spot where the deceased Majid, father-in-law of the first informant was sleeping on Takhat (wooden cot) along with Ali Akbar and Ali Sarvar, who are sons of the first informant. We gather from first information report that as soon as offence was committed, the accused-appellant was sighted by the first informant, her son Ali Akbar and few other relatives who have been examined in this case and whose testimony is to be scrutinized on this point specifically as to whether they have in fact seen the occurrence as claimed by them or not?

24. We have before us post mortem examination report of the deceased Majid which also confirms death of the deceased Majid in the intervening night of 23/24.10.2002 when the occurrence allegedly took place. We have already taken note of ante mortem injuries found on the deceased Majid on conduction of post mortem examination by Dr. V.J.P. Sinha PW-6.

25. Before we enter into factual merit of this case, we find it appropriate to evaluate testimony regarding actual occurrence and it being witnessed by the so-called eye witnesses. The prosecution in order to prove its case against the appellant Suheil has examined PW-1 Maimun Nisha (complainant), PW-2- Ali Akbar and PW-3 Sakelu as eye witness of the occurrence. and from the facts stated by PW-2 Ali Akbar stated in his testimony on page 29 of the paper book, the presence of PW-1 and PW-3 at the place of the incident at the time of occurrence is completely ruled out and the evidence of PW-1 and PW-3 on the point of assault by the appellant on the deceased does not inspire any confidence and is liable to be discarded.

26. In this regard it will be useful to reproduce the relevant extract of the testimony of PW-3 on page- 29 of the paper book " माँ व बुआ के पहुचने के पहले ही सुहैल भाग गए थे I माँ व बुआ ट्रेक्टर पर जब लाश लादी जा रही थी तब पहुची I किसी औरत ने मेरी माँ को बताया था कि सुहैल ने मजीद को मार दिया I जब मेरे दादा को मार दिया तब मई रोने लगा I ५ बजे तक मैं रो रहा था तब तक आदमी नहीं आये थे I सुहैल को मैं पहले सा जानता था I."

27. Upon careful scrutiny of testimony of witnesses of fact, we are convinced that testimony of PW-1 and PW-3 on the face of it appears to be improving on the point that they also have seen the occurrence although it is proved from the testimony of PW-2 that they were not present at the time and place of occurrence.

28. In this context, learned counsel for the appellant has vociferously claimed that testimony of PW-2 is partisan. In fact, he has not seen occurrence as claimed by him. The testimony so forthcoming is contradictory to medical evidence on record. Although Ali Akbar PW-2 was sleeping beside the deceased Majid but he has not seen the occurrence. He appears to be improving all the time due to tutoring. He was not competent witness still the trial court asked him particular questions in his examination-in-chief. The cross examination of PW-2 virtually exposes vulnerability of this witness while he was neither competent nor was he reliable witness.

29. The evidence of PW-1 and PW-3 having been ruled out from consideration in view of their presence on the crime scene at the time of occurrence having been rendered doubtful, we are now left with the evidence of child witness PW-2 Ali Akbar on the point of assault by the appellant on the deceased.

30. In so far as testimony of Ali Akbar PW-2 who is child witness aged about 9 years is concerned, his testimony is quite relevant, for the reason that he was sleeping beside the deceased Majid on the same Takhat (wooden cot) at the time of the incident and he claims to have seen the occurrence when he woke up by on hearing the sound of gun shot fired by the accused-appellant. Now we have to analyze testimony of eye witness PW-2 vis-a-vis attendant circumstances whether testimony as forthcoming from PW-2 is reliable or not?

31. It has been contended by the learned counsel for the appellant that the evidence of PW-2 Ali Akbar is wholly inadmissible on the ground that he being a minor is not competent to depose. The issue whether an accused can be convicted on the basis of uncorroborated evidence of a child

witness is no longer res-integra and stands supported by Apex Court in its judgement delivered in the case of **Dattu Ram Rao Sakhare and others Vs. State of Maharashtra (1997) 5 SCC page 341**. The Apex Court in paragraph 5 of its aforesaid judgement has observed as hereunder:-

"5 - The entire prosecution case rested upon the evidence of Sarubai (P.W.2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. A child be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the evidence Act provided that such witness is able to understand the question and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well settled principle we may proceed to consider the evidence of Sarubai (P.W.2)."

32. What follows from the reading of the aforesaid judgment is that, the evidence of a child witness can be considered under Section 118 of the evidence Act provided that child witness is able to understand the question and to give rational answers thereof and further there is no practise that in every case, the evidence of child witness be corroborated before a conviction can be recorded as it's basis but as a rule of prudence it is desireable for the court to have the corroboration of such evidence from other dependable evidence on record.

33. We now proceed to test the evidence of PW-1 on the touch stone of this well settled principle.

34. Upon perusal of the statement of PW-2, we find that the trial judge has recorded his reasons and found that PW-2 Ali Akbar was a competent witness and his evidence was unblemished. We do not find any reason to take a view different from one taken by the trial court with regard to the competency of PW-2 to depose in view of the fact that the trial court was the best court to ascertain whether the child witness produced before it was a competent to depose after putting several questions to him and observing his demeanor.

35. Learned counsel for the appellant has next submitted that no reliance can be placed on his evidence for the purpose of convicting the appellant in view of the glaring contradictions and inconsistencies in his evidence on several material particulars of the matter.

36. In order to examine the aforesaid aspect of the matter we will have to analyse the entire testimony of PW-2 in order to asses it's wholesome veracity particularly on the fact whether the incident was witnessed by PW-2 Ali Akbar or not. It is true that on page 28 of the paper book PW-2 Ali Akbar has stated in his evidence recorded before the trial court that on the date of the incident

he was sleeping with his grand father Majeed and his younger brother and he had recognized the person who had shot his grand father with a gun which was about 1/2 of arm in length as the accused appellant Suheil and on the same page he deposed that he and his younger brother Ali Sarvar woke up on hearing the sound of a gun shot and on waking up he saw that Suheil had shot his grand father by putting his gun against the body of his grand father from a point blank range and then he had threatened him and his brother with dire consequences in case they dared to raise any hue and cry. Thereafter the appellant Suheil had run away from the place of incident. PW-2 has clearly testified that the incident had taken place on about 12.00 p.m. and he had recognized the accused in the light of the lantern. Attention has also been invited by learned counsel for the appellant to page 29 of the paper book in which PW-2 in his cross examination had admitted that he had on that date deposed only those facts which were narrated to him by his counsel and submitted that PW-2 is a tutored witness and hence his testimony has no evidentiary value and is liable to be discarded.

37. It is true that there are minor contradictions in his evidence on the point whether he was awake at the time of the assault or had waken up after the shot had been fired but the evidence of PW-2 on the point of the presence of the appellant at the time of the incident and at the place of occurrence armed with a gun and his runnng away from the place of occurrence leaving Majeed dead and threatening PW-2 and his younger brother with dire consequences upon noticing that they had woken up and seen him remains unimpeachable and wholly intact. The contradictions in his evidence to which our attention has been invited by te learned counsel for the appellant in our opinion are extremely minor contradictions which do not go to the core of the prosecution case so as to render it unreliable and he cannot be termed as tutored witness merely by picking only a sentence from his testimony by him in his cross examination on page 29 of the paper book that whatever his lawyer had told him he had deposed, in view of the fact that the defense counsel despite subjecting PW-2 to a gruelling cross examination could not succeed in eliciting anything from him which may even remotely create a doubt with regard to the veracity of the facts deposed by him in his evience and upon an over all appraisal his evidence as appears to be umimpeachable and trustworthy.

38. After a thorough analysis and scrutiny of the entire testimony of PW-2, we have no doubt that the incident was witnessed by PW-2 Ali Akbar and the conviction of the appellant can be based on the sole testimony of the child witness PW-2 without insisting on any corroboration.

39. Learned counsel for the appellant has also challenged the veracity of the prosecution case as spelt out in the FIR on the ground of inconsistencies between the ocular testimonry and medical evidence on record. It has been submitted by the learned counsel for the appellant by refering to the evidence of PW-6 Dr. B.J.P.Singh who had conducted the post mortem of the dead body of the deceased that the firearm injury found on the dead body of the deceased could have been caused only, if he was sleeping in a particular position. PW-8 Dr. B.J.P. Singh who had conducted the post mortem of the deceased in which his evidence on page 45 of the paper book had stated that " *Yadi mritak dahini karvat leta to aur use goli mari jaye to uproktanusar goli ki chot aa sakti hai I Yadi chit leta to to uproktanusar chot aane ki sambhavana kam hai.* ". In our opinion

even if we accept the aforesaid contention of the learned counsel for the appellant the prosecution case is not liable to be discarded on the aforesaid ground in view of the fact that the prosecution has not come up with a case that the deceased was sleeping ina particular posture when he was shot. Even otherwise the discrepancy between the ocular testimony and the medical evidence pointed out by the learned counsel for the appellant is not of such a degree or irreconcilable so as to render the entire prosecution case unreliable and incredible. The prosecution has come up with a categorical case that the appellant had shot the deceased Majeed while he was sleeping on a wooden table with his grand sons. According to the post mortem report of the deceased one gun shot wound of entry on the left side of the deceased's chest along with a corresponding gun shot wound of exit on right side of chest were found on his dead body. The post mortem report of the deceased in fact corroborates the crux of the prosecution theory that the appellant had shot the deceased with his firearm and in view of the above, the eye witness account of the incident given by PW-2 is not liable to be discarded only on the ground that the prosecution has not been able to prove by any evidence that the deceased was sleeping in the same posture as testified by PW-8 in his evidence when he was shot.

40. Learned counsel for the appellant has further has failed to demonstrate that the appellant's conviction under Section 25 of the Arms Act is vitiated in any manner.

40. In view of the foregoing discussion, we do not find any reason to interfere with the recorded conviction of the appellant under Sections 302, 506(2) IPC and Section 25 of the Arms Act and sentence awarded to him by the trial court vide impugned judgment and order dated 25.08.2016.

41. This appeal lacks merit and is accordingly dismissed.

42. There shall however be no order as to costs.

(2016) 9 ILRA 673
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 7026 Of 2006

Mahendra @ Guddan **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Rajendra Kumar Mishra, Arvind Kumar Dixit, Dharam Narayan Misra, Jeet Bahadur Singh, R.B. Verma

Counsel for the Respondent:
Govt. Advocate.

The appeal is allowed. The impugned judgement and order dated 9.11.2006 passed by the Special Judge, Dacoity Affected Area, Etawah in Special Sessions Trial No. 104 of 2005, arising out of Case Crime No. 25 of 2005; State Vs. Mahendra alias Guddan convicting the appellant under sections-307/34, 364 A IPC I.P.C. and Sections-25/27 Arms Act and sentencing him to seven years' R. I. coupled with fine of Rs. 1,000/- and in default of payment of fine one year's additional R. I. on the first count and imprisonment for life coupled with fine of Rs. 5000/- and in default of payment of fine, three years' additional R. I. on the second count and three years' R. I. coupled with fine of Rs. 1000/- and in default of payment of fine, one year's additional R. I. on the third count, respectively is hereby set aside.

Held: Para- We will given reasons later but we make the operative order now.

Case Law discussed:

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. The arguments of this appeal was concluded on 19.09.2016, when, following order was passed by us:

Heard Shri Arvind Kumar Dixit, assisted by Shri Raj Bahadur Verma, learned counsels for the appellant, Shri Saghir Ahmad, learned A. G. A. assisted by Sri J. K. Upadhyay, learned A. G. A., Kumari Meena, learned A. G. A. and Mrs. Manju Thakur, Brief Holder appearing for the State.

We will give reasons later but we make the operative order now.

The appeal is allowed. The impugned judgment and order dated 9.11.2006 passed by the Special Judge, Dacoity Affected Area, Etawah in Special Sessions Trial No. 104 of 2005, arising out of Case Crime No. 25 of 2005; State Vs. Mahendra alias Guddan convicting the appellant under sections-307/34, 364 A IPC and Sections-25/27 Arms Act and sentencing him to seven years' R. I. coupled with fine of Rs. 1,000/- and in default of payment of fine one year's additional R. I. on the first count and imprisonment for life coupled with fine of Rs. 5000/- and in default of payment of fine, three years' additional R. I. on the second count and three years' R. I. coupled with fine of Rs. 1000/- and in default of payment of fine, one year's additional R. I. on the third count, respectively is hereby set aside.

The appellant is acquitted of all the charges framed against him. Appellant is in jail, he shall be released forthwith unless and until he is wanted in any other case.

There shall, however, be no order as to cost.

2. Here are the **reasons:-**

3. By way of instant criminal appeal, challenge has been made by the appellant- Mahendra @ Guddan to the judgment and order of conviction dated 9.11.2006, passed by Special Judge (Dacoity Affected Area, Etawah), in Special Sessions Number 104 of 2005 arising out of case crime no.25/2005 and 26/2005, under Sections 307, 364A IPC and 25/27 Arms Act, Police Station Bakewar, District Etawah.

4. Record reveals that first information report was lodged by Sri Ramnath Singh Yadav, Station House Officer, Police Station- Bakewar, District Etawah at police station Bakewar on 25.02.2005 at 11.30 P.M. regarding the alleged offence committed by accused-appellant, under aforesaid Sections of Indian Penal Code, Dacoity Affected Area Act, and Arms Act, respectively, with allegations that while he was on surveillance duty accompanied by S.I. Sri Suresh Kumar Yadav, Constable Shyam Singh in his area on 25.2.2005 and they reached at police out-post Lakhna, who were busy in patrolling duty and as soon as they reached near Jhal Canal Bridge area, across the Bumba Ki Puliay, and were going towards Ranipura Road leading to deserted place, they saw in the head light of jeep, three persons crossing Kharanja side of the road, along with one little child, in the loneliness of night. The police party became apprehensive and tried to stop them, whereupon, with the intention to kill, they fired on the police party, however, members of the police party somehow saved themselves believing that these people have kidnapped some child and are taking him to some deserted place, after combing and surrounding, the miscreants swooped upon them. Two, out of the three miscreants fled away from the scene, whereas one miscreant along with the child was caught ahead of culvert at 9.00 p.m. The child was crying. On being asked, he spelled his name as Rishabh @ Nishant and he spelled his father's name as Komal Kushwaha of village-Berikhera. The child was trembling with fear. When the miscreant was asked about his name, he spelled his name as Mahendra Singh @ Guddan, son of Sidh Gopal Jatav R/o Berikhera, police

station Bakewar, Etawah. On search of his person, 0.12 bore country-made pistol with one empty cartridge from his possession were recovered and, beside this, the police party also recovered three live cartridges from the right pocket of his pant and took possession of the same. When they inquired about names of the other two accused, who had secured their escape, then name of one miscreant was spelled as Bhoorey Singh s/o Balram Dhanuk while another miscreant remained unidentified. The police party also inquired about the victim child, whereupon, it transpired that name of this child is Rishabh @ Nishant, son of Komal Kushwaha, (a resident of his- accused Mahendra- neighbouring village). He also stated that Bhoorey Singh son of Balram Dhanuk of his village had asked him 8-10 days ago that child of Komal Kushwaha, who studies in Lakhana school, should be kidnapped and he will get Rs.2000/- as remuneration out of ransom money thereof. It was also promised that whatever ransom is obtained as a result of this act, a share of the same, shall be given to him. The accused also stated that kidnapping was done around 4.00 P.M. when the child was returning after attending the school. Accused further told that he took the child to the Lakhna Bridge where he met with Bhoorey Singh s/o Balram Dhanuk and one more person was accompanying him, whom, he does not know. They along with child were proceeding towards some lonely and deserted place. Bhoorey Singh s/o Balram Dhanuk was saying that the child is to be handed over to notorious Karori Pathak. He also told that Bhoorey Singh s/o Balram Dhanuk and his accomplice fled away towards forest. Victim child told the police that Mahendra @ Guddan, who resides in his neighborhood, took him on pretension of giving strawberry along with co-villager Bhoorey Singh s/o Balram Dhanuk and one more person. The recovered gun along with cartridges was taken into possession and kept sealed. The entire process/episode of recovery was reduced in writing and after obtaining endorsement of all concerned, a memo of the same, was prepared, which is Exhibit Ka-1.

5. The matter was reported at the police station by Sri Ram Nath Singh Yadav, Station House officer, Police Station- Bakewar, District Etawah at 11.30 p.m. on 25.02.2005. Relevant entry was made in the Check FIR at crime numbers 25/2005, under Sections 307, 364A IPC and 10/12 Dacoity Affected Area Act and at Crime No.26/2005 and under Sections 25/27 Arms Act. Check FIR is Exhibit Ka-2.

6. This was followed by entries made in the concerned General Diary Constable Ramnayan Yadav P.W.6 and a case was registered by making entry at Serial No.40 on 25.02.2005 at 11.30 P.M. under aforesaid Sections of Indian Penal Code, D.A.A. & Arms Act, which General Diary entry is Exhibit Ka-3.

7. S.I. Sri Ranvir Singh Khokha P.W.5 was entrusted with the investigation of this case. He noted down relevant information in the case diary, recorded statement of various persons and also handed over custody of the victim Rishab @ Nishant to his father Komal Singh on 26.2.2005 and prepared a memo of the same as Exhibit ka-1. Thereafter investigation was taken over by S.I. Brijesh Kumar Yadav on 11.3.2005. He prepared site plan of the occurrence, Exhibit Ka-4. He also obtained sanction from District Magistrate, Etawah, for filing charge-sheet (for case under Arms Act). After completing investigation, charge-sheet was filed at aforesaid Crime Nos.25/05 and

26/05, under Sections 307, 364 (A) IPC and 10/12 Dacoity Affected Areas Act and under Section 25/27 Arms Act, which charge-sheets are Exhibit Ka-6 and Ka-7 respectively.

8. Thereafter, this case was committed to the court of Sessions from where this case was made over for trial and disposal to the aforesaid court of Special Judge, Dacoity Affected Areas Act, Etawh, where the prosecution and accused both were heard on point of charge and the trial court was satisfied with, prima facie case against the accused, therefore, charges under Sections 364A IPC and 307 read with 34 IPC and under Section 25/27 Arms Act were framed. The prosecution was required to produce all its testimony, whereupon prosecution adduced seven witnesses in all. A brief reference of the same is *ut infra* :

9. Rishabh P.W.1 is the victim and at the time of his testimony his age was of seven years. He has described about the incident.

10. Komal Singh P.W.2 is the father of the victim.

11. S.I. Suresh Kumar Yadav P.W.3 is the person, who accompanied the informant police party on the day of occurrence when the victim Rishabh was recovered from possession of accused Mahendra and has described about fact of alleged recovery of the child and arrest of accused Mahendra.

12. S.I. Ramnath Yadav P.W.4 is the informant and also eye-witness of fact of recovery of the victim on the basis of recovery memo and has proved the same as Exhibit ka-1.

13. S.I. Ranvir Singh Khokha P.W.5 is the Investigating officer. He has proved his part of investigation.

14. Constable Ramnayan Yadav P.W.6 has made relevant entries in the concerned Check FIR and the GD.

15. S.I. Brijesh Kumar Yadav P.W.7. He is the second Investigating Officer. He has proved his part of investigation and particularly filing of charge-sheets in this case against the accused persons.

16. After the evidence of the prosecution was closed, the statement of the accused was recorded under Section 313 Cr.P.C., wherein, the accused pleaded innocence and alleged false implication on account of enmity.

17. No testimony whatsoever was adduced on behalf of the defence.

18. The learned trial court after hearing submissions of the parties and considering the case on its merit, returned the finding of conviction, whereby, accused Mahendra was convicted under

Sections 307/34 IPC and under Section 364A IPC and also under Sections 25/27 Arms Act and was sentenced *ut supra*.

19. It has been vehemently claimed on behalf of the appellant that the entire testimony on record is self explanatory and self speaking about the police high handed-ness played in-collusion with the first informant that because of village parti-bandi and election of Pradhan, a conspiracy was hatched to teach a lesson to the accused but this conspiracy stands exposed in the face of specific circumstances and particularly when we evaluate testimony of the victim qua unnatural behaviour of the police personnel, which aspect reflects deliberation, embellishment, improvement of testimony and tutoring of witnesses as well. The prosecution deliberately wanted to rope in several persons of opponent party, who had staked claim against P.W.2 Komal Singh in the election of Pradhan. The entire story is afterthought and concocted, full of drama. The testimony on record is inherently contradictory and the same does not inspire any confidence. Prosecution has failed to prove its case beyond reasonable doubt.

20. Learned AGA, while refuting the aforesaid contentions, has retorted that the case of the prosecution is proved beyond reasonable doubt. The testimony of child witness is innocuous and inspires confidence. The police party has proved the factum of recovery of the child from possession of the accused around 9 P.M. on 25.2.2005 in forest/deserted place. The very motive for kidnapping, was demand for ransom and the accused was acting for another person- co-accused Bhooray, while the crime was unraveled by the police by making speedy recovery of the child. Whatever contradictions appear in the testimony of the prosecution witnesses of fact are not substantial contradictions, rather, such contradictions are on the face petty in nature having only little effect, which contradictions are bound to occur in testimony of the witnesses and uniformity of description of the incident, which uniformity cannot be expected from each and every witness of the case. Learned trial court has taken just view of the matter and has passed just decision and sentenced appropriately.

21. We have also considered the aforesaid submissions and perused the record.

22. The core consideration that crops up for adjudication of this appeal relates to fact whether the prosecution has been able to establish its case against the appellant beyond reasonable doubt?

23. Upon perusal of the first information report, Exhibit Ka-2, we come across allegations against appellant that fact of recovery of the child and arrest of accused Mahendra took place on 25.2.2005 when the police party headed by informant- Station Officer of Police Station- Bakewar- Sri Ramnath Singh Yadav, caught the appellant at lonely and deserted area within vicinity of village Ranipura.

24. As per allegations made in the FIR, the police party was in search of wanted criminals and on patrolling duty in the area and all of sudden, when the police party reached within periphery of village- Ranipura, after crossing Bumba Ki Puliya, then, they saw in the head light of Jeep three

persons crossing the Kharanja road along with one little child at such secluded and deserted place, the police party apprehended some foul play and intercepted the miscreants, whereupon the miscreants fired on the police party but the police personnel somehow managed to save themselves and surrounded them and in the torch light, they saw the miscreants and caught one miscreant around 9 P.M., 50 yards ahead of the culvert along with a little child. On inquiry being made, it transpired that the kidnapped boy belongs to village- Berikhera and name of his father was Komal Singh when inquiry was made from the apprehended culprit, he spelled his name as Mahendra Singh @ Guddan Sidh Gopal Jatav R/o Berikhera, police station Bakewar, district Etawah.

25. The police party also recovered 0.12 bore country-made pistol from his possession with one empty cartridge from its barrel besides recovering three live cartridges from the right pocket of pant and took possession of the same. On inquiry being made, it further transpired that accused Mahendra kidnapped the child at the instance of Bhoorey Singh Dhanuk of the same village and the accused was promised to get Rs.2000/- for this particular act. He was further promised that he shall also be given his share in the ransom. FIR also contains description to the fact that the child was kidnapped around 4.00 P.M. after closure of the school hours when he was returning home. The child was taken at the Lakhna Bridge where Bhoorey met with the accused along with one more person. Bhoorey was telling that this child is to be handed over to Karori Pathak and while they were proceeding further, the police party, apprehended him. First informant made a memo of arrest and seizure of the child and on the basis of the same, FIR was lodged at 25.2.2005 at 11.30 P.M. at Case Crime No.25/2005 Police Station- Bakewar under aforesaid sections of IPC and Dacoity Affected Areas Act and at Case Crime No.26 of 2005 under Sections 25/27 Arms Act.

26. Thereafter, the investigation ensued and it was completed only following intervention of two Investigating Officers- the first one being Ranvir Singh Khokha P.W.5. who has proved his part of investigation till 1.3.2005. After him, S.I. Brijesh Kumar Yadav P.W.7, took over investigation and after completing the investigation filed charge-sheets Exhibit Ka-6 and Ka-7, respectively at aforesaid crime numbers.

27. Now, the prosecution was required to prove its case on merit and the prosecution produced Rishabh @ Nishant P.W.1- the victim- who is the star witness for the prosecution.

28. We have very carefully scanned testimony of this witness (P.W.-1- Rishabh), whereupon, we find that this witness has developed his intelligence to such a level that he was able to understand import of general questions put to him and to answer intelligently such questions. His testimony as a whole, is full of improvement and embellishments and sufficient to shatter the entire prosecution case, on specific points, that this witness was ever kidnapped for ransom by the accused. In the examination-in-chief of this witness, he has specifically stated that he was going back to home from his school, he met with Guddan near temple, Guddan lured him for giving (him) strawberry. This happened around 3.00 P.M. in the afternoon. This witness sat on the bicycle of Guddan then he met with Bhoora, Bhoora also accompanied them. Police saved him and took him to the police out-post. In the night his father came to the police out-post and brought him back home from there. Bhoora and Guddan were identified by this witness in the court also. But this

testimony when appraised qua testimony emerging in cross-examination, the same becomes outcome of marvelous tutoring and embellishments. This witness has stated that his father used to drop him at the school then his father also used to take him back from the school and in his cross-examination, he says that police met him two hours after he left the school and daroga ji took him inside the jeep and daroga ji kept this witness with him for around four hours. Then, he stated that daroga ji took him to Berikhera at that time and night had not set in. This witness has conceded to the fact that it was daroga ji, who dropped him at his house and here a question in form of inquisitiveness surfaces; as to whether, the police came to his (P.W.1) home in the very night or not; then, the child witness (P.W.1) nodded in the negative. On page-13 of his cross-examination of the paper book, his testimony reflects that the entire evidence has been tutored either by his counsel or by his father and they had told him to spell name of two accused persons. He has also stated that police had caught Bhoora after one hour when it was day time. He has acceded to the suggestion that at the time when Bhoora was brought at the police station he saw him. He has also nodded in affirmative to the specific query that police told him that accused Bhoora resides in village-Berikhera. This testimony specifically establishes that the police is colluding with the father of the victim and in fact the child remained in possession of the police and the child was brought home, well, in the evening and was dropped at his home and, thereafter, because of village partibandi and enmity on account of election of Pradhan in the village with other party false accusation was made. It is obvious that the police managed and facilitated this occurrence at great ease and convenience. When father of the victim used to drop his child at the school and used to take him back from there, how, and why, the child was returning home on foot, has not been clarified. In this way, the very apprehension of the accused being present at the alleged place near Bumba Ki Puliya culvert, becomes extremely doubtful. The testimony of victim P.W.1 appearing in examination-in-chief, is in sheer contrast to what has emerged in his cross-examination. Claim of false implication due to enmity on account of village partibandi gets strengthened.

29. Relevant to take note of testimony of first informant Ramnath Yadav P.W.4. He has testified that he was busy in search of wanted criminals and was doing patrolling duty within circle of his police station on 25.2.2005 and when he crossed Jhal Canal and Bumba ki puliya and was on way to Ranipura jungle then only, he saw three persons pulling a child with them and, thereafter, the police party after a little resistance by the miscreants overpowered the appellant and recovered the child from his possession. But testimony on record and particularly of the Investigating Officer on page-21 of the paper book indicates that no entry whatsoever regarding departure of S.O. Ramnath Singh from the police station for search of criminals or patrolling duty was ever made in the concerned GD, nor did Ramnath Singh name the wanted criminals for whose search he went out from the police station on 25.2.2005. In this view of the matter, it is obvious that the the story of apprehending the accused at a place 50 yards ahead of Bamba Ki Puliya culvert, is not worth believing. The testimony on this aspect is tainted and improved one- full of material contradictions.

30. One important aspect of this case deserves mention that after the child did not return home around 4 P.M. and in the face of fact that child's father used to pick up the child from the school after close of school hours, no concrete effort was made on behalf of the informant side to lodge any report at the concerned police station about disappearance of the child. But it was the

police party and particularly the first informant, Station House Office of police station Bakewar, Etawah, who allegedly apprehended the accused and the child. The apprehended accused and the alleged recovery of the child from possession of the appellant around 9 P.M. on 25.2.2005 and then after elapse of about 2 and ½ hours, lodged the first information report at the police station Bakewar around 11.30 P.M. On this specific circumstance the prosecution, has failed to come out with cogent explanation. Why the father of the victim child kept silent from 4.00 P.M. upto 11.30 P.M. is beyond reason of an ordinary prudent man. The testimony of Ranvir Singh Khokha P.W.5, Brijesh Kumar Yadav P.W.7 and father of the victim Komal Singh P.W.2, respectively, contradicts each other in material particulars. On wholesome consideration of the occurrence and appraisal of evidence and facts vis-a-vis circumstances, lead us to conclusion that it is a case which was managed and handled by the police for embarrassing the accused in order to help his opponent- the other side- who had inimical intendments and for setting score with the accused.

31. The learned trial court while appreciating facts, evaluating testimony and apparent circumstances of the case misread the wholesomeness of the case and recorded findings of conviction on such shaky evidence, which is full of infirmity and hollowness. Consequently, the finding of conviction lacks the legal force and we are unable to uphold the same as such. These are the reasons upon which, we set aside the impugned judgment and order of conviction dated impugned judgment and order dated 9.11.2006 passed by the Special Judge, Dacoity Affected Area, Etawah in Special Sessions Trial No. 104 of 2005, arising out of Case Crime No. 25 of 2005; State Vs. Mahendra alias Guddan convicting the appellant under sections-307/34, 364 A IPC and Sections-25/27 Arms Act.

32. However, we direct that the appellant will ensure compliance of provisions of Section 437A Cr.P.C. by furnishing security bonds before the concerned trial court at the earliest.

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

(2016) 9 ILRA 681
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 10259 Of 2015

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

Counsel for the Applicant:
Santosh Tripathi, K.A. Verma, K.P. Verma

Counsel for Opposite Party:
Govt. Advocate

This application has been filed seeking the release of the applicant on bail in Case Crime No.38 of 2015, u/s 376, 511 I.P.C., Police Station-Sihani Gate, District-Ghaziabad.Submission of counsel for the applicant is that the applicant was not nominated in the F.I.R. and there is no proper identification parade organized in this case.
Learned A.G.A. has brought the attention of the Court to the material collected by the Investigating Officer further in this regard which is to the effect that when the shirt of the applicant was shown to different members of staff, then Shri Vishnu Durai, who was the Manager of the canteen, told that he had seen the applicant wearing the same shirt in that night. There is also evidence, confirming the presence of the applicant at the place of occurrence, to the effect that when the applicant had run away from the place of occurrence he left the footprints on the floor and there was a trail of imparted footprints from Room No.605 up to the place of occurrence.when the accused-applicant was arrested the victim Dr. Juhi Chaouksy also had the occasion to see him and there was no mistake in identifying the accused-applicant by her.
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.

Held: Para-

Case Law discussed:

(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.38 of 2015, u/s 376, 511 I.P.C., Police Station-Sihani Gate, District-Ghaziabad.

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

3. Perused the record.

4. Submission of counsel for the applicant is that the applicant was not nominated in the F.I.R. and there is no proper identification parade organized in this case. Further submission is that as the applicant was earlier ousted from the service regarding which some agitation was initiated by the fellow comrades of the union and that had also indignated the office bearers of the hospital, eventually resulting into false implication of the applicant in the present case. Therefore, the applicant should be released on bail.

5. Learned A.G.A. has opposed the prayer for bail and has submitted that this is a case in which one qualified lady doctor, who was employed in the hospital, was indecently assaulted upon by the accused-applicant and an audacious attempt to commit rape upon her was made. Further submission is that the applicant was a sweeper in the same hospital and the statement given by the victim doctor before the Magistrate u/s 164 of Cr.P.C. would indicate that while she was taking rest in the duty room, in the dead of the night the applicant sneaked into the room and gagged her. She resisted, protested and tried to save herself and wriggle out from the clutches of the applicant. In this process of struggling, the shirt of the accused-applicant got torn which was left out in the room itself. Thereafter, seeing his attempt having failed, the applicant fled away from there. Learned A.G.A. has brought the attention of the Court to the material collected by the Investigating Officer further in this regard which is to the effect that when the shirt of the applicant was shown to different members of staff, then Shri Vishnu Durai, who was the Manager of the canteen, told that he had seen the applicant wearing the same shirt in that night. There is also evidence, confirming the presence of the applicant at the place of occurrence, to the effect that when the applicant had run away from the place of occurrence he left the footprints on the floor and there was a trail of imparted footprints from Room No.605 up to the place of occurrence. It is relevant to mention that Room No.605 is the room in which the accused-applicant used to stay in the night. Thereafter when the accused-applicant was arrested the victim Dr. Juhi Chaouksy also had the occasion to see him and there was no mistake in identifying the accused-applicant by her. Submission is that as the victim had already seen the accused and identified him, the identification parade had lost its meaning as it remains useful and purposeful only when the identifying witness did not get any occasion to see the accused after the occurrence. Contention is that as the victim had already seen the accused-applicant then there was hardly any justification for the Investigating Officer to organize the identification parade. Further contention is that the lady doctors' work in the night hours is not only a professional service but they also perform an important social service by doing so and their safety and security is of prime importance. Such kind of audacious temerity displayed by the accused-applicant, who himself was an employee in the same hospital, is highly deplorable and cannot be either soft-pedalled or lightly viewed.

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.

(2016) 9 ILRA 683
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ A No.- 18925 Of 2016

Rashi Mani Mishra & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Anil Kumar Srivastava, T.P. Singh

Counsel for the Respondents:
C.S.C., Ashok Khare, Ms. Meenakshi Singh, Manu Khare, Sanjay Kumar Mishra, Seemant Singh, Siddharth Khare

Five Executive Engineers posted in different Divisions of the Rural Engineering Department of the State1 have filed this petition to assail the seniority list dated 22 March 2016. They have also sought a direction that the Department should not hold the Departmental Promotion Committee meeting on 29 April 2016 for considering promotions on the basis of the aforesaid seniority list dated 22 March 2016. An amendment application has been filed to assail the communication dated 1 December 2015 sent by the Special Secretary in the State Government to the Director and Chief Engineer for preparing a fresh seniority list of Assistant Engineers in the Department pursuant to the directions issued by the Supreme Court on 7 April 2015 in **Secretary, Minor Irrigation Department** & R.E.S. v. Narendra Kumar Tripathi,2 and on 26 October 2015 in Special Leave Petition No. 2075 of 20063, **Special Leave Petition No. 11832 of 2006** and **Writ Petition No. 489 of 2005** as also in certain other writ petitions by the High Court. This amendment application also seeks the quashing of the order dated 25 April 2016 by which additional charge of Superintending Engineer has been given to certain Executive Engineers. An impleadment application has also been filed by Madan Mohan Srivastava. The impleadment application was allowed by order dated 18 May 2016.

The dispute relates to determination of the seniority of Assistant Engineers working in the Department. The seniority of such Assistant Engineers which had been determined on 14 December 2001 did not count the *ad hoc* services rendered by Assistant Engineers prior to their regularisation on 14 December 1989. It was subjected to challenge in many writ petitions earlier filed from 2001. The Assistant Engineers pleaded that the *ad hoc* services should be added to their length of service for determining their seniority. Ultimately the Supreme Court decided matters relating to Narendra Kumar Tripathi on 7 April 2015 and directed for re-determination of the seniority by adding the service rendered on *ad hoc* basis for the purpose of seniority. The seniority was then re-determined on 22 March 2016.

The petitioners also contended that even if the directions issued by the Supreme Court on 7 April 2015 in **Secretary, Minor Irrigation Department** were required to be implemented for all the *ad hoc* Assistant Engineers, then too the facts of each *ad hoc* Assistant Engineer were required to be examined. In this connection, it needs to be noted that objections were filed to the tentative seniority list. No distinguishing

factor was pointed out in the objections nor it has been pointed out in the writ petition. The Office Order dated 31 December 2015 specifically stated that the seniority would be determined after adding the *ad hoc* services rendered by Assistant Engineers prior to regularisation as a thumb rule and so if such an objection had to be raised, it was incumbent to raise this particular objection but learned Senior Counsel for the petitioners has not been able to point out from the objections or the order dated 22 March 2016 that such an objection was raised. It was only submitted by learned Senior Counsel for the petitioners during the course of hearing that the State Government was required to examine each individual case to find out whether the facts relating to the other Assistant Engineers were the same as that of Narendra Kumar Tripathi. The only distinguishing feature pointed out by the Full Bench regarding Narendra Kumar Tripathi was that prior to his *ad hoc* appointment on 12 June 1985, he was working in the work-charge establishment from 18 January 1983. Narendra Kumar Tripathi gave up the plea for counting his seniority from 18 Jaunary 1983 before the Supreme Court and stated that only his *ad hoc* service from 12 June 1985 should be counted. Thus also there is nothing which may distinguish the factual aspects of the other Assistant Engineers from that of Narendra Kumar Tripathi who had been granted relief by the Supreme Court. We are, therefore, not inclined to accept this submission when it was neither raised before the Department at the time of filing the objections or in this writ petition. In any case, as noted above, 108 *ad hoc* Assistant Engineers had been appointed in four batches in 1985 and even in the appointment order dated 12 June 1985, the petitioner was placed at Serial No. 32. All the Assistant Engineers were similarly situated as would be seen from the case set up by them before the Full Bench in Farhat Hussain Azad.

Thus, as none of the submissions advanced by learned Senior Counsel for the petitioners have any force, the writ petition deserves to be dismissed.

Held: Para-

Case Law discussed:
Secretary Minor Irrigation Deptt. & R.E.S. v. Narendra Kumar Tripathi **– 2015 (4) SCALE 569.**
State of Uttar Pradesh and others v. Arvind Kumar Srivastava12 ;
Rajendra Pratap Singh Yadav & Ors. V. State of U.P. and others13 ; and M/s Shenoy and Company and Others v. Commercial Tax Officer and Others14,
Amrit Lal Berry v. Collector of Central Excise, New Delhi and Others15, K.C. Sharma & Ors. V. Union of India, (1997) 6 SCC 721

(Delivered by Hon'ble Dilip Gupta, J.)

1. Five Executive Engineers posted in different Divisions of the Rural Engineering Department of the State1 have filed this petition to assail the seniority list dated 22 March 2016. They have also sought a direction that the Department should not hold the Departmental Promotion Committee meeting on 29 April 2016 for considering promotions on the basis of the aforesaid seniority list dated 22 March 2016. An amendment application has been filed to assail the communication dated 1 December 2015 sent by the Special Secretary in the State Government to the Director and Chief Engineer for preparing a fresh seniority list of Assistant Engineers in the Department pursuant to the directions issued by the Supreme Court on 7 April 2015 in **Secretary, Minor Irrigation Department & R.E.S. v. Narendra Kumar Tripathi,**[2] and on 26 October 2015 in Special Leave Petition No. 2075 of 20063, **Special Leave Petition No. 11832 of 2006** and **Writ Petition No. 489 of 2005** as also in certain other writ petitions by the High Court. This amendment application also seeks the quashing of the order dated 25 April 2016 by which additional charge of

Superintending Engineer has been given to certain Executive Engineers. An impleadment application has also been filed by Madan Mohan Srivastava. The impleadment application was allowed by order dated 18 May 2016.

2. The dispute relates to determination of the seniority of Assistant Engineers working in the Department. The seniority of such Assistant Engineers which had been determined on 14 December 2001 did not count the *ad hoc* services rendered by Assistant Engineers prior to their regularisation on 14 December 1989. It was subjected to challenge in many writ petitions earlier filed from 2001. The Assistant Engineers pleaded that the *ad hoc* services should be added to their length of service for determining their seniority. Ultimately the Supreme Court decided matters relating to Narendra Kumar Tripathi on 7 April 2015 and directed for re-determination of the seniority by adding the service rendered on *ad hoc* basis for the purpose of seniority. The seniority was then re-determined on 22 March 2016.

3. The seniority list earlier prepared by the Department on 14 December 2001 placed the petitioners at serial Nos. 106, 109, 107, 122 and 108 respectively. However, even before the finalization of the list on 14 December 2001**,** Narendra Kumar Tripathi had filed **Writ Petition No. 9940 of 2001**[4] for quashing the order dated 26 December 2000 by which the State Government had rejected the representation filed by him to claim seniority from the date when he was initially appointed on 18 January 1983 in the Department on work-charge basis. It was stated that he had subsequently been appointed as an Assistant Engineer in the Department on *ad hoc* basis by order dated 12 June 1985 and his services were regularized by order dated 14 December 1989 but his seniority was being counted from 14 December 1989. He claimed the benefit of the previous service rendered by him on work-charge basis from 18 January 1983. The representation was rejected by the State Government by order dated 26 December 2000. The Division Bench of the High Court allowed this writ petition filed by Narendra Kumar Tripathi on 13 February 2003 and directed the Department to fix his seniority from the date of his initial appointment on work-charge basis on 18 January 1983.

4. Narendra Kumar Tripathi also filed **Writ Petition No. 11542 of 2004**[5] for a direction upon the respondents to promote him on the post of Executive Engineer from the date juniors to him had been granted promotion by giving him seniority from 8 January 1983. **Arjun Ravi Das** had also filed **Writ Petition No. 2605 of 2002**[6] for quashing the seniority list dated 14 December 2001 claiming that the period of *ad hoc* service rendered by him from 1985 prior to his regularization on 14 December 1989 should be counted for the purpose of seniority. This petition field by Arjun Ravi Das was decided with a bunch of writ petitions on 27 February 2004. All the writ petitions were dismissed holding that seniority had to be counted from the date the substantive appointment was given on regularization.

5. It needs to be noted that in view of the conflicting judgments delivered in the first Writ Petition filed by Narendra Kumar Tripathi and that filed by Arjun Ravi Das, subsequent Writ Petitions filed by **Farhat Hussain Azad**[7] and many other Writ Petitions including the second Writ Petition filed by Narendra Kumar Tripathi for a direction upon the Department to add the services

rendered by the Assistant Engineers on *ad hoc* basis for determining the seniority, were referred to a Full Bench. The issue that was required to be resolved by the Full Bench was as to whether the services rendered by an employee on *ad hoc* basis prior to regularization can be counted for the purposes of determining the seniority. The Full Bench in **Farhat Hussain Azad** observed in paragraph No. 54 that the view taken by the Division Bench in **Arjun Ravi Das** that such *ad hoc* service could not be counted was correct. The observations are as follows :-

"In view of the above, the said judgment in N.K. Tripathi (supra) is liable to be declared as a judgment per incurium, as it was decided in complete inadvertence without even making any reference to the facts or the statutory Rules applicable in the case. On the other hand, the judgment in Arjun Ravi Das (supra) is a well reasoned judgment based on the interpretation of the statutory provisions applicable therein. In such a fact situation it cannot be held that there is a conflict in the two judgments of this Court. The law laid down in Arjun Ravi Das (supra) is in consonance with the judgments rendered by the Hon'ble Apex Court from time to time."

6. Thereafter, the Full Bench proceeded to examine the petitions on merits. It noticed that all the writ petitioners except Narendra Kumar Tripathi had initially been appointed as Assistant Junior Engineers on *ad hoc* basis and they were subsequently regularized. A seniority list of Assistant Engineers was then published on 4 February 1995 but it was subject to the decision of this Court in a petition filed by N. K. Agarwal. A final seniority list was, thereafter, prepared on 14 December 2001. The case of N.K. Tripathi was found to be slightly different by the Full Bench since he was initially appointed as an Assistant Engineer on work-charge basis on a fixed salary in the Department on 10 June 1983 and was, thereafter, appointed as an Assistant Engineer on *ad hoc* basis by the order dated 12 June 1985. His services were, however, subsequently regularized like that of other *ad hoc* Assistant Engineers by means of the order dated 14 December 1989. It was sought to be contended by the learned counsel for the petitioners before the Full Bench that the petitioners had been promoted on *ad hoc* basis as Assistant Engineers in accordance with the procedure prescribed under the various Government Orders and it could not be said that their appointments on *ad hoc* basis were dehors the Rules. It was, however, sought to be contended by the learned counsel appearing for the State that the *ad hoc* promotions had not been made in accordance with law and, therefore, the services rendered on *ad hoc* basis before regularization could not be counted for the purpose of seniority. The Full Bench did not accept the contention of the petitioners and observations are :-

"We have carefully considered the aforesaid submissions advanced by the learned counsel for the parties. A perusal of the Government Orders dated 7.12.1979 and 3.3.1981 indicate that only the quota for promotion of Junior Engineers to the post of Assistant Engineer had been provided whereas the Government Order dated 1.12.1983 provided for the qualification/ experience require for promotion. The petitioners had not been promoted to the post of Assistant Engineer on *ad hoc* basis in accordance with the 1954 Regulations or the 1970 Promotion Rules and indeed the learned counsel for the petitioners have also not been able to point out anything which may suggest that the *ad hoc* promotions had been made in accordance with the aforesaid Rules or Regulations. There is nothing on the record to indicate that the *ad hoc* appointment had been made in

consultation with the Commission on the basis of the recommendation of a Selection Committee as contemplated under the 1970 Promotion Rules. All that has been submitted by the learned counsel for the petitioners is that though the departmental Selection Committee had made recommendations for *ad hoc* promotion of the petitioners, they cannot be blamed for want of approval by the Commission. **Thus, neither was the constitution of the Selection Committee in accordance with the aforesaid Rules and nor was the Commission consulted. Such being the position, the promotion of the petitioners, as *ad hoc* Assistant Engineer was clearly de hors the Rules and in view of the proposition of law laid down in the aforesaid mentioned cases, such period of officiation cannot be considered for the purposes of seniority. The submissions advanced by the learned counsel for the petitioners, therefore, cannot be accepted**."

(emphasis supplied)

7. It needs to be noted that before the Full Bench it was also sought to be contended by the learned counsel for the petitioners that the seniority list of 85 Assistant Engineers prepared on 4 February 1995 could have been altered on 14 December 2001 only in respect of the parties in the writ petition filed by N.K. Agarwal but the State, under the garb of the aforesaid judgment, altered the entire seniority list. This contention was repelled by the Full Bench in paragraph 65 of the judgment, which is reproduced below:-

"In our opinion once the criteria for fixation of the seniority was alterated, the seniority list was required to be prepared afresh and the alterations cannot be restricted to the case of the parties alone. This is what has been done by the State after publishing a tentative seniority list and inviting objections from the concerned persons on 1.9.2001. Thus there is no merit in this contention also."

8. **Secretary, Minor Irrigation Department** filed **Special Leave Petition No. 18683 of 2004**, which was ultimately numbered as **Civil Appeal No. 3348 of 2015** against the judgment rendered on 13 February 2003 in the first writ petition filed by Narendra Kumar Tripathi that had been allowed by the Division Bench. **Special Leave Petition No. 8330 of 2005**, which was ultimately numbered as **Civil Appeal No. 3349 of 2005**, was also filed by Narendra Kumar Tripathi against the judgment rendered by the Full Bench on 10 December 2004. These two Civil Appeals were decided together by the Supreme Court by a common judgment dated 7 April 2015.

9. The Supreme Court noted that the question involved in both the matters was as to whether the writ petitioner was entitled to count the service rendered as an Assistant Engineer from 12 June 1985, the date of his initial appointment on *ad hoc* basis for the purpose of seniority or service could be counted only from 14 December 1989, the date on which approval to his appointment was given by the State Government under the provisions of the Uttar Pradesh Regularization on *Ad hoc* Appointments (on posts within the purview of the Public Service Commission) Rules, 1979 as amended on 7 August 1989. The Supreme Court held that when the Rules provide that *ad hoc* appointments have to be regularized and the seniority has to be counted from the date of appointment, the writ petitioner could not have been deprived of the past service

rendered by him from 12 June 1985 till the date of his regularization. The Supreme Court observed that the Rules had the effect of treating the appointment as a regular appointment from the date of initial appointment. The observations of the Supreme Court are as follows:-

"The scheme of the working of the Rules in the Department shows that right from 1979, the Department has been making direct recruitment after due selection and by applying the 1979 Rules which rules have been extended from time to time to subsequent recruitments, services were regularized. Validity of the scheme of these recruitments is not under challenge. **In such circumstances, when the rules provide that such *ad hoc* appointments have to be regularized and seniority counted from the date of appointment, the writ petitioner could not be deprived of the past service rendered by him from 12th June, 1985 till the date of regularization. It is not a case of appointments made without due selection or without vacancy or without qualification or in violation of rules.** The larger Bench failed to observe that the appointment of the writ petitioner was not dehors the rules nor by way of stop gap arrangement. **The rules had the effect of treating the appointment as a regular appointment from initial date of appointment**. In these circumstances, the principle laid down in **K.C. Joshi** was not applicable. It is not a case where service rendered is either fortuitous or against rules or by way of stop gap arrangement. **Applying the principle laid down in Direct Recruit Class II Engineering Officers' Association, the writ petitioner is entitled to count service from 12th June, 1985. Moreover, the department has allowed the benefit of past service to other similarly placed incumbents as observed in the judgment giving rise to the appeal of the department.**

Accordingly, we are unable to approve the view taken by the larger Bench to the extent it proceeds on the assumption that past service of the writ petitioner was by way of stop gap arrangement or contrary to the rules.

We, therefore, direct the State to redetermine the seniority after hearing the affected parties within six months. It is made clear that benefit of redetermination of seniority at this stage will not disturb holding of posts by any incumbent and except for benefit in pension other benefits to which the writ petitioner may be found entitled will be given only on notional basis."

(emphasis supplied)

10. Subsequently, **Special Leave Petition**[8] filed by S.K. Singh and another against the judgment of the Full Bench in **Farhat Hussain Azad** together with **Writ Petition No. 489 of 2005** and **Special Leave Petition No. 11832 of 2006** were taken up by the Supreme Court and they were disposed on 26 October 2015 in terms of the judgment in **Secretary, Minor Irrigation Department**. The observations are as follows:-

"Learned counsel for the petitioners submit that the questions that fall for determination in these petition stand answered in terms of our Order dated 7th April, 2015 passed in *Secretary Minor Irrigation Deptt. & R.E.S. v.* Narendra Kumar Tripathi - *2015 (4) SCALE 569*.

They submit that these petitions could also be disposed off in terms of the said judgment. We see no reason to decline that prayer.

These special leave petitions and writ petition are accordingly disposed off on terms similar to the one set out in the judgment, mentioned above."

11. It also needs to be noted that after the decision was rendered by the Supreme Court on 7 April 2015 in **Secretary, Minor Irrigation Department** & R.E.S., **Madan Mohan Srivastava** filed a Writ Petition bearing **Service Bench No. 637 of 2015**[9] before the Lucknow Bench for a direction to regularize his service from the date of his initial *ad hoc* appointment by giving him the benefit of the aforesaid judgment of the Supreme Court. The High Court after noticing that the petitioner had represented to the Principal Secretary, Personnel Department of the State Government for this grievance, disposed the writ petition with a direction to the Principal Secretary, Personnel Department of the State Government to consider his case also while considering other matters. The persons who had filed impleadment applications in this petition were also given liberty to raise their objections.

12. **Riyaz Ali** had also earlier filed **Claim Petition No. 2150 of 1995** before the State Public Service Tribunal. The Tribunal allowed the petition by order dated 6 February 1997 and directed the Department to prepare a fresh seniority list by giving the petitioner seniority from the date of initial *ad hoc* appointment like other Assistant Engineers and, thereafter, to place the petitioner at the proper place. The State of Uttar Pradesh filed a **Writ Petition**[10] to assail the order passed by the Tribunal. This petition was dismissed on 15 July 2015 in view of the law laid down by the Supreme Court in the case of Secretary, Minor Irrigation Department. The Court also directed the State to ensure compliance of the order passed by the Tribunal.

13. It transpires that **Dinesh Kumar and three others** had also filed **Claim Petition No. 2018 of 2015** before the State Public Service Tribunal contending that they were given *ad hoc* appointments on the post of Assistant Engineer on 25 April 1985 and subsequently regularized on 14 December 1989 and so they should also be given the benefit of the decision of the Supreme Court in **Secretary, Minor Irrigation Department** and the services rendered by them from 12 June 1985 should be counted for the purpose of seniority. The Tribunal disposed of the petition with a direction to the respondents to decide the representation filed by them for this relief.

14. Pursuant to the aforesaid directions issued by the Supreme Court, the High Court and the Tribunal, the Special Secretary in the State Government sent a communication dated 1 December 2015 to the Director and Chief Engineer pointing out that in view of the directions contained in the judgment rendered by the Supreme Court in **Secretary Minor Irrigation Department** on 7 April 2015, the seniority list dated 14 December 2001 has been cancelled and a decision has been taken to prepare a fresh seniority list after adding the services rendered by Assistant Engineers on *ad-hoc* basis.

15. The Department, thereafter, issued the Office Order dated 31 December 2015. This Office Order refers to the aforesaid directions issued by the Supreme Court, the High Court and the Tribunal and states that in order to give effect to the aforesaid directions, the length of service rendered by the Assistant Engineers on *ad hoc* basis was required to be counted, as a thumb rule, from the date they were initially appointed on *ad hoc* basis. The seniority lists dated 14 December 2001 and 15 June 2012 were, accordingly, cancelled and a tentative seniority list was published to which objections were invited in 15 days.

16. **Brijesh Kumar Dubey**[11] filed a writ petition before the Lucknow Bench to challenge the Office Order dated 31 December 2015 issued by the Principal Secretary in the State Government for re-determination of the seniority of Assistant Engineers from the date of their *ad hoc* appointments. Learned counsel appearing for the interveners in the said petition contended that the tentative seniority list had been published to give effect to the directions of the Supreme Court and the High Court. This petition was disposed of on 15 March 2015 holding that there was no error in the impugned order issued by the State Government but since the objections submitted by the aggrieved persons were under consideration, a direction was issued that the objections should be considered in accordance with the law laid down by the Supreme Court as well as the Rules.

17. The objections dated 12 January 2016 submitted by Rashi Mani Mishra, who is petitioner No.1, have been enclosed with the writ petition. It has been stated in the objection that since he was not a party in the Civil Appeal filed by Narendra Kumar Tripathi before the Supreme Court, the order of the Supreme Court for re-determination of the seniority would not be applicable to his case. After referring to various decisions and the Rules it was sought to be contended that the tentative seniority list dated 31 December 2015 should be cancelled and the earlier seniority list dated 14 December 2001 should be restored.

18. The objections filed by the Assistant Engineers to the tentative seniority list dated 31 December 2015 were considered and decided by the State Government by a detailed order dated 22 March 2016 and a final seniority list was declared. The petitioners who were at serial Nos.106, 109, 107, 122 and 108 in the earlier seniority list dated 14 December 2001 were placed at serial Nos.260, 208, 261, 274 and 262 in the seniority list dated 22 March 2016.

19. Sri T.P. Singh, learned Senior Counsel appearing for the petitioners assisted by Sri Anil Kumar Srivastava made the following submissions :-

(i) the judgment rendered by the Supreme Court in **Secretary, Minor Irrigation Department** is a judgment rendered in personam and is confined to the relief claimed by Narendra Kumar Tripathi before the Supreme Court. The Supreme Court granted relief to Narendra Kumar Tripathi after finding that his initial appointment on *ad hoc* basis on 12 June 1985 was in accordance with the Rules. He, therefore, submitted that the seniority of all the Assistant Engineers was not required to be re-determined and in support of his submission placed reliance upon the judgment of the Supreme Court in **State of Uttar Pradesh and others v. Arvind Kumar Srivastava**[12];

(ii) the seniority determined by the Department on 14 December 2001 could not have been reopened after a period of 15 years. In support of this contention learned Senior Counsel placed reliance on the judgment of the Supreme Court in **Rajendra Pratap Singh Yadav & Ors. v. State of U.P. and others**[13]; and

(iii) in any case, the Department was obliged to examine whether the *ad hoc* appointments of the Assistant Engineers who were claiming the benefit of *ad hoc* services were in accordance with the law laid down by the Full Bench in **Farhat Hussain Azad** and were not by way of stop gap arrangement or fortuitous.

20. Sri Ashok Khare, learned Senior Counsel appearing for the private respondents, however, submitted:-

(i) the State Government was obliged to prepare a fresh seniority list keeping in mind the principle that *ad hoc* services rendered by the Assistant Engineers prior to their regularization was required to be counted for determining the seniority in view of the law laid down by the Supreme Court in **Secretary, Minor Irrigation Department** ;

(ii) the view taken by the Full Bench of the High Court in **Farhat Hussain Azad** that *ad hoc* services rendered prior to regularisation cannot be counted for the purpose of determining the seniority was specifically overruled by the Supreme Court and it was held that *ad hoc* services rendered prior to regularisation should be counted for the purpose of seniority and so this principle was required to be applied to all the Assistant Engineers ;

(iii) the State Government was, therefore, obliged to implement the directions given by the Supreme Court in Secretary Minor Irrigation Department. Directions were also subsequently issued by the Supreme Court in other matters and directions were also issued by the High Court and the Tribunal for implementing the aforesaid directions of the Supreme Court for re-determination of the seniority ;

(iv) to support the contention that the direction in **Secretary, Minor Irrigation Department** was required to be implemented for all the Assistant Engineers, reliance was placed on the judgment of the Supreme Court in **M/s Shenoy and Company and Others v. Commercial Tax Officer and Others**[14]; and

(v) no objection was taken by the petitioners in their objections to the tentative seniority list that there was any distinguishing feature from that of Narendra Kumar Tripathi or there was any factual mistake in adding the *ad hoc* services of the Assistant Engineers for the purpose of seniority.

21. Ms. Meenakshi Singh, learned Standing Counsel appearing for the State contended that:-

(i) no exception can be taken to the decision of the State to cancel the seniority list dated 14 December 2001 and to issue a fresh seniority list after inviting objections from all the Assistant Engineers in the light of the law laid down by the Supreme Court in **Secretary, Minor Irrigation Department** ;

(ii) even otherwise, the seniority list was prepared afresh not only in the light of the decision of the Supreme Court **Secretary, Minor Irrigation Department** but also to ensure compliance of the directions issued by the Supreme Court in the Special Leave Petitions and the Writ Petition that were subsequently decided by the Supreme Court on 26 October 2015, as also the orders passed in various writ petitions by the High Court and the Tribunal ;

(iii) by Office Order dated 31 December 2015 a tentative list was published inviting objections from all concerned and the final seniority list was published on 22 March 2016 after taking into consideration all the objections and there is no illegality nor any factual error has been pointed out in the petition ;and

(iv) Narendra Kumar Tripathi was selected on *ad hoc* basis along with many other Assistant Engineers by order dated 12 June 1985 after an advertisement was published in December 1984 and was placed at serial No. 32 in the list. In fact 108 Assistant Engineers had been granted *ad hoc* appointments in 1985. A seniority list dated 14 December 2001 was prepared in which the *ad hoc* services of such Assistant Engineers was not added for the purpose of seniority. This seniority list never attained finality as it was challenged in many Writ Petitions before the Division Bench and the Full Bench of the High Court and against the decision of the Full Bench in **Farhat Hussain Azad** the matter was finally decided by the Supreme Court in **Secretary, Minor Irrigation Department** on 7 April 2015. A direction was given to re-determine the seniority after adding the *ad hoc* services rendered by Assistant Engineers prior to regularisation. It is, therefore, not correct on the part of the petitioners to allege that the final seniority list published on 14 December 2001 has been reopened after 15 years.

22. Sri Manu Khare, learned counsel appearing for the private respondents adopted the arguments of Sri Ashok Khare, learned Senior Counsel and also placed reliance upon the decision of the Supreme Court in **Amrit Lal Berry v. Collector of Central Excise, New Delhi and Others**[15].

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

24. The dispute in this petition is about the seniority of Assistant Engineers working in the Department. As noted above, 108 Assistant Engineers were given *ad hoc* appointments in 1985 after an advertisement had been issued. Their services were subsequently regularized on 14 December 1989 under the provisions of the Uttar Pradesh Regularization of *Ad hoc* Appointments (on posts within the purview of Public Service Commission) (Second Amendment) Rules, 1989. A final seniority list was thereafter prepared on 14 December 2001. The services rendered by such Assistant Engineers on *ad hoc* basis were not counted for seniority purpose and their seniority was

determined from the date of their regularization on 14 December 1989. This seniority list was challenged in various writ petitions. In fact Narendra Kumar Tripathi, in the first petition filed by him even before the declaration of the final seniority list, had challenged the order rejecting his representation that he had filed for adding the *ad hoc* services rendered by him prior to 14 December 1989. The order of the State Government was set aside in this writ petition filed by Narendra Kumar Tripathi and a direction was issued to fix his seniority from the date of his initial appointment in the work-charge establishment of the Department on 18 January 1983. It may be stated that initially Narendra Kumar Tripathi was working in the Department on work-charge basis from 18 January 1983 before he was given *ad hoc* appointment on 12 June 1985. The seniority list dated 14 December 2001 was also challenged in various Writ Petitions. A Division Bench of this Court on 27 February 2004 in Ravi Arjun Das filed by *ad hoc* Assistant Engineers for counting the service rendered on *ad hoc* basis prior to regularisation in 1989 for the purposes of seniority was dismissed on 27 February. Thereafter, certain other Writ Petitions, including the second Writ Petition by Narendra Kumar Tripathi were filed and finding a conflict between the two Division Benches in **Narendra Kumar Tripathi** and **Arjun Ravi Das**, these Writ Petitions were referred to a Full Bench. The issue before the Full Bench was as to whether the services rendered on *ad hoc* basis prior to regularisation should be counted for determining the seniority. The Full Bench observed that *ad hoc* services rendered after appointment made dehors the Rules and without following any procedure prescribed by law cannot be counted for the purposes of seniority. The Full Bench, thereafter decided the petitions on merit in view of the statement made by the learned counsel for the parties. The Full Bench found that all the petitioners had been initially appointed on *ad hoc* basis as Assistant Engineers in the year 1985 except Narendra Kumar Tripathi who had been initially engaged in the work-charge establishment in 1983 and was thereafter appointed on 12 June 1985 as an Assistant Engineer on *ad hoc* basis. The Full Bench noted that the services of all such *ad hoc* Assistant Engineers appointed in 1985 were subsequently regularized by the order dated 14 December 1989 and a final seniority list was prepared on 14 December 2001. This seniority list did not count the services rendered by the Assistant Engineers on *ad hoc* basis. The Full Bench dismissed all the petitions holding that the *ad hoc* services rendered prior to regularization could not be counted for the purposes of seniority. The seniority list was, therefore, not disturbed by the Full Bench.

25. Narendra Kumar Tripathi filed a Special Leave Petition before the Supreme Court against the judgment rendered by the Full Bench on 10 December 2004. **Secretary, Minor Irrigation Department** also filed a Special Leave Petition against the judgment rendered on 13 February 2003 in the first petition filed by Narendra Kumar Tripathi. These Special Leave Petitions were subsequently numbered as Civil Appeal No.3348 of 2015 and Civil Appeal No.3349 of 2015 respectively. The Supreme Court noticed that in both the matters the question was whether Narendra Kumar Tripathi was entitled to count the *ad hoc* service on the post of Assistant Engineer from 12 June 1985, which was the date of his initial appointment on *ad hoc* basis for the purposes of seniority or his service was to be counted only from 14 December 1989, which was the date on which he was regularized in service. It needs to be stated that Narendra Kumar Tripathi had made a statement before the Supreme Court that his seniority should be counted from 12 June 1985 and not from 18 January 1983 when he was appointed on work-charge basis. The Supreme Court held that

when the Rules provide for regularisation of such *ad hoc* appointments, then Narendra Kumar Tripathi could not be deprived of the past services rendered by him from 12 June 1985 till the date of regularisation for the reason that the Rules had the effect of treating the appointment as a regular appointment from the initial date of appointment. The Supreme Court also observed that the Department had allowed the benefit of the past services rendered on ad-hoc basis to other similarly placed incumbents as was noted by the High Court in the first writ petition filed by Narendra Kumar Tripathi. The Supreme Court, therefore, directed the State to re-determine the seniority after hearing the affected parties within six months. Thereafter, as noticed above, Special Leave Petition filed by S.K. Singh and others against the judgment of the Full Bench rendered on 10 December 2004 with one more Special Leave Petition and a Writ Petition were disposed of by the Supreme Court on 26 October 2015 in terms of the directions set out in the judgment rendered in **Secretary, Minor Irrigation Department** on 7 April 2015. Certain other writ petitions were also disposed of by the High Court and the Tribunal in the same terms.

26. On a consideration of various directions issued by the Supreme Court, the High Court and the Tribunal, the State Government issued an Office Order dated 31 December 2015 notifying the tentative seniority list and requiring all concerned to file objections, if any, within fifteen-days. Objections were filed and were considered and thereafter a final seniority list was published on 22 March 2016. The writ petitioners, who were at Serial Nos.106, 109, 107, 122, 108 in the seniority list dated 14 December 2001 have now been placed at Serial Nos.260, 208, 261, 274, 262 in the seniority list dated 22 March 2016. They have, accordingly, filed this petition for setting aside this seniority list dated 22 March 2016 and for reviving the earlier seniority list dated 14 December 2001.

27. Thus, right from 2001 the seniority list dated 14 December 2001 has been in constant litigation and in 2015 directions were given by the Supreme Court to re-determine the seniority. The State Government has now determined the seniority on 22 March 2016. It is, therefore, not possible to accept the contention of learned Senior Counsel for the petitioners that the seniority list dated 14 December 2001 has now been reopened after 15 years in 2016 without any basis. The decision of the Supreme Court in Rajendra Pratap Singh Yadav, therefore, does not help the petitioners.

28. The main contention of Sri T.P. Singh, learned Senior Counsel appearing for the petitioners was that the directions that were issued by the Supreme Court related to Narendra Kumar Tripathi and, therefore, his seniority was only required to be re-determined. There was, in such circumstances, no occasion for the State Government to re-determine the seniority of all the Assistant Engineers who had been working on *ad hoc* basis.

29. The contention of learned Standing Counsel appearing for the State and the learned Senior Counsel appearing for the private respondents is that the Supreme Court did not accept the stand of the State Government that the *ad hoc* services rendered prior to regularisation should not be counted for the purpose of seniority and a specific direction was issued that *ad hoc* services rendered from 1985 upto the date of regularisation should also be counted for the purpose of

seniority. It was, therefore, contended that it was incumbent upon the State Government to have re-determined the seniority by giving the benefit to all the Assistant Engineers who had rendered such *ad hoc* services and not to Narendra Kumar Tripathi alone, more particularly when such a direction was subsequently issued by the Supreme Court in two Special Leave Petitions and one Writ Petition filed by other Assistant Engineers as also the directions issued by the High Court as well as the Tribunal subsequently to prepare a fresh seniority list in the light of the directions issued by the Supreme Court on 7 April 2015 in **Secretary, Minor Irrigation Department**.

30. It is not in dispute that the seniority list dated 14 December 2001 did not count the *ad hoc* services rendered by the Assistant Engineers prior to their regularisation. The Full Bench upheld the seniority list dated 14 December 2001 holding that the State was justified in not giving this benefit. In the opinion of the Full Bench, all the Assistant Engineers had been appointed on *ad hoc* basis dehors the Rules as neither the constitution of the Selection Committee was in accordance with the Rules nor was the Public Service Commission consulted. This view of the Full Bench in **Farat Hussain Azad** was not accepted by the Supreme Court. The Supreme Court held that the High Court failed to notice that the appointment was not dehors the Rules nor by way of stop gap arrangement or fortuitous. The Supreme Court held that in such circumstances the writ petitioner could not be deprived of the past *ad hoc* service rendered by him from 12 June 1985 till the date of regularisation. The Supreme Court also specifically observed that it was unable to approve the view taken by the Full Bench to the extent it proceeded on the assumption that past service of the writ petitioner was by way of stop gap arrangement or contrary to the Rules and directed the State to re-determine the seniority after hearing the affected parties within six months. The Supreme Court also observed that the benefit of re-determination of seniority at this stage will not disturb holding of posts by any incumbent and except for the benefit in pension, other benefits to which the writ petitioner may be found entitled will be given only on notional basis.

31. Once the principle on the basis of which the seniority list was prepared on 14 December 2001 did not find favour of the Supreme Court, the entire seniority had to be re-determined in the light of the observations made and the directions issued by the Supreme Court, more so when such directions were subsequently also issued by the Supreme Court in Special Leave Petition (C) No.2075 of 2006, Writ Petition No.489 of 2005 and Special Leave Petition (C) No.11832 of 2006 and also by the High Court in matters referred to above as well as by the Tribunal.

32. It is not a case where there was a factual error committed by the Department while placing Narendra Kumar Tripathi in the seniority list. The principle that *ad hoc* services rendered prior to the regularisation should not be counted formed the basis on which the seniority list dated 14 December 2001 was prepared but this did not find favour of the Supreme Court and it was specifically held that *ad hoc* services rendered prior to the regularisation should be counted for the purpose of seniority. Narendra Kumar Tripathi was amongst the 108 Assistant Engineers who had been appointed on *ad hoc* basis in 1985. In fact, the appointment order dated 12 June 1985 related to a number of Assistant Engineers and Narendra Kumar Tripathi was placed at Serial No.32. Three other similar orders were issued in 1985 as a result of which 108 *ad hoc* appointments were made.

33. It needs to be remembered that as the seniority list dated 14 December 2001 did not count the period of *ad hoc* services rendered by Assistant Engineers prior to their regularisation, large number of Writ Petitions had been filed to challenge the seniority list dated 14 December 2001 and they were heard together and decided by a common judgment by the Full Bench in Farhat Hussain Azad. Common contentions were raised on behalf of the petitioners as would be apparent from the judgment and it cannot be said that any particular petitioner raised an issue peculiar and individual to his petition. The High Court did not accept the contention of the petitioners and dismissed all the writ petitions holding that *ad hoc* services rendered by such Assistant Engineers prior to regularization could not be added. However, the Supreme Court did not accept this view of the High Court and directed in the matters relating to Narendra Kumar Tripathi that *ad hoc* services rendered by Assistant Engineers prior to regularisation should be counted for the purpose of seniority. It needs to be reiterated that a principle for determining the seniority of Assistant Engineers had been determined by the Supreme Court and this principle was, therefore, required to be followed for all the similarly situated Assistant Engineers.

34. Thus, when relief was granted to Narendra Kumar Tripathi then identically situated Assistant Engineers were required to be treated alike by extending that benefit to them and this is what was done. On the other hand, if this was not done, it would have resulted in discrimination and this would be violative of Article 14 of the Constitution. It was, therefore, incumbent upon the State Government to have given the benefit of such *ad hoc* services to all the other *ad hoc* Assistant Engineers. It is for this purpose that the State Government issued the Office Order dated 31 December 2015 indicating this position and inviting objections from all concerned to the tentative seniority list.

35. In this connection, it will be useful to refer to the decision of the Supreme Court in **M/s Shenoy & Company (supra),** on which reliance has been placed by learned Senior Counsel for the respondents. A batch of 1590 writ petitions were filed in the Karnataka High Court by a large number of traders including Hansa Corporation to challenge the constitutional validity of The Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1979. The Division Bench of the Karnataka High Court, by a common judgment dated 24 August 1979, struck down the Act, allowed the writ petitions and issued a mandamus to the State Government forbearing it from taking any proceedings under the Act. The State Government, however, filed only one appeal against the writ petition filed by Hansa Corporation and the Supreme Court by the judgment dated 25 September 1980 allowed the appeal, set aside the judgment of the Karnataka High Court and upheld the validity of the Act. The Authorities, thereafter, issued notices to all the dealers including those who had filed writ petitions in the High Court calling upon them to register themselves under the Act and to file returns and pay the amount of tax due under the original 1979 Act. Writ petitions were then filed by such dealers in the Karnataka High Court contending that notices issued to them were bad in law inasmuch as the State had not filed any appeal against the judgment rendered in the writ petitions filed by them and that the judgment of the Supreme Court could rescue the State from taking proceedings only against Hansa Corporation and not against them. The writ petitions were dismissed by the Karnataka High Court. The Supreme Court examined whether the judgment in the writ petition filed by Hansa

Corporation validated the action of the State and after referring to the earlier decisions of the Supreme Court in **State of Punjab Vs. Joginder Singh**[16] and **Makhanlal Waza Vs. Jammu & Kashmir State**[17], the Supreme Court held that the decision of the Supreme Court would not only bind Hansa Corporation but all the writ petitioners before the High Court. The observations are:

"22**. Though a large number of writ petitions were filed challenging the Act, all those writ petitions were grouped together, heard together and were disposed of by the High Court by a common Judgment. No petitioner advanced any contention peculiar or individual to his petition, not common to others. To be precise, the dispute in the cause or controversy between the State and each petitioner** had no personal or individual element in it or anything personal or peculiar to each petitioner. The challenge to the constitutional validity of 1979 Act proceeded on identical grounds common to all petitioners. **This challenge was accepted by the High Court by a common judgment and it was this common judgment that was the subject matter of appeal before this Court in Hansa Corporation case. When the Supreme Court repelled the challenge and held the Act constitutionally valid, it in terms disposed of not the appeal in Hansa Corporation case alone, but petitions in which the High Court issued mandamus on the non-existent ground that the 1979 Act was constitutionally invalid. It is, therefore, idle to contend that the law laid down by this Court in that judgment would bind only the Hansa Corporation and not the other petitioners against whom the State of Karnataka had not filed any appeal**. To do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution. Article 141 reads as follows:

"The law declared by the Supreme Court shall be binding on all courts within the territory of India"

.....

24. A writ or an order in the nature of mandamus has always been understood to mean a command issuing from the Court, competent to do the same, to a public servant amongst others, to perform a duty attaching to the office, failure to perform which leads to the initiation of action. In this case, the petitioners-appellants assert that the mandamus in their case was issued by the High Court commanding the authority to desist or forbear from enforcing the provisions of an Act which was not validly enacted. In other words, a writ of mandamus was predicated upon the view that the High Court took that the 1979 Act was constitutionally invalid. Consequently the court directed the authorities under the said Act to forbear from enforcing the provisions of the Act qua the petitioners. The Act was subsequently declared constitutionally valid by this Court. The Act, therefore, was under an eclipse, for a short duration; but with the declaration of the law by this Court, the temporary shadow cast on it by the mandamus disappeared and the Act revived with its full vigour, the constitutional invalidity held by the High Court having been removed by the judgment of this Court. If the law so declared invalid is held constitutionally valid, effective and binding by the Supreme Court, the mandamus for bearing the authorities from enforcing its provisions would become ineffective and the authorities cannot be compelled to perform a negative duty. **The declaration of the law is binding on everyone and it is therefore, futile to contend**

that the mandamus would survive in favour of those parties against whom appeals were not filed."

(emphasis supplied)

36. In the present case also, a batch of writ petitions were decided by a common judgment by the Full Bench in **Farat Hussain Azad**. The dispute was not personal or individual to any particular petitioner but was a common dispute as to whether the *ad hoc* services rendered by Assistant Engineers prior to regularisation should be counted for the purpose of seniority. Though all the writ petitioners may not have approached the Supreme Court, certainly Narendra Kumar Tripathi did approach the Supreme Court. In such circumstances, when the Supreme Court directed as a principle that *ad hoc* services rendered by Assistant Engineers prior to the regularisation should be counted for the purpose of seniority and the seniority should be re-determined, it cannot be contended by the petitioners that the State Government was not justified in re-determining the seniority of such *ad hoc* Assistant Engineers. We must, however, hasten to add that directions had also been issued by the Supreme Court, the High Court and the Tribunal in other matters to which we have adverted earlier. The State was, therefore, justified in issuing the Office Order dated 31 December 2001 inviting objections from all concerned against the tentative seniority list based on the thumb rule indicated in the judgment of the Supreme Court.

37. Learned Senior Counsel for the petitioners, however, placed reliance upon the decision of the Supreme Court in **Arvind Kumar Srivastava & Ors** to contend that the seniority of Narendra Kumar Tripathi alone was required to be re-determined. In paragraph 22, the Supreme Court summed up the legal principles as follows:

"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.

22.1. **The normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly** situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2 **However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence**. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as

fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3 **However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like** [see K.C. Sharma & Ors. v. Union of India, (1997) 6 SCC 721]. On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

(emphasis supplied)

38. It has been held by the Supreme Court in the aforesaid decision that normally relief should be given to all other identical situated persons if a particular set of employees are given relief by the Court as not doing so would amount to discrimination and would be violative of Article 14 of the Constitution. The Supreme Court emphasised that this principle needs to be applied more emphatically in services matters as service jurisprudence postulates that all similarly situated persons should be treated similarly. An exception was, however, carved out in cases of laches and delay as well as acquiescence but even this exception, it has been held, would not apply where the judgment pronounced by the Court is a judgment in rem with the intention to give benefit to all similarly situated persons. Such a situation would arise when the subject matter of the decision touches upon policy matters, like a scheme for regularisation of service. However, if the judgment of the Court is in personam, benefit of such judgment shall accrue to the parties before the Court and this would be when it is either expressly stated or can be impliedly found out from the tenor and language of the judgment.

39. In the present case, the subject matter of the decision before the Supreme Court was a policy matter as to whether the benefit of *ad hoc* services rendered by Assistant Engineers prior to their regularisation should be extended or not for the purpose of seniority. The State Government issued the Office Order dated 31 December 2015 immediately after the decisions were rendered by the Supreme Court and the High Court as also the Tribunal. The judgment of the Supreme Court did direct for re-determination of the seniority list in six months and it cannot by any stretch of imagination be said that the judgment was a judgment in personam.

40. Learned Senior Counsel for the petitioners also contended that even if the directions issued by the Supreme Court on 7 April 2015 in **Secretary, Minor Irrigation Department** were required to be implemented for all the *ad hoc* Assistant Engineers, then too the facts of each *ad hoc*

Assistant Engineer were required to be examined. In this connection, it needs to be noted that objections were filed to the tentative seniority list. No distinguishing factor was pointed out in the objections nor it has been pointed out in the writ petition. The Office Order dated 31 December 2015 specifically stated that the seniority would be determined after adding the *ad hoc* services rendered by Assistant Engineers prior to regularisation as a thumb rule and so if such an objection had to be raised, it was incumbent to raise this particular objection but learned Senior Counsel for the petitioners has not been able to point out from the objections or the order dated 22 March 2016 that such an objection was raised. It was only submitted by learned Senior Counsel for the petitioners during the course of hearing that the State Government was required to examine each individual case to find out whether the facts relating to the other Assistant Engineers were the same as that of Narendra Kumar Tripathi. The only distinguishing feature pointed out by the Full Bench regarding Narendra Kumar Tripathi was that prior to his *ad hoc* appointment on 12 June 1985, he was working in the work-charge establishment from 18 January 1983. Narendra Kumar Tripathi gave up the plea for counting his seniority from 18 Jaunary 1983 before the Supreme Court and stated that only his *ad hoc* service from 12 June 1985 should be counted. Thus also there is nothing which may distinguish the factual aspects of the other Assistant Engineers from that of Narendra Kumar Tripathi who had been granted relief by the Supreme Court. We are, therefore, not inclined to accept this submission when it was neither raised before the Department at the time of filing the objections or in this writ petition. In any case, as noted above, 108 *ad hoc* Assistant Engineers had been appointed in four batches in 1985 and even in the appointment order dated 12 June 1985, the petitioner was placed at Serial No.32. All the Assistant Engineers were similarly situated as would be seen from the case set up by them before the Full Bench in **Farhat Hussain Azad**.

41. Thus, as none of the submissions advanced by learned Senior Counsel for the petitioners have any force, the writ petition deserves to be dismissed. It is, accordingly, dismissed. The interim order stands vacated.

(2016) 9 ILRA 701
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Habeas Corpus Writ Petition No.- 19992 Of 2016

Mayank Kumar Rana ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Arun K. Singh Deshwal, Arun K. Singh -I

Counsel for the Respondents:
G.A., Deepak Mishra

This petition has been filed by the petitioner with a prayer to direct the respondents to produce the petitioner before this Court and also for quashing the order dated 27.1.2016 passed by respondent no.2, District Magistrate, Bijnor as well as order dated 16.3.2016 passed by respondent no.1.

It has been stated by the detaining authority that on 22.12.2015, the District President of Uttar Pradesh Prathmik Shikshak Sangh, Bijnor namely Nagesh Kumar, S/o Lal Bahadur Singh who was the Headmaster of the Primary School, Haldaur and was also working on the post of A.B.R.C., Haldaur, had called a meeting in Indr Park, Bijnor. The petitioner in a public place at Indra Park where the said meeting of the teachers association was going on, reached there and in broad-day-light shot a fire at the temporal region of Nagesh Kumar who received serious injuries. Due to the said act of the petitioner, the teachers present at the Indra Park and people of the nearby area became panic and tension prevailed and there was a sense of insecurity and fear in the people due to which there was disturbance of public order for which an FIR was lodged by one Manoj Kumar against the petitioner.

After registration of the said case, the Investigating Officer started the investigation and made spot inspection and further recovered empty cartridge and other articles from the place of occurrence. The statement of the informant and eye-witness Manoj Kumar was recorded who has supported the prosecution case. The other eye-witnesses also in their statements have supported the prosecution case and from the medical report of the said injured, injuries of fire-arm were found. As per the statement of the Doctor who had examined the injured opined that due to the injuries received by the injured Nagesh Kumar he was not able to speak. The Investigating Officer of the case tried to arrest the petitioner but the petitioner could not be arrested and it was stated that he surrendered on 1.1.2016 before the Magistrate concerned. He was thereafter sent to jail and the petitioner was taken in the custody of the Investigating Officer on 12.1.2016 and on remand at his pointing out, a country-made pistol of 32 bore was recovered from the village Bakar from a Sugar Cane field and from the said pistol, a live cartridge was also recovered. The recovery memo of the pistol was prepared, on the basis of which the Investigating Officer has registered a case u/s 25/27 of the Arms Act which was registered as

Case Crime No.30 of 2016 and the same was endorsed in the G.D of Police Station Kotwali City, district Bijnor at 12.30 hours on 12.1.2016.

The representation of the petitioner dated 9.2.2016 which was received by the Central Government on 11.2.2016 was decided after a gross delay on 26.5.2016 i.e. after more than three and half months. The explanation which has been given in the counter affidavit of respondent no.6 in para nos.4, 5 and 6 is wholly unsatisfactory. Thus the detention order passed by the detaining authority and confirmed by the State Government are liable to be set-aside on this ground alone.

Accordingly, the detention order dated 27.1.2016 passed by respondent no.2 as well as order dated 16.3.2016 passed by respondent no.1 are hereby set-aside.

Held: Para-

Case Law discussed:
Nandu @ Nand Kishore Vs. Union of India reported in 2012 (79) ACC 869

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

1. This petition has been filed by the petitioner with a prayer to direct the respondents to produce the petitioner before this Court and set him at liberty forthwith and also for quashing the order dated 27.1.2016 passed by respondent no.2, District Magistrate, Bijnor as well as order dated 16.3.2016 passed by respondent no.1.

2. The brief facts of the case are that an FIR was lodged by one Manoj against the petitioner on 22.12.2015 u/s 307 IPC which was registered as Case Crime No.1288 of 2015 at Police Station Kotwali City, District Bijnor at 20.10 hours for an incident which is said to have taken place on the same day at 14 hours. In the incident one person namely Nagesh Kumar received injuries, who was medically examined on 22.12.2015 and was discharged from the hospital on 2.1.2016.

3. It appears that on the basis of the said solitary case, the detention order was passed by the District Magistrate, Bijnor, respondent no.2 against the petitioner u/s 3(2) of National Security Act (hereinafter referred to as the NSA). The District Magistrate while passing the detention order has mentioned in the grounds of the detention that the petitioner is a man of criminal antecedents and because of his criminal personality, he disturbs the social harmony.

4. It has been stated by the detaining authority that on 22.12.2015, the District President of Uttar Pradesh Prathmik Shikshak Sangh, Bijnor namely Nagesh Kumar, S/o Lal Bahadur Singh who was the Headmaster of the Primary School, Haldaur and was also working on the post of A.B.R.C., Haldaur, had called a meeting in Indra Park, Bijnor. The petitioner in a public place at Indra Park where the said meeting of the teachers association was going on, reached there and in broad-day-light shot a fire at the temporal region of Nagesh Kumar who received serious injuries. Due to the said act of the petitioner, the

teachers present at the Indra Park and people of the nearby area became panic and tension prevailed and there was a sense of insecurity and fear in the people due to which there was disturbance of public order for which an FIR was lodged by one Manoj Kumar against the petitioner.

5. After registration of the said case, the Investigating Officer started the investigation and made spot inspection and further recovered empty cartridge and other articles from the place of occurrence. The statement of the informant and eye-witness Manoj Kumar was recorded who has supported the prosecution case. The other eye-witnesses also in their statements have supported the prosecution case and from the medical report of the said injured, injuries of fire-arm were found. As per the statement of the Doctor who had examined the injured opined that due to the injuries received by the injured Nagesh Kumar he was not able to speak. The Investigating Officer of the case tried to arrest the petitioner but the petitioner could not be arrested and it was stated that he surrendered on 1.1.2016 before the Magistrate concerned. He was thereafter sent to jail and the petitioner was taken in the custody of the Investigating Officer on 12.1.2016 and on remand at his pointing out, a country-made pistol of 32 bore was recovered from the village Bakar from a Sugar Cane field and from the said pistol, a live cartridge was also recovered. The recovery memo of the pistol was prepared, on the basis of which the Investigating Officer has registered a case u/s 25/27 of the Arms Act which was registered as Case Crime No.30 of 2016 and the same was endorsed in the G.D of Police Station Kotwali City, district Bijnor at 12.30 hours on 12.1.2016.

6. When the detaining authority came to know that while being in judicial custody since 1.1.2016, the petitioner was trying to obtain bail for which he has filed bail application through his lawyer before the District & Sessions judge, Bijnor which was pending and there is every likelihood that he would be allowed bail and as soon as he is released on bail, he would again indulge in such anti-social activities which may disturb the public order and on the said satisfaction the detaining authority in order to prevent the petitioner from committing such anti-social activities, passed the detention order on 27.1.2016 against the petitioner informing him about his right to make representation against the same before the detaining authority (District Magistrate), State Government, U.P. Advisory Board, Lucknow and Central Government, New Delhi respectively. The said detention order was passed by the detaining authority on the basis of report submitted by the Superintendent of Police to him under the N.S.A. Act to prevent him from committing such anti-social activities which was prejudicial to the disturbance of public order. The detention order was served to the petitioner along with grounds of detention in District Jail, Bijnor on 27.1.2016 itself. The petitioner submitted his representation dated 9.2.2016 to the various authorities as mentioned in the detention order through Superintendent of District Jail, respondent no.4 who sent the same to the District Magistrate on the same day.

7. The petitioner was heard by the U.P. Advisory Board, Lucknow on 4.3.2016 when he appeared in person in support of his representation filed against the detention order dated

27.1.2016 which took decision to confirm the detention order. The detention order passed by the District Magistrate was confirmed by the State Government on 16.3.2016 for detaining the petitioner for the period of 12 months from the date of passing of the detention order u/s 12(1) of N.S.A. The representation of the petitioner dated 9.2.2016 was rejected by the State Government on 19.2.2016.

8. The pleadings between the parties have been exchanged.

9. Heard Sri Arun Kumar Singh, learned counsel for the petitioner, Sri Deepak Mishra, learned counsel for the respondent no.6 and Sri Vikas Sahai, learned A.G.A. for the State and perused the record.

10 The sole ground which has been canvased and argued by learned counsel for the petitioner is that the representation dated 9.2.2016 of the petitioner against the detention order to the Central Government which was addressed to the Secretary Ministry of Home Affairs, New Delhi was forwarded by the District Magistrate, Bijnor to the Central Government on 11.2.2016. It was urged that the representation of the detenue-petitioner was rejected by the Central Government on 26.5.2016 and there has been gross delay in deciding the representation of the petitioner by the Central Government/respondent no.6 thus the detention order is liable to be set-aside on this ground alone. He pointed out that the explanation given by the Central Government/respondent no.6 in para no.4, 5 and 6 of the counter affidavit for the said delay does not appear to be a plausible one as the representation of the petitioner has been lying with the Central Government and was not attended promptly. It was stated that the further comments were called by the Central Government from the State Government on 22.2.2016 through Secretary Home, U.P. Lucknow and the District Magistrate, Bijnor and further reminder letters were sent on 11.3.2016, 4.4.2016, 26.4.2016 and 5.5.2016 respectively. The Government of U.P. Forwarded its report vide letter no.108/2/04/2016-Cx-7 dated 10.5.2016 and the same was received in the Ministry on 17.5.2016. Thereafter the representation and comments of the Secretary Home of the Government of U.P. were processed for considering the Union Home Secretary on 17.5.2016. The Home Secretary Ministry of Home Affairs, New Delhi after duly considering the order of detention and grounds of detention rejected the same on 26.5.2016. Thus there has been a inordinate delay of about three and half months, hence the detention order is liable to be quashed. In support of his contention he has placed reliance on the judgement of this Court in the case of **Nandu @ Nand Kishore Vs. Union of India reported in 2012 (79) ACC 869**. He further submitted that in the said case also the detention order was quashed on the ground of delay in deciding the representation by the Central Government which was lying unattended and the explanation given by the Central Government was not found to be convincing.

11. Learned AGA has stated that there is no delay on the part of the District Magistrate, State Government in deciding the representation of the petitioner and they promptly attended and rejected the same.

12. Sri Arun Misra holding brief of Sri Deepak Misra, learned counsel for the respondent no.6, Union of India tried to justify the delay in deciding the representation of the petitioner dated 9.2.2016 by the Central Government which rejected on 26.5.2016 but could not dispute the fact that the explanation given for the delay is not a convincing one.

13. Considered the submissions advanced by learned counsel for the parties and examined the material brought on record. The representation of the petitioner dated 9.2.2016 which was received by the Central Government on 11.2.2016 was decided after a gross delay on 26.5.2016 i.e. after more than three and half months. The explanation which has been given in the counter affidavit of respondent no.6 in para nos.4, 5 and 6 is wholly unsatisfactory. Thus the detention order passed by the detaining authority and confirmed by the State Government are liable to be set-aside on this ground alone.

14. Accordingly, the detention order dated 27.1.2016 passed by respondent no.2 as well as order dated 16.3.2016 passed by respondent no.1 are hereby set-aside.

15. The present Habeas Corpus Writ Petition is allowed. No order as to cost.

16. The respondents are directed to set at liberty petitioner Mayank Kumar Rana forthwith, if he is not wanted in any other case.

(2016) 9 ILRA 706
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 19998 Of 2006

Ram Gopal **...Petitioner**
Versus
Union Of India & Ors. **...Respondents**

Counsel for the Petitioner:
P.K. Misra, V.K. Tripathi, S. Niranjan

Counsel for the Respondents:
Govind Saran, M B Singh, SC, Vijay Kumar Singh

This writ petition under Article 226 of Constitution of India has come up assailing judgment and order dated 16.09.2005 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad (hereinafter referred to as ''Tribunal') in Original Application no. 452 of 1999 whereby petitioner's challenge to order of removal dated 19.06.1997 and appellate order dated 18.12.1997 has failed.

Petitioner was initially employed as Muster Roll Casual Labour in 1976 and then regularized in 1988. On 04.02.1995 while posted under Assistant Engineer (North), Mathura Junction petitioner was placed under suspension. At that time he was working as Gangman. Thereafter in exercise of power under Rule 14(ii) of Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to as "Rules 1968") disciplinary authority passed order of removal holding that regular enquiry against petitioner is not "reasonably practicable" since none is ready to tender evidence for fear of attack on his life as petitioner was involved in criminal activities of threatening and man-handling, officers of Railway.

Petitioner challenged aforesaid order in appeal but the same was dismissed vide order dated 18.12.1997 passed by Senior Divisional Engineer (North) Jhansi whereagainst petitioner filed Original Application which has been dismissed.

Earlier petitioner was served with a chargesheet dated 01.03.1995 alleging charge of misbehaving with senior officer K.R. Chopra, CPWI, Mathura Junction at his residence. Petitioner was initially posted at Mathura wherefrom he was transferred to Kosikalan vide order dated 15.10.1996 passed by Divisional Engineer. Petitioner was not happy with such transfer and on 27.05.1997 forcibly entered chamber of Chief Pathway Inspector, Mathura Junction, misbehaved with him and threatened, for his transfer from Kosikalan to Mathura. On 15.10.1996 petitioner threatened Pathway Mistry and R.K. Saxena, PWI with an Axe in his hand. Subsequently, petitioner tendered written apology on 17.10.1996 assuring good behavior. On 24.04.1997 petitioner threatened Y.S. Tyagi, Pathway Inspector with a stick in his hand and did not allow him to move for more than an hour. He threatened A.K. Asthana on 25.05.1997 stating that his family would be liquidated if he (petitioner) is not transferred from Kosikalan to Mathura. Petitioner's criminal activities terrorising various officers who submitted report but refused to depose as witness having apprehension of loss or damage to

their person and family on the part of petitioner. These facts and material have been found exist on record by Tribunal. Before us also, nothing has been placed to show that these facts were nonest or concocted.

In the entirety of facts and circumstances and having gone through the judgment of Tribunal impugned in this writ petition, we are satisfied that there is no manifest illegality or error apparent on the face of record, justifying interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of Constitution of India.

Writ petition lacks merit. It is accordingly dismissed.

Held: Para-

Case Law discussed:

Reena Rani Vs State of Haryana and others, (2012) 10 SCC 215,
Union of India Vs Tulsiram Patel (1985) 3 SCC 398,
Ved Mitter Gill Vs Union Territory Administration, Chandigarh and others, 2015 (8) SCC 86,
Southern Railway Officers Association v. Union of India, (2009) 9 SCC 24,
Risal Singh Vs State of Haryana and others, (2015)1 SCC (LS) 351,
Jaswant Singh Vs State of Punjab, (1991) 1 SCC 362 and Reena Rani Vs State of Haryana (supra),

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Dharam Pal Singh, learned Senior Counsel, assisted by Sri S. Niranjan, learned counsel for petitioner and Sri Vijay Kumar Singh, counsel for respondents.

2. This writ petition under Article 226 of Constitution of India has come up assailing judgment and order dated 16.09.2005 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad (hereinafter referred to as "Tribunal') in Original Application no. 452 of 1999 whereby petitioner's challenge to order of removal dated 19.06.1997 and appellate order dated 18.12.1997 has failed.

3. Petitioner was initially employed as Muster Roll Casual Labour in 1976 and then regularized in 1988. On 04.02.1995 while posted under Assistant Engineer (North), Mathura Junction petitioner was placed under suspension. At that time he was working as Gangman. Thereafter in exercise of power under Rule 14(ii) of Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to as "Rules 1968") disciplinary authority passed order of removal holding that regular enquiry against petitioner is not "reasonably practicable" since none is ready to tender evidence for fear of attack on his life as petitioner was involved in criminal activities of threatening and man-handling, officers of Railway.

4. Petitioner challenged aforesaid order in appeal but the same was dismissed vide order dated 18.12.1997 passed by Senior Divisional Engineer (North) Jhansi whereagainst petitioner filed Original Application which has been dismissed.

5. Sri Dharam Pal Singh, learned Senior Counsel, urged that petitioner was made victim of conspiracy and collusion of senior officers of Railway. One Kuldeep Raj Chopra, Chief Rail Pathway Inspector, Mathura Junction who desired to carry some sleepers, Railway property to his residence at Agra and instructed petitioner to do so, which he declined and annoyed thereto aforesaid Chief Rail Pathway Inspector managed suspension of petitioner through disciplinary authority i.e. Assistant Engineer (North) Mathura Junction. Further that on 09.03.1995, petitioner went to residence of Kuldeep Raj Chopra where he was abused and threatened by Sri Chopra alleging that he has suffered for not carrying out his orders. At the time when petitioner was abused and man handled, some persons were present at the residence of Sri Chopra. Petitioner received injuries whereupon he lodged a report at Police Station, Mathura, being Case Crime no. 68 of 1995 under Sections 323 and 504 I.P.C. A complaint was also forwarded to Divisional Railway Manager, Jhansi but nothing happened and instead Sri Chopra prevailed over higher authorities in getting petitioner removed from service without any disciplinary enquiry. It is contended that without disciplinary enquiry, imposition of major penalty upon petitioner is patently illegal. Reliance is placed on a decision in **Reena Rani Vs State of Haryana and others, (2012) 10 SCC 215**.

6. It is not in dispute that disciplinary authority can impose punishment of removal or dismissal upon an employee without carrying out regular departmental enquiry by invoking powers under Article 311 (2), second proviso clause (b), which permits imposition of major penalty if enquiry is not reasonably practicable. Rule 14(ii) of Rules 1968 incorporates the said principle of Article 311(2), second proviso, and is parimateria.

7. Considering the aforesaid proviso under Article 311, a Constitution Bench in **Union of India Vs Tulsiram Patel (1985) 3 SCC 398** held that condition precedent for invoking Clause (b) of Article 311(2) second proviso is the satisfaction of disciplinary authority that it is not reasonably applicable to hold enquiry contemplated of Clause 2 of Article 311. Words "reasonably practicable" does not mean "impracticable". Practicable means "capable of being put into practice, carried out in action, effected, accomplished, or done, feasible". Whether it was practicable to hold enquiry 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). It should be looked into point of view by an ordinary concerned as he would have thought or opined and take a reasonable view of prevailing situations. The reasonable practicability of holding an enquiry is a matter of assessment to be made by the disciplinary authority who is competent to do so at present and available on the spot knowing each and every aspect of the facts and circumstances necessary for being knowing whether an enquiry is reasonably practicable or not. A disciplinary authority however is not expected to dispense with a disciplinary enquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an enquiry since the case of Department is weak or must fail if enquiry is conducted. The statutory provisions also require the disciplinary authority to record its reasons for arriving at the satisfaction that the enquiry is not reasonably practicable. This is what the law has been throughout and has been refract in **Reena Rani Vs State of Haryana and others (supra).**

8. In **Ved Mitter Gill Vs Union Territory Administration, Chandigarh and others, 2015 (8) SCC 86,** Court has approved view taken by High Court that mere mention of fact that disciplinary authority is convinced that it is not reasonably practicable to hold an enquiry is not sufficient and is against mandate of law. Court also relied on the interpretation of Rule 14(ii) of Rules 1968 in **Southern Railway Officers Association v. Union of India, (2009) 9 SCC 24** holding that disciplinary authority should not take a decision in hot haste and must take due care and caution to comply with the mandatory requirement of stringent extra ordinary provisions of Rule 14 (ii), else it would amount to abuse of power conferred upon disciplinary authority. Where reasons are given, Court will not examine sufficiency of reasons as an appellate authority but would confine its review by judging those reasons placing itself in the armchair of a disciplinary authority. The disciplinary authority is the man on the spot. He act on the basis of report/material placed before him. He also knows other facts and circumstances as also the atmosphere in his area of function and also well conversant with the attitude of person concerned. It was also observed, relying on Tulsiram (supra), that situation which makes holding of an inquiry not reasonably practicable, may exist before disciplinary inquiry could be initiated against a government servant, or such a situation can also come into existence subsequently during course of an inquiry and at that stage also power under Rule 14(ii) can be exercised. The mere fact that some part of an enquiry has been held will not make any difference.

9. In **Risal Singh Vs State of Haryana and others, (2015)1 SCC (LS) 351** following earlier decisions in **Tulsiram Patel (supra), Jaswant Singh Vs State of Punjab, (1991) 1 SCC 362 and Reena Rani Vs State of Haryana (supra)**, Court said that enquiry cannot be dispensed with on mere ipse dixit or irrelevant or nonest grounds. Whenever such an order, passed by disciplinary authority dispensing enquiry, is challenged in a Court of law, it is incumbent upon authorities to show that satisfaction is based on certain objective facts and is not outcome of whims or caprice of the concerned officer.

10. When we judge the facts and circumstances of present case in light of dictum and exposition of law as noticed above, we find substantive material and justification on the part of respondent authorities by proceeding to pass impugned order of removal after dispensing with enquiry holding that it was not reasonably practicable.

11. Earlier petitioner was served with a chargesheet dated 01.03.1995 alleging charge of misbehaving with senior officer K.R. Chopra, CPWI, Mathura Junction at his residence. Petitioner was initially posted at Mathura wherefrom he was transferred to Kosikalan vide order dated 15.10.1996 passed by Divisional Engineer. Petitioner was not happy with such transfer and on 27.05.1997 forcibly entered chamber of Chief Pathway Inspector, Mathura Junction, misbehaved with him and threatened, for his transfer from Kosikalan to Mathura. On 15.10.1996 petitioner threatened Pathway Mistry and R.K. Saxena, PWI with an Axe in his hand. Subsequently, petitioner tendered written apology on 17.10.1996 assuring good behavior. On 24.04.1997 petitioner threatened Y.S. Tyagi, Pathway Inspector with a stick in his hand and did not allow him to move for more than an hour. He threatened A.K. Asthana on 25.05.1997 stating that his family would be liquidated if he (petitioner) is not transferred from Kosikalan to Mathura. Petitioner's

criminal activities terrorising various officers who submitted report but refused to depose as witness having apprehension of loss or damage to their person and family on the part of petitioner. These facts and material have been found exist on record by Tribunal. before us also, nothing has been placed to show that these facts were nonest or concocted.

12. In the impugned order of removal, disciplinary authority had mentioned all the facts in this regard in detail and counsel for petitioner could not dispute that impugned order cannot be said to lack reasons.

13. In the entirety of facts and circumstances and having gone through the judgment of Tribunal impugned in this writ petition, we are satisfied that there is no manifest illegality or error apparent on the face of record, justifying interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of Constitution of India.

14. Writ petition lacks merit. It is accordingly dismissed.

(2016) 9 ILRA 711
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 27955 Of 2016

Shravan Kumar ...Applicant
Versus
State Of U.P. & Anr. ...Opposite parties

Counsel for the Applicant:
Rajesh Kumar Singh, Manoj Kumar Singh

Counsel for the Opposite parties:
G.A.

In complaint case no. 575/9 of 2013 (Shravan Kumar Vs. Rambhul & others), ACJM, Court No.-1, Muzaffar Nagar had passed order dated 11.7.2013 by which six persons were summoned for prosecution of offence under Section 147, 148, 323, 452, 392, 307, 504, 506, 427 IPC. Against said order, Criminal Revision no. 85 of 2014 (Nitoo Vs. State of U.P. & another) was preferred, which was heard and allowed by judgement dated 30.01.2015 of Additional Sessions Judge, Court No.-1, Muzaffar Nagar. In this judgement, the revisional court had held that the impugned order was passed without applying judicial mind. After hearing to the parties, revisional court had also held that order of summoning for Section 392 and 307 IPC appears not in accordance with law and on this ground revisional court had allowed the revision and remanded the matter for passing fresh order by trial court in accordance with law.

After consideration of the order dated 11.7.2013 of trial court, it is found that after noting the facts of the case in the name of the witnesses, said court had passed order of cognizance and summoning, which is apparently without application of judicial mind, in which neither facts were discussed nor it was considered as to which accused had committed what overt act. Such order should have been speaking and after application of judicial mind. In these circumstances, the revisional court was not at error when it had passed the direction of quashing the order of trial court and of remanding the matter for fresh orders. But this direction of lower revisional court is erroneous when it had give mandate to pass fresh order in light of observations made in its judgment. In view of above, this application is disposed of with direction to the trial court to pass fresh speaking order

Held: Para- Criminal revision, as a rule, is admitted for considering correctness, legality or propriety of any finding, or the regularity of proceedings of lower court, and not for directly considering the evidences and appreciating them like trial court or appellate court. Such evidences should not be considered in revision for substituting findings of facts of trial court.

Case Law discussed:
Nitoo Vs. State of U.P. & another

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. In complaint case no. 575/9 of 2013 (Shravan Kumar Vs. Rambhul & others), ACJM, Court No.-1, Muzaffar Nagar had passed order dated 11.7.2013 by which six persons were summoned for prosecution of offence under Section 147, 148, 323, 452, 392, 307, 504, 506, 427 IPC. Against said order, Criminal Revision no. 85 of 2014 (Nitoo Vs. State of U.P. & another) was preferred, which was heard and allowed by judgement dated 30.01.2015 of Additional Sessions Judge, Court No.-1, Muzaffar Nagar. In this judgement, the revisional court had held that the impugned order was passed without applying judicial mind. After hearing to the parties, revisional court had also held that order of summoning for Section 392 and 307 IPC appears not in accordance with law and on this ground revisional court had allowed the revision and remanded the matter for passing fresh order by trial court in accordance with law.

2. The judgment of revisional court dated 30.01.2015 passed in Criminal Revision no. 85 of 2015 has been challenged in present application by complainant of the original complaint case.

3. This contention of learned counsel for the applicant is acceptable that trial court is not supposed to give finding of fact and any observation on facts by it should not be considered by trial court at the time of passing of fresh order on merits.

4. Criminal revision, as a rule, is admitted for considering correctness, legality or propriety of any finding, or the regularity of proceedings of lower court, and not for directly considering the evidences and appreciating them like trial court or appellate court. Such evidences should not be considered in revision for substituting findings of facts of trial court.

5. After consideration of the order dated 11.7.2013 of trial court, it is found that after noting the facts of the case in the name of the witnesses, said court had passed order of cognizance and summoning, which is apparently without application of judicial mind, in which neither facts were discussed nor it was considered as to which accused had committed what overt act. Such order should have been speaking and after application of judicial mind. In these circumstances, the revisional court was not at error when it had passed the direction of quashing the order of trial court and of remanding the matter for fresh orders. But this direction of lower revisional court is erroneous when it had give mandate to pass fresh order in light of observations made in its judgment.

6. In view of above, this application is disposed of with direction to the trial court to pass fresh speaking order, after application of judicial mind, on merits of the case before it, without being influenced by any observation on merit of the case made in the judgement dated 30.01.2015 by revisional court.

(2016) 9 ILRA 713
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 29355 Of 2016

Beerendra Kumar Verma ...Petitioner
Versus
Food Corporation Of India & Anr. ...Respondents

Counsel for the Petitioner:
Indra Raj Singh, A. Singh

Counsel for the Respondents:
C.S.C., Santosh Kumar Mishra

The petitioner is a candidate for the appointment to the post of Assistant Grade-III (General). The Food Corporation of India, the first respondent issued an advertisement on 23rd January, 2015 calling applications from the candidates to a large number of posts mentioned in the advertisement. Total 4318 posts were advertised in the said advertisement. Pursuant to the advertisement, the petitioner made an application for appointment on the post of Assistant Grade III.

It is stated that essential qualification mentioned in the advertisement was Bachelor Degree in any discipline along with working experience in computer. The petitioner claims that he fulfills the eligibility criteria, he did his Bachelor of Science (Honours) in the year 2008 from Bundelkhand University. He claims that he has done a Computer Foundation Course from the same University and has a certificate of Course on Computer Concepts (CCC) issued by the National Institute of Electronics and Information Technology (NIELIT). The petitioner claims that he is under the Scheduled Caste category.

The Delhi High Court in Pushpa (supra) has held that if a person is of reserved category he is so by birth and not by acquisition of this category because of any other event happening at a later stage. A certificate issued by the competent authority of a reserved candidate to this effect is only an affirmation of fact which is already in existence. The purpose of such certificate is to enable the authorities to believe in the assertion of the candidate that he belongs to 'SC' category and act thereon by giving the benefit to such candidate for his belonging to 'SC' category. The Court has further held that once the certificate is issued then it is clear that the candidate belongs to the said category and it cannot be said that he has acquired the status of SC only on the date of issuance of the certificate. Thus the plea taken in the counter affidavit that the caste certificate is of the latter point, cannot be accepted as the caste certificate has been brought on the record along with the writ petition and in short counter affidavit it is not the stand of the respondent that on an enquiry, the said certificate has been found to be fabricated or forged.

As a sequel to the above, in my view the impugned order dated 05.06.2016 needs to be quashed for the reasons mentioned hereinabove, it is accordingly quashed. The matter is remitted to the authority concerned/ respondent no. 1 to furnish opportunity to the petitioner and pass a speaking order expeditiously, preferably within four weeks from the date of communication of this order.

The writ petition is, accordingly, allowed.

Held: Para-

Case Law discussed:

Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board & Anr., Civil Appeal No. 1691 of 2016
Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405,
Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336,
Kranti Associates Private Limited and another v. Masood Ahmed Khan and others, (2010) 9 SCC 496,
Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board & Anr., Civil Appeal No. 1691 of 2016,
Pushpa v. Government of NCT of Delhi and others, Writ Petition (C) No. 9112 of 2008,Tej Pal Singh & Ors. V. Govt. Of NCT of Delhi, ILR 2001 Delhi 298,

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

1. The petitioner is a candidate for the appointment to the post of Assistant Grade-III (General). The Food Corporation of India, the first respondent issued an advertisement on 23rd January, 2015 calling applications from the candidates to a large number of posts mentioned in the advertisement. Total 4318 posts were advertised in the said advertisement. Pursuant to the advertisement, the petitioner made an application for appointment on the post of Assistant Grade III.

2. It is stated that essential qualification mentioned in the advertisement was Bachelor Degree in any discipline along with working experience in computer. The petitioner claims that he fulfills the eligibility criteria, he did his Bachelor of Science (Honours) in the year 2008 from Bundelkhand University. He claims that he has done a Computer Foundation Course from the same University and has a certificate of Course on Computer Concepts (CCC) issued by the National Institute of Electronics and Information Technology (NIELIT). The petitioner claims that he is under the Scheduled Caste category.

3. The petitioner qualified the written examination and he ranked 56 in the order of merit. It is stated in paragraph-8 of the writ petition that a call letter was issued to the petitioner on 31st December, 2015 and he appeared with his original documents on the scheduled date, time and place i.e. 20th January, 2016 at 01.00 p.m. in the office of the first respondent and placed all such documents, which he has brought on record as annexure-2 to the writ petition, before the authority. After perusing the same, the authority was fully satisfied, however, by an order dated 05th June, 2016 the petitioner came to know that the first respondent has declared the final result and the petitioner's candidature has been cancelled by a cryptic order.

4. At the time of moving of this writ petition, on 27th June, 2016 the Court has directed to put up this case as fresh on 05th July, 2016. On 05th July, 2016 the first respondent filed a short counter affidavit without adverting to the material facts averred in the writ petition. The stand taken in the short counter affidavit is that the petitioner, at the time of verification, could not submit the caste certificate hence his candidature has been cancelled.

5. A rejoinder affidavit to the short counter affidavit has been filed, wherein the said fact has been denied and the petitioner has brought on record the caste certificate issued by the competent authority i.e. the Tehsildar, Sadar, Kanpur Nagar dated 29th October, 2013 as annexure-2 to the rejoinder affidavit. The same document has been appended by the petitioner along with the writ petition also.

6. It is contended on behalf of the petitioner that the impugned order has been passed in utter disregard to the principles of natural justice as no opportunity was afforded to the petitioner before cancelling his candidature and it does not contain any reason. Learned counsel for the petitioner has placed reliance on the judgements of the Supreme Court in the case of **Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board & Anr., Civil Appeal No. 1691 of 2016 and Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405**.

7. Learned counsel for the respondents Sri S.K. Mishra submits that there is no requirement to assign any reason while cancelling the candidature of a candidate. The reasons have been mentioned in the short counter affidavit. He further submits that the Corporation has been authorized by the Parliament to frame statutory rules hence the statutory rules have been framed by the Food Corporation of India. It was further submitted that the condition mentioned in the advertisement is as sacrosanct as the law and it has statutory flavour. No other submission has been made.

8. The learned counsel for the respondent has drawn the attention of the Court to an order passed by this Court to implead the selected candidates. The learned counsel for the petitioner submits that since the grievance of the petitioner, at this stage, is that the authority may be directed to pass a speaking order after giving opportunity to the petitioner, as such, there is no need to issue notice to the candidates for whose impleadment, the application was filed by the petitioner.

9. I have heard learned counsel for the parties and considered the rival submissions.

10. The petitioner has demonstrated that he possesses the essential qualification mentioned in the advertisement. The advertisement for the post of Assistant Grade-III requires the following qualification.

"Bachelor degree in any discipline along with the work experience in Computer."

11. In regard to his qualification, the petitioner has brought on record a xerox copy of the Degree of B.Sc. (Honours) issued in 2008 by the Buldelkhand University and the CCC certificate which has been issued by the NIELIT.

12. Indisputably, the petitioner appeared in the written test and he has qualified it. The averment made by the petitioner in the writ petition that his rank is 56 out of 334 posts is unrebutted in the short counter affidavit. It was submitted that even if the petitioner's certificate is ignored, the petitioner has secured more marks than a candidate of General Category, therefore, he could have been treated as a General Category candidate. The final merit list has not been brought on the record by the first respondent, thus the averment made in the writ petition that the petitioner ranked 56 in the merit list stands uncontroverted.

13. The submission of learned counsel for the petitioner that the caste certificate was produced by him, which he has brought on record earlier, also merit acceptance. The said submission was made in paragraph-8 of the writ petition which has also not been denied in the short counter affidavit. The next submission of the learned counsel for the petitioner that the order impugned does not contain any reason also merit acceptance. The impugned order is so cryptic and skeletal that entire order can be extracted below:

"You are not found eligible for the post applied by you as you have not fulfilled the eligibility criteria/ conditions laid down in the Advertisement No. 3/2015-FCI Category-III."

14. A simple reading of the impugned order clearly indicates that no reason has been assigned while rejecting the candidature of the petitioner. It is not mentioned in the order that which criteria/ condition is lacking.

15. Insofar as the minimum qualification mentioned in the advertisement is concerned, the petitioner appears to possess the essential qualification as he is graduate in Science and has also CCC certificate from a recognized institution.

16. In regard to the submissions of learned counsel for the respondents that the reason has been mentioned in the short counter affidavit that the petitioner failed to produce the document, cannot be accepted on two grounds:

(i) the reason must be recorded in the impugned order as it cannot be supplemented by an affidavit. The Supreme Court in **Mohinder Singh Gill (supra)** has held that the reasons cannot be supplemented subsequently by filing affidavits. The relevant part of the judgement is extracted below:

"8. ...when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out...."

17. The Supreme Court in a long line of decisions has settled that the necessity of recording reason of an executive action is a part of natural justice and in the present date set-up judicial review of administrative action is expanding day by day. The administrative, quasi judicial authorities have to justify its action in various fields of the public law. The reason should also be communicated to the affected party.

18. In the case of **Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336**, the Court has held as under:

"27. It is a settled legal proposition that not only administrative but also judicial orders must be supported by reasons recorded in it. ...

The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

19. The Supreme Court in the case of **Kranti Associates Private Limited and another v. Masood Ahmed Khan and others, (2010) 9 SCC 496** has culled out the following principles for the necessity of recording reasons by the administrative quasi judicial authorities:

"47. Summarizing the above discussion, this Court holds:

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor1.

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain2 EHRR, at 562 para 29 and Anya v. University of Oxford3, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process"."

20. Applying the aforesaid principles of law laid down by the Supreme Court at the case in hand, I find the impugned order is completely bereft of the reasons, hence the impugned order is unsustainable. The respondents have tried to supplement the reasons by way of a short counter affidavit.

(ii) In addition to above, the petitioner has made a categorical averment in paragraph no. 8 of the writ petition that he had produced the caste certificate at the scheduled date i.e. 20.01.2016. This fact has not been denied in the short counter affidavit. In fact the present writ petition was entertained by this Court in the month of June, 2016 and more than three months have elapsed but no counter affidavit giving reply to all the paragraphs has been filed by the respondents. Thus the statement made in paragraph no. 8 of the writ petition stands unrebutted.

21. Pertinently, the petitioner has brought on record his caste certificate which was issued on 29.10.2013, much before 20.01.2016. He has relied on a judgement of the Supreme Court in the case of **Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board & Anr., Civil Appeal No. 1691 of 2016**. In the said judgement, the Supreme Court referred a judgement of Delhi High Court in the case of **Pushpa v. Government of NCT of Delhi and others, Writ Petition (C) No. 9112 of 2008** wherein the Delhi High Court followed the judgement in the case of **Tej Pal Singh & Ors. v. Govt. of NCT of Delhi, ILR 2001 Delhi 298**.

22. The Delhi High Court in **Pushpa (supra)** has held that if a person is of reserved category he is so by birth and not by acquisition of this category because of any other event happening at a later stage. A certificate issued by the competent authority of a reserved candidate to this effect is only an affirmation of fact which is already in existence. The purpose of such certificate is to enable the authorities to believe in the assertion of the candidate that he belongs to 'SC' category and act thereon by giving the benefit to such candidate for his belonging to 'SC' category. The Court has further held that once the certificate is issued then it is clear that the candidate belongs to the said category and it cannot be said that he has acquired the status of SC only on the date of issuance of the certificate. Thus the plea taken in the counter affidavit that the caste certificate is of the latter point, cannot be accepted as the caste certificate has been brought on the record along with the writ petition and in short counter affidavit it is not the stand of the respondent that on an enquiry, the said certificate has been found to be fabricated or forged.

23. As a sequel to the above, in my view the impugned order dated 05.06.2016 needs to be quashed for the reasons mentioned hereinabove, it is accordingly quashed. The matter is remitted to the authority concerned/ respondent no. 1 to furnish opportunity to the petitioner and pass a speaking order expeditiously, preferably within four weeks from the date of communication of this order.

24. The writ petition is, accordingly, allowed.

25. No order as to costs.

(2016) 9 ILRA 720
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE DILIP B. BHOSALE, C.J.
THE HON'BLE YASHWANT VARMA, 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 the Petitioners:
Amar Nath Singh

Counsel for the Respondents:
C.S.C., A.N. Singh, A.S.G.I., Amit Misra, Anjali Upadhya, B.B. Jauhari, Manoj Kumar Singh, Ramendra Pratap Singh, Ravindra Kumar, Shivam Yadav

The Akhil Bhartiya Manav Kalyan Evam Samajotthan Karya Sansthan, Allahabad instituted these proceedings in public interest seeking the following reliefs:

I. Issue a writ, order or direction in the nature of mandamus commanding the State Government of Uttar Pradesh to transfer the officers/employees, who have completed services of more than 3 years in NOIDA, Greater NOIDA and Yamuna Expressway Authority, out of District forthwith.

II. Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to constitute a C.B.I. Enquiry in the matter, so that proper and fair investigation may be done with regard to assets of the private opposite parties as well as assets of their relatives and the work discharged by them in the authority.

III. Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to lodge the First Information Report against the erring persons.

IV. Issue any other order or direction which the Hon'ble Court may deem fit and proper in the circumstances of the case."

Having gone through the writ petition, the averments made therein and the material brought on record, we find that while various allegations of a general character have been made in respect of wrongdoings committed in the allotment of land, misappropriation of funds, acquisition of property and wealth by employees, no specific allegation or charge stands leveled or established against the twelfth respondent. The writ petition carries no material which may prove the commission of any act of malfeasance or corruption against the twelfth respondent personally. We have carefully gleaned through the various averments taken in the writ petition as well as the supplementary affidavit filed on behalf of the writ petitioners but have failed to

find any material which may justify the return or recordal of an adverse finding or comment against the twelfth respondent personally. No corrupt motive or act attributable to the said respondent stands established conclusively from the record. The challenge in the writ petition which was primarily centered around the continuance of the twelfth respondent in any view of the matter has paled into insignificance consequent to the own steps taken by the Government which has decided to transfer him from the said post. Insofar as the remaining private respondents are concerned, the learned counsel for the petitioner has not raised any serious challenge and had confined their challenge to the continuance of the twelfth respondent alone. In view of the above, and noticing the fact that the Government has itself transferred the twelfth respondent during the pendency of the writ petition, we find that no further directions for the transfer of the twelfth respondent are warranted.

We have noted that no specific allegation stood proved and established conclusively against the twelfth respondent personally. It is perhaps in this light that the State Government had (and perhaps justifiably) vehemently argued initially that no circumstances warranted the transfer or removal of the twelfth respondent from NOIDA. The learned Advocate General not just stoutly defended the twelfth respondent but also urged for our consideration that the officer in question was of exemplary character and it was because of his administrative skills and prowess that the State Government had continued him on the post. While we do not have any reason to doubt the submission of the learned Advocate General or for that matter the ability of the twelfth respondent, we feel that certain other relevant and larger issues merited consideration by the Government in such matters.

The second aspect which must merit mention is this. The mere fact that the 1955 Regulations do not envisage a maximum tenure does not necessarily mean that a person may be permitted to continue on a particular post for years together. It would in fact be in the fitness of things and perhaps to overcome the leveling of allegations such as the present against the twelfth respondent that the Government consider the shifting of officers periodically. We note that the Government Order dated 24 December 2001 itself envisages the Civil Service Board fixing both the minimum as well as the maximum tenure of posting of IAS officers. While a minimum tenure has been fixed, we were told that the Civil Services Board has till date not fixed the maximum tenure period. It would therefore, be appropriate for the Board as well as the Government to revisit this issue so that in future such challenges and allegations of nepotism are avoided.

Since the twelfth respondent has already been transferred from NOIDA, no further operative directions need be issued. The PIL's shall stand disposed of subject to the observations made hereinabove.

Held: Para-

Case Law discussed:
Writ-C No. 49534 of 2015 [Jitendra Kumar Goel Vs. State of U.P. and 15 others],S G Jaisinghani v. Union of India AIR 1967 SC 1427,Douglas J. In United States vs. Wunderlick 1951 342 US 98:96 Law Ed 113,

(Delivered by Hon'ble Dilip B. Bhosale, Chief Justice
&
Hon'ble Yashwant Varma, J.)

1. The Akhil Bhartiya Manav Kalyan Evam Samajotthan Karya Sansthan, Allahabad instituted these proceedings in public interest seeking the following reliefs:

I. Issue a writ, order or direction in the nature of mandamus commanding the State Government of Uttar Pradesh to transfer the officers/employees, who have completed services of more than 3 years in NOIDA, Greater NOIDA and Yamuna Expressway Authority, out of District forthwith.

II. Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to constitute a C.B.I. Enquiry in the matter, so that proper and fair investigation may be done with regard to assets of the private opposite parties as well as assets of their relatives and the work discharged by them in the authority.

III. Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to lodge the First Information Report against the erring persons.

IV. Issue any other order or direction which the Hon'ble Court may deem fit and proper in the circumstances of the case."

2. This petition came up for hearing before a Division Bench of the Court on 30 June 2016. On the said date the attention of the Court appears to have been drawn to the pendency of an earlier public interest litigation being Writ-C No. 49534 of 2015 [Jitendra Kumar Goel Vs. State of U.P. and 15 others] in which similar issues were raised. Taking note of the same, the Division Bench directed the present Public Interest Litigation to be posted for orders along with Writ-C No. 49534 of 2015 on 1 July 2016. These two petitions were thereafter heard together and the Division Bench as an interim measure proceeded to pass the 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.

List on the date fixed. "

3. The above order of restraint issued against the twelfth respondent came to be passed upon the Division Bench noticing that he had continued to be posted at the same place for the last six years during which time serious scams in respect of allotment of land and wrongful utilisation of properties had occurred. It also recorded that during this period various employees of NOIDA such as Yadav Singh, Ramendra Singh and V.K. Goel had been imprisoned on allegations of having accumulated wealth and properties running into hundreds of crores. The Division Bench further noted that at the relevant time, the twelfth respondent was simultaneously holding charge of the following posts:- (a) Chief Executive Officer [CEO] Greater NOIDA Industrial Development

Authority1, (b) Chairman, New Okhla Industrial Development Authority2 (c) CEO NOIDA (d) Chairman Yamuna Expressway Industrial Development Authority3.

4. Noticing the above facts, the Division Bench proceeded to observe as follows:-

"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 arrangement 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 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. "

x x x x x x x x x x

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.

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."

5. Pursuant to the liberty granted by the Court on 1 July 2016, the State respondent, NOIDA as well as the twelfth respondent filed their affidavits. The twelfth respondent in addition to a counter affidavit also filed an application seeking vacation of the order of restraint issued by the Court. The State along with its counter affidavit brought on record of these proceedings an order dated 18 July 2016 in terms of which the twelfth respondent was restrained from functioning as CEO NOIDA, GNIDA and YEA. On 3 August 2016, the counsel for the petitioner was granted time to respond to the counter affidavits filed in these proceedings and the matter was adjourned to 10 August 2016. The matter was thereafter called on 11 August 2016 and was thereafter adjourned to 16 August 2016 on the request of the learned Chief Standing Counsel.

6. On 16 August 2016, the leaned Chief Standing Counsel drew the attention of the Court to a communication of the same date which purported to convey the decision of the Civil Services Board taken in its meeting held on 18 July 2016. The communication recorded that Sri Praveer Kumar IAS had been posted as the Chairman NOIDA, GNIDA and YEA. The communication further stated that the Civil Services Board had on the same date also taken a decision to the effect that the twelfth respondent would continue to be posted as the CEO NOIDA. This position and posting of the twelfth respondent continued till on 2 September 2016 a further communication of the State Government was placed on record whereby the Court was apprised of a decision of the State Government dated 25 August 2016 in terms of which the twelfth respondent was transferred from the post of CEO NOIDA, divested of charge and placed on waiting.

7. The petition itself laid various allegations against the twelfth to seventeenth respondents, who are stated to have been posted in some capacity or the other in NOIDA. For convenience, we note as under.

8. The petition alleged that large scale wrongdoings, illegal allotments and misappropriate of moneys had occurred at NOIDA during the period when the twelfth respondent held charge as the Chairman and CEO. It alleged that despite the aforesaid wrongdoings having come to light, the State for reasons unknown continued to post the twelfth respondent as CEO of NOIDA. It alleged that illegal allotments had been made with a view to pander to the whims and fancies of politicians and that NOIDA itself had become a hotbed of corruption. It further referred to the fact that a large scam had recently been unearthed in NOIDA as a consequence of which one Sri Yadav Singh was apprehended and in respect of whom a CBI inquiry had come to be instituted pursuant to the directions of this Court. It was alleged that despite such wrongdoings having come to light, the State had continued to post the twelfth respondent as CEO of NOIDA. The petition further alleged large scale corruption in the acceptance of tenders and allotment of land in the Sports City Project of NOIDA. It was based on the above allegations that the instant PIL was presented before this Court.

9. As noted above, Writ-C No. 49534 of 2015 had also been instituted in this Court with similar allegations. In the said writ petition also various directions were issued by the Court from time to time calling upon the State respondents including the Chief Secretary to explain the reasons behind the continued retention of the twelfth respondent as the CEO of the three authorities aforementioned. In the said writ petition, it was alleged that the twelfth respondent had continued to hold charge as CEO of the three authorities for more than ten years. Pursuant to the directions of the Court issued in the said writ petition, the Chief Secretary filed an affidavit in which he asserted that the post of CEO in the authorities was a cadre post. The Chief Secretary further averred on affidavit that the twelfth respondent had been substantively appointed as CEO GNIDA since 4 July 2010 and had on different occasions accorded additional charge of Chairman and CEO of NOIDA, GNIDA and YEA. In paragraph 12 it was averred that the twelfth respondent was substantively posted on a cadre post as CEO GNIDA and was only holding additional charge of Chairman of the three authorities namely NOIDA, GNIDA and YEA. The Chief Secretary further averred in paragraph 14 that there is no maximum time limit fixed for any IAS officer being posted on any

post. In these proceedings, the State respondents in their affidavits have brought on record the details of the posting of the twelfth respondent from 4 July 2010 and the same is evident from the chart which appears below:-

PERIOD	POSTING
04.07.2010 -14.12.2010	CEO GNIDA
14.12.2010-20.07.2011	CEO GNIDA and NOIDA
20.07.2011-01.11.2011	CEO GNIDA
01.11.2011-20.11.2011	Chairman and CEO GNIDA
20.11.2011-15.12.2011	Chairman and CEO GNIDA + CEO NOIDA
15.12.2011-20.12.2011	Chairman and CEO GNIDA
20.12.2011-26.12.2011	Chairman and CEO GNIDA + CEO YEA
26.12.2011-26.03.2012	Chairman and CEO GNIDA
26.03.2012-02.05.2013	CEO GNIDA + CEO NOIDA
03.05.2013- 19.09.2015	CEO GNIDA and NOIDA + Chairman NOIDA, GNIDA and YEA
18.07.2016-25.08.2016	CEO NOIDA + Chairman NOIDA, GNIDA and YEA
18.07.2016-25.08.2016	CEO NOIDA

10. The primary defense which has been set up by the State and which was reiterated in the oral submissions advanced by the learned Advocate General and the learned Chief Standing Counsel was to the following effect. It was contended that the post of CEO NOIDA and Greater NOIDA had been identified as a cadre post under the **Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955**[4]. In view thereof it was submitted that an IAS officer such as the twelfth respondent was justifiably posted and that the Division Bench on 1 July 2016 had clearly proceeded on an incorrect premise that the post was being occupied by him on the basis of deputation. It was submitted that the notification dated 6 December 2010 in terms of which the post of Chief Executive Officer of NOIDA and GNIDA was included as a cadre post under the 1955 Regulations did not militate against the provisions of Section 3 of the **U.P. Industrial Area Development Act, 1976** (for short "1976 Act"). The State further referred to the fact that the appointment and posting of the twelfth respondent was pursuant to the decisions taken by the Civil Services Board and had therefore, been effected in accordance with law. Referring to the details set forth in the order of 18 July 2016, it was sought to be contended that the allegation that the twelfth respondent had remained on the said post for the last more than ten years was factually incorrect and had been made only to lend color to the controversy. It was asserted that the twelfth respondent was appointed substantively on the post of CEO NOIDA only on or about 20 September 2015. It was additionally alleged that during the period 3 April 2003 to 30 June 2010, the twelfth respondent was posted with the Government of India and therefore, the very bedrock of the submissions of the petitioner and the premise of the order of the Division Bench dated 1 July 2016 was incorrect. The

twelfth respondent, in their submission, held the post of CEO NOIDA on a substantive basis only from September 2015. It was asserted that during 2010-2015 various other officers had been posted on substantive basis as CEO NOIDA. The twelfth respondent in his affidavit averred that it was only for a short duration that he was granted additional charge of CEO NOIDA during this period. Referring to the allegations levelled against certain officers and employees of NOIDA including Yadav Singh and Ramendra Singh, it was contended that all the aforementioned officers had been directly appointed in NOIDA prior to the posting of the deponent and that he had therefore, nothing to do with their appointments. The twelfth respondent further averred categorically that during his tenure as CEO, NOIDA no scam had taken place. Insofar as the allegations of wanton and illegal acquisition of land is concerned, the twelfth respondent asserts that the acquisitions were undertaken pursuant to statutory powers conferred upon NOIDA and that there was no statutory prohibition against the allotment of land to builders. He further averred that there was no illegality in the allotment of land under the Sports City Project of the NOIDA.

11. We note here that although the allegations were primarily leveled by the petitioner against the respondents 12-17, notices were issued to all the respondents 10-18. However it is only the twelfth respondent who has appeared in these proceedings and has opposed the petition along with the authorities themselves namely, NOIDA, GNIDA and YEA. We further note that the learned counsel for the petitioner has mainly centered his objections and submissions in support of the writ petition against the twelfth respondent.

12. Having noticed the factual basis for the preferment of the petition and the disclosures made by the respondents, we now proceed to note the primary legal submissions which have been advanced in these proceedings. Learned counsel for the petitioner while reiterating the averments made in the writ petition has contended that large scale scams occurred in the authorities and more particularly NOIDA clearly being indicative of the fact that all was not well. He asserted that the State Government even in the matter of posting of officers must act in a manner which inspires confidence in the public at large and that its action must not reflect of favouritism in favour of a select few. It was contended that the continuance of the twelfth respondent was clearly detrimental to the public interest, without justification in law and that the State Government was continuing to accord him protection despite various scams and allegations having been leveled against the twelfth respondent and NOIDA. It was, therefore, submitted that larger public interest clearly warranted removal of the twelfth respondent from the post of CEO NOIDA.

13. The learned counsels for the respondents have apart from addressing submissions on the merits of the allegations leveled in the petition, in unison, taken serious objection to the entertainment of the PIL itself and have submitted that the instant petition was neither bonafide nor did it espouse any issue of public interest. In this respect, we note that not only the learned Advocate General but also Sri Ravi Kant learned senior counsel and Sri Ravindra Singh learned counsel who appeared for the twelfth respondent have taken serious objection to this Court having entertained the instant PIL itself. It was submitted that the instant proceedings are a clear abuse of the process of Court and it is apparent that quite far from espousing any issue of public interest, the same has come to be instituted at the behest and instance of unknown and interested quarters.

Learned counsel drew the attention of the Court to the fact that the petitioner was stated to be a society registered and resident at Allahabad and that in the entire petition, there was no material which may have even remotely indicated its activities or area of operations. It was alleged that there was a complete non disclosure in the writ petition of particulars required under Chapter XXII Rule 3A of the Allahabad High Court Rules, 19525. Learned counsel submitted that the writ petition carried not one averment of any public or social service which the petitioner society may be stated to have performed. Additionally, it was contended that the writ petition itself did not bring on record either the Memorandum or Articles of the society so as to indicate its aims and objectives. In fact learned counsel submitted that the petition had been instituted and entertained even in the absence of a resolution of the society deciding to institute the present proceedings and authorizing the petitioner in that regard. The attention of the Court was further drawn to the fact that none of the office bearers of the society had come forward to even affirm the affidavit in support of the petition and that the writ petition itself had been preferred on the strength of an affidavit of a 24 year old resident of District Kaushambi, who was stated to be engaged in farming. Viewed in this light, learned counsels submitted that the petition clearly lacked bonafides and should have been dismissed at the threshold itself. It was contended that it is petitions like the present which have sullied the field of public interest litigation and have consequently invited adverse comment from the Supreme Court as well as this Court.

14. Sri Ravi Kant, learned Senior Counsel appearing for NOIDA has in addition to the above contended that the issue of posting of a particular officer by the State Government is one which falls within its exclusive prerogative. He submits that this Court would clearly be transgressing the limits of its jurisdiction under Article 226 to the Constitution in interfering with such actions of the Government. It is his submission that issues of the nature which stand raised in this petition would clearly invite the Court to step into an arena which is within the exclusive domain and discretion of the State Government. He lastly submitted that the petitioner had woefully failed to establish even one charge of wrongdoing against the twelfth respondent personally and despite the same an order of restraint was passed by the Division Bench ex parte. It was his submission that the averments taken in the petition even prima facie did not warrant the issuance of such a restraint by the Division Bench and that too without notice to the twelfth respondent. It is these rival submissions which now fall for consideration.

15. We shall for the sake of convenience first take up the submission of exclusion of judicial review as urged by Sri Ravi Kant. As noted above, Sri Ravi Kant contended that this Court must draw a line in respect of matters which fell within the exclusive domain and discretion of the Government and consequently hold that the subject matter of the petition was beyond the pale of judicial review. According to him, the posting of officers was a subject which fell within the exclusive prerogative of the State Government and that therefore the Court would be clearly overstepping its jurisdiction in interfering with the same. While we note that a similar submission was not advanced by the learned Advocate General who appeared for the State, but since the issue has been raised we proceed to deal with the same.

16. Now in a democracy there is no such thing as an absolute discretion. In fact as has been repeatedly held, absolute or unfettered discretion is anathema to the rule of law. Judicial review is now recognized as a basic and inalienable feature of our Constitution. In a society which is governed by the rule of law, no person or institution can claim immunity from a review by a constitutional court in respect of its actions, of course on well established principles and standards. The jurisprudence which has developed over the years on this subject has over a period of time repelled submissions made on similar lines. No longer is the judicial review power of the court thwarted by arguments of a political thicket or a policy measure. The primary touchstone upon which all actions of the State must be tested is the Constitution. The jurisdiction of the Court, therefore, to enquire and test the action of the State is not and cannot be ousted. Of course the intensity of the review process is an issue altogether different. However the proposition advanced for our consideration is worded in absolutist terms and therefore cannot be accepted. We may in this connection note what stands recorded in the classic work of HWR Wade on Administrative Law and is relevant in this context:-

"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered government discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or where the law permits, to evict a tenant, regardless of his motive. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest..... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed." **Administrative Law (HWR Wade & CF Forsyth - 9th Ed. - Pages 354-355)**

17. Dealing with the discretion of the Government to retain or appoint lawyers to represent it in a court of law, the Supreme Court in **State of Punjab Vs. Brijeshwar Chahal**[6] observed as under:-

"19. It is by now, fairly well settled that not only the Government but all public bodies are trustees of the power vested in them and custodians of public interest. Discharge of that trust in the best possible manner is the primary duty of those in charge of the affairs of the State or

public body. This necessarily implies that the nature of functions and duties including the power to engage, employ or recruit servants, agents, advisors and representatives must be exercised in a fair, reasonable, non- discriminatory and objective manner. It is also fairly well settled that duty to act fairly and reasonably is a facet of "Rule of Law' in a constitutional democracy like ours. A long line of decisions of this Court over the past five decades or so have ruled that arbitrariness has no place in a polity governed by rule of law and that Article 14 of the Constitution of India strikes at arbitrariness in every State action. We may gainfully refer to some of these decisions, not so much to add to their content as to remind ourselves that we have come a long way in the matter of settling the contours of the doctrine of Rule of Law of which equality is one significant feature.

20. In S G Jaisinghani v. Union of India AIR 1967 SC 1427, this Court held that absence of arbitrary power is the first essential of "Rule of Law" upon which rests our Constitutional system. This Court ruled that in a system governed by rule of law, any discretion conferred upon the executive authorities must be confined within clearly defined limits. This Court quoted with approval, the following observations of Douglas J. in United States vs. Wunderlick 1951 342 US 98:96 Law Ed 113:

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered."

"39. The development of law in this country has taken strides when it comes to interpreting Articles 14 and 16 and their sweep. Recognition of power exercisable by the functionaries of the State as a trust which will stand discharged only if the power is exercised in public interest is an important milestone just as recognition of the Court's power of judicial review to be wide enough to strike at and annul any State action that is arbitrary, unguided, whimsical, unfair or discriminatory. Seen as important dimensions of the rule of law by which we swear the law as it stands today has banished from our system unguided and uncanalised or arbitrary discretion even in matters that were till recently considered to be within the legitimate sphere of a public functionary as a repository of Executive Power. Those exercising power for public good are now accountable for their action, which must survive scrutiny or be annulled on the first principle that the exercise was not for public good in that the same was either malafide, unfair, unreasonable or discriminatory. Extension of the principle even to contractual matters or matters like engagement of law officers is symbolic of the lowering of the threshold of tolerance for what is unfair, unreasonable or arbitrary. The expanding horizons of the jurisprudence on the subject both in terms of interpretation of Article 14 of the Constitution as also the court's willingness to entertain pleas for judicial review is a heartening development on the judicial landscape that will disentitle exercise of power by those vested with it as also empower those affected by such power to have it reversed if such reversal is otherwise merited.....

41. To sum up, the following propositions are legally unexceptionable:

41.1 The Government and so also all public bodies are trustees of the power vested in them.

41.2 Discharge of the trust reposed in them in the best possible manner is their primary duty.

41.4 The duty to act in a fair, reasonable, non-discriminatory and objective manner is a facet of the Rule of Law in a constitutional democracy like ours."

18. Bearing the above principles in mind it is clear that the submission advanced by Sri Ravi Kant, learned senior counsel, is not worthy of acceptance. This Court cannot accept the submission that under no circumstances can the Court enquire into the action of the State Government in posting a particular officer for continually long periods even though administrative exigencies or public interest may warrant otherwise. There may be myriad situations warranting the shifting of an officer. These may include contingencies such as pendency of enquiries, allegations of maladministration or even the extreme case where the transfer of the officer itself may be mandated in case of ongoing enquiries or probes. The continuance of an officer in the face of such contingencies may itself be detrimental to the interests of the administration. The other important aspect which may have to be borne in mind is the issue of public interest and the requirement of State action, albeit in the administrative realm, to be perceived as fair, just and unbiased. The continuance of an officer under cloud or whose handling of affairs may have resulted in the erosion of public confidence may itself warrant the transfer of an official. While the above is not meant to be an exhaustive criteria, we have dilated on this aspect in order to underline that in such situations, if the Government fail to act in larger public interest, the Court may in an appropriate case be constrained to invoke its jurisdiction in order to restore the faith of the people and to underscore the principles of good governance. We therefore reject the contention of complete immunity from scrutiny of action of the State in the posting or transfer of its officers.

19. In the early 1980's our Supreme Court evolved what would turn out to be a powerful tool in the hands of the constitutional courts of the country. The PIL was evolved to enable the legitimate constitutional claims of the voiceless, socially backward and the economically deprived to be addressed by Courts. The PIL was structured upon the need to address the deprivations faced by those who on account of backwardness, economic or otherwise, were unable to approach a court of law or whose voices were lost in the din of a billion people. Over a period of time, this tool was expanded to cover areas and issues of lack of governance, bureaucratic apathy and corruption. While the scope and expanse of the PIL jurisdiction grew, the Courts also found instances of the forum being abused by busybodies, interlopers who used the forum camouflaging their oblique motives and vested interests. It was noticing this aspect which had grown in proportion over a period of time that the Supreme Court was constrained to sound a note of caution. In **State of Uttaranchal Vs. Balwant Singh Chaufal**[7] the Court noted the earlier precedents on the subject and observed as follows:-

"**155**. In Dattaraj Nathuji Thaware, this court expressed its anguish on misuse of the forum of the court under the garb of public interest litigation and observed(SCC p 595, para 12) that the public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of

public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The court must not allow its process to be abused for oblique considerations...."

158. In Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra & Others AIR 2008 SC 913, this Court observed as under:

10. It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, the time which otherwise could have been spent for disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy, whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters -government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system."

181. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

20. It was with a view to address the above noted mischief that this Court introduced Rule 3A in Chapter XXII of the 1952 Rules requiring all PIL's to carry a declaration and disclosure with respect to the persons approaching the Court.

21. When one tests the present petition on the guidelines formulated by the Supreme Court and referred to above, it is apparent that the instant PIL clearly fails to meet the benchmark of a bona fide petition instituted in public interest. As we read the averments made in the writ petition, it is ex facie apparent that it carries no details of any public causes that this society based at Allahabad may have pursued in the past. There is no disclosure whatsoever of any public issue that it may have advocated or addressed in the past. The writ petition does not disclose any details of charitable or social activities that the society may have undertaken or pursued. Far from having raised or pursued any cause or interest of the people of Gautumbudh Nagar, there are no details of any activity undertaken by the petitioner society in Allahabad either. As rightly pointed out by learned counsels for the respondents, the writ petition was not instituted on the basis of any resolution or decision of the society. At least no such resolution was brought on record. It also did not carry any authorization in favor of the Secretary or the deponent to the affidavit filed in support of the writ petition. In fact we find that even the Memorandum of Association of the society which may have disclosed its aims and objects was not brought on record. The deponent of the affidavit, as learned counsels have pointed out, is a twenty four year old farmer living in District Kaushambi. Most of the averments in the writ petition however have been sworn on the basis of personal knowledge of the deponent. We have been unable to comprehend how a young resident of Kaushambi engaged in farming derived or could have personal knowledge in respect of officers and

employees or for that matter the affairs concerning NOIDA. All these aspects clearly cast a serious cloud on the bona fides and motives of the petitioner. We are conscious of the fact that the Division Bench on 1 July 2016 entertained this petition overruling the objections taken by the respondents on this score and exercised powers suo moto. We therefore, now proceed to deal with the contentions raised on merits.

22. We have already extracted the reliefs sought in the writ petition at the beginning of our judgment. Relief "i' as framed seeks a direction commanding the State Government to transfer officers/employees who have completed more than three years in NOIDA, GINIDA and YEA out of the district forthwith. The relief so sought is liable to be tested against the provisions of the 1976 Act. Now it is not disputed that NOIDA is an authority which stands constituted in terms of Section 3 of the 1976 Act. By virtue of Section 4, the Chief Executive Officer is liable to be appointed by the State Government and is to be a whole time officer of the authority. Section 4 reads as fallows:

"4. Chief Executive Officer.- (1) The Chief Executive Officer of the Authority shall be appointed by the State Executive 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."

23. By virtue of the provisions of Section 5, the authority constituted under the 1976 Act is entitled to appoint officers and employees and determine their grades and designations. Section 5 reads as follows:

"5. Staff of the Authority.- (1) Subject to such control and restrictions as may be determined by general special orders of the State Government, the Authority may appoint such number of officers and employees as may be necessary for the performance of its functions and may determine their grades and designations.

(2) Subject as aforesaid the officers and other employees of the Authority shall be entitled to receive from the funds of the Authority such salaries and allowances and shall be governed by such other conditions of service as may be agreed upon with the Authority."

24. Salaries and allowances payable to such officers and employees is to be drawn from the funds of the authority concerned. In terms of Section 3(2), the authority is declared to be a body corporate.

25. From the provisions referred to above, it is apparent that the officers and employees are engaged by and appointed in an authority constituted under Section 3. The authority is constituted

to exercise its powers and carry out its functions in a notified industrial development area. The officers and employees of the authority, as is evident from the provisions of Section 5, are not employees of the State Government so to speak but employees of the authority. No provision of the 1976 Act or any regulation or rule framed thereunder renders their services transferable either between the authorities constituted under Section 3 inter se or to any other department or wing of the State Government. At least no such provision was brought to our attention by the learned counsel for the petitioner. It was in the above backdrop that we called upon the learned counsel to explain relief "i' as claimed in the petition. Learned counsel for the petitioner candidly admitted that the relief as framed in light of the provisions of the 1976 Act was not liable to be granted. He however, submitted and prayed that since the instant writ petition was in the nature of a public interest litigation, the reliefs sought therein may not be viewed in a strict or pedantic sense. In essence learned counsel for the petitioner submitted that the relief be moulded to read as a prayer seeking issuance of a direction for the transfer or removal of the twelfth respondent. We accordingly and in this light proceed further in the matter.

26. Having gone through the writ petition, the averments made therein and the material brought on record, we find that while various allegations of a general character have been made in respect of wrongdoings committed in the allotment of land, misappropriation of funds, acquisition of property and wealth by employees, no specific allegation or charge stands leveled or established against the twelfth respondent. The writ petition carries no material which may prove the commission of any act of malfeasance or corruption against the twelfth respondent personally. We have carefully gleaned through the various averments taken in the writ petition as well as the supplementary affidavit filed on behalf of the writ petitioners but have failed to find any material which may justify the return or recordal of an adverse finding or comment against the twelfth respondent personally. No corrupt motive or act attributable to the said respondent stands established conclusively from the record. The challenge in the writ petition which was primarily centered around the continuance of the twelfth respondent in any view of the matter has paled into insignificance consequent to the own steps taken by the Government which has decided to transfer him from the said post. Insofar as the remaining private respondents are concerned, the learned counsel for the petitioner has not raised any serious challenge and had confined their challenge to the continuance of the twelfth respondent alone. In view of the above, and noticing the fact that the Government has itself transferred the twelfth respondent during the pendency of the writ petition, we find that no further directions for the transfer of the twelfth respondent are warranted.

27. We have noted that no specific allegation stood proved and established conclusively against the twelfth respondent personally. It is perhaps in this light that the State Government had (and perhaps justifiably) vehemently argued initially that no circumstances warranted the transfer or removal of the twelfth respondent from NOIDA. The learned Advocate General not just stoutly defended the twelfth respondent but also urged for our consideration that the officer in question was of exemplary character and it was because of his administrative skills and prowess that the State Government had continued him on the post. While we do not have any reason to doubt the submission of the learned Advocate General or for that matter the ability of the twelfth respondent,

we feel that certain other relevant and larger issues merited consideration by the Government in such matters.

28. While it is no doubt true that the posting of government officials is primarily an administrative function of the Government, as noted above, there is no such thing as an unfettered or absolute discretion in such matters. We have already repelled the submission advanced by Sri Ravi Kant of a judicial "hands off" in respect of these issues. As noted above, the Government is the repository of public trust and all its actions must therefore necessarily be imbued with the element of public interest. All its actions must answer the test of fairness and rationality. In fact good governance mandates that its actions must, as the Division Bench observed in its order of 1 July 2016, inspire confidence in the people and subserve above all public interest.

29. It is in light of the above principles that we note with some consternation that certain serious allegations were leveled in the writ petition including against the thirteenth and fourteenth respondents. While the State failed to effectively respond to the said allegations in its counter affidavit and left it to NOIDA to reply, NOIDA in its initial reply did not effectively traverse these allegations. All that it averred initially was that certain complaints of fraud and cheating were received against the thirteenth respondent, a class IV employee, as a consequence of which criminal action was initiated. Similarly in respect of the fourteenth respondent it averred that the said employee had retired in 2008. In its subsequent affidavit it disclosed that a FIR was lodged against the thirteenth respondent on 10 January 2015 and which has subsequently culminated in the submission of a charge sheet under sections 420, 467, 468 and 471 IPC. The holding of a property in a posh sector of NOIDA by the said respondent was not traversed in either of the said affidavits. Similarly in respect of the fourteenth respondent, neither of the affidavits traversed his alleged interests in MMR Builders. More striking are the facts surrounding the case of Yadav Singh. A Division Bench of the Court while directing the CBI to take over investigation into the said scam, noted in its judgment that the income tax raids conducted during November 2014 revealed his connections with as many as twenty five private companies and Yadav Singh and his syndicate having acquired 320 plots valued valued at Rs. 750 crores. The raids further found large scale allotments having been effected by Yadav Singh in favor of his wife and family members. All this is stated to have been achieved while Yadav Singh was posted in different departments during the period 2002 to 2014. Further information was sought from the CEO NOIDA on 6 January 2015 by the Income Tax Department with respect to award of contracts to 75 companies connected to Yadav Singh. Since the investigation is ongoing we have refrained from commenting further on this aspect. However if there be even a figment of truth in the various allegations noticed above, it is apparent that all was not well at NOIDA. We have borne in mind the fact that the twelfth respondent was at the helm of affairs right from March 2012 as CEO NOIDA as well as Chairman NOIDA, GNIDA and YEA. Some of these incidents pertain to a period when he was posted at NOIDA. The fact whether he was holding charge of the post of CEO in a substantive or other capacity would really be of no significance. This much however is clear that there were serious allegations of wrongdoing and corruption at NOIDA. It was perhaps in this light that the Government should have considered a revamp of the administration of the authority if nothing else. If the allegations against Yadav Singh and others be true, it is apparent that they unfolded and

occurred under the watch of the twelfth respondent. In such a situation it was perhaps appropriate that the Government rethink and revisit the issue of deployment and postings in the Authority. The faith and trust of the common man in the system and in the person/officer at the helm of affairs is equally important, which the Government should bear in mind, while continuing the same officer at one place for years together, and giving scope to generate doubt about the system. No person is indispensable. The Government should have not come before the Court with the stand that the services of the twelfth respondent are indispensable and that there is no other IAS officer who can work for the authorities. The very concept of transfer, would thereby stand defeated.

30. The second aspect which must merit mention is this. The mere fact that the 1955 Regulations do not envisage a maximum tenure does not necessarily mean that a person may be permitted to continue on a particular post for years together. It would in fact be in the fitness of things and perhaps to overcome the leveling of allegations such as the present against the twelfth respondent that the Government consider the shifting of officers periodically. We note that the Government Order dated 24 December 2001 itself envisages the Civil Service Board fixing both the minimum as well as the maximum tenure of posting of IAS officers. While a minimum tenure has been fixed, we were told that the Civil Services Board has till date not fixed the maximum tenure period. It would therefore, be appropriate for the Board as well as the Government to revisit this issue so that in future such challenges and allegations of nepotism are avoided.

31. Since the twelfth respondent has already been transferred from NOIDA, no further operative directions need be issued. The PIL's shall stand **disposed of** subject to the observations made hereinabove.

(2016) 9 ILRA 737
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE OM PRAKASH- VII, J.

Criminal Misc. Bail Application No.- 32278 Of 2016

Rajesh @ Michal ...Applicant
Versus
State Of U.P. ...Opposite party

Counsel for the Applicant:
Sudarshan Singh

Counsel for the Opposite party:
G.A.

applicant Rajesh @ Michal involved in Case Crime No. 432 of 2016, under Section 3 (1) U.P. Gangster and Anti Social Activities (Prevention) Act, Police Station G.R.P. Mughalsarai, the applicant is on bail in cases shown in the gang chart. The applicant has been falsely implicated in the present case. There is no reliable evidence against him.

Keeping in view the nature of the offence, provision for initiation of cases and release of the accused in U.P. Gangster and Anti Social Activities (Prevention) Act, evidence, complicity of the accused, severity of punishment, submissions of the learned counsel for the parties and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

Held: Para-

Case Law discussed:

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

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

2. It is submitted by learned counsel for the applicant that the applicant is on bail in cases shown in the gang chart. The applicant has been falsely implicated in the present case. There is no reliable evidence against him. In case he is released on bail, he will not misuse the liberty of bail and will cooperate in the trial.

3. On the other hand, learned AGA opposed the prayer for bail.

4. Keeping in view the nature of the offence, provision for initiation of cases and release of the accused in U.P. Gangster and Anti Social Activities (Prevention) Act, evidence, complicity of the accused, severity of punishment, submissions of the learned counsel for the parties and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

5. Let the applicant Rajesh @ Michal involved in Case Crime No. 432 of 2016, under Section 3 (1) U.P. Gangster and Anti Social Activities (Prevention) Act, Police Station G.R.P. Mughalsarai, District Chandauli be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned.

(2016) 9 ILRA 739
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 32502 Of 2016

Balveer **...Applicant**
Versus
State Of U.P. **...Opposite party**

Counsel for the Applicant:
Dharmendra Singhal, Prashant Kumar Singh

Counsel for Opposite Party:
G.A., Devashish Mitra

This application has been filed seeking the release of the applicant on bail in Case Crime No. 70 of 2016 u/s 147, 148, 149 and 302/34 IPC, Police Station- Aliganj District-Bareilly.

Submission of learned counsel for the applicant is that the allegation against the applicant is that he along with some other co-accused were armed with country made fire-arms.

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-
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.

Case Law discussed:

(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. 70 of 2016 u/ss 147, 148, 149 and 302/34 IPC, Police Station- Aliganj District-Bareilly.

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

3. Perused the record.

4. Submission of learned counsel for the applicant is that the allegation against the applicant is that he along with some other co-accused were armed with country made fire-arms.

Further submission is that the weapon recovered at the instance of the applicant is also a country made pistol. Out of all the accused persons, one co-accused Mudit Pratap Singh is said to have been armed with rifle. Further submission is that firing is said to have been resorted to by all the accused persons, who carried firearms but there is only one fire-arm injury incurred by deceased which has gone through and through causing one entry wound and one exit wound on his body. Emphasis was laid by the learned counsel for the applicant on the fact that there is evidence collected to the effect that firing distance between the place of firing and the place where the deceased was hit is about 50-60 meters. Further submission is that even the spot examination also indicates the long distance between the deceased and the assailants. Further submission is that as the applicant was said to have been armed with country made pistol, it is so obvious that the firing made by the country made weapon cannot have a killing range at such a distance. The fire arm wound as has been caused to the deceased going through and through his body must, in all probability, have been caused by the rifle and not by a country made pistol. It has also been pointed out that the deceased was not the intended target of anybody and it appears from the evidence that he involuntarily got hit almost accidentally in the volley of fire. Further submission is that in view of the fact that a country made pistol is said to have been used by the applicant, his case stands distinguishable from that of co-accused Mudit Pratap Singh, who is said to have been armed with a rifle and is also said to have used the same. Further submission is that keeping that aspect in view it is so obvious that the applicant in all probability cannot be said to be the author of the fatal injuries received by the deceased. 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 7.6.2016 having no criminal history and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

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- Balveer, involved in Case Crime No. 70 of 2016, u/ss 147, 148, 149 and 302/34 IPC, P.S.- Aliganj, District- Bareilly 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.

(2016) 9 ILRA 742
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Application U/s 482 No.- 43724 Of 2012
&
Application U/s 482 No.- 12023 Of 2013

Habib Ahmad. **...Applicant**
Versus
State Of U.P. & Anr. **...Opposite parties**

Counsel for the Applicant:
Krishn Mohan Tripathi, K.M. Tripathi

Counsel for the Opposite parties:
Govt. Advocate, Rakesh Chandra Tiwari

The present Application u/s 482 Cr.P.C. No.43724 of 2012 has been moved for quashing the charge sheet no.288A of 2012 dated 28.09.2012 and Application u/s 482 Cr.P.C. No.12023 of 2013 has been moved for quashing the charge sheet no.288 of 2012 dated 30.08.2012 and prayer has been made in both Applications for quashing of further proceedings of criminal case no.3665 of 2012 (State Vs. Ali Ahmad and others), arising out of case crime no.664 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, pending in the court of Addl. Chief Judicial Magistrate, Rampur.

Learned counsel for applicants contends that the applicant Habib Ahmad was secretary of Gram Shiksha Samiti being Headmaster of Primary School of the Village Rustam Nagar, P.S. Swar, District Rampur while the applicants Ali Ahmad and Jagat Singh were members of the Committee being guardians of two students, and Smt. Nanhi Begum was Chairman of the Committee by virtue of being Village Pradhan; that the applicants have been falsely implicated on the false FIR lodged by opposite party no.2 on 03.04.2012 at case crime no.664 of 2012 through application under Section 156(3) Cr.P.C dated 23.02.2011 and the Investigating Officer, without collecting any evidence has submitted charge sheets under the influence of the opposite party no.2; that as per averments made in the FIR, the applicant Habib Ahmad allegedly called the opposite party no.2 at his home on 16.03.2001 and demanded a sum of Rs.50,000/- from him, for making his selection on the post of Shiksha Mitra in Primary School of Village Rustampur, but he refused to make payment and asked for transparent selection. The above selection was set aside by this Court as the post of Shiksha Mitra was reserved for female candidate; that again in the year 2004 the same Principal (applicant Habib Ahmad) allegedly received the application form of opposite party no.2 for Shiksha Mitra on 17.12.2004 and on 19.12.2004, told him of misplacing of his application and when on 20.12.2004, he approached the applicant Habib Ahmad with another application form, he did not accept and got selected Noor Hasan in connivance with other accused persons and is alleged to have committed cheating with the opposite party no.2; that the real fact is that neither any demand was made from the opposite party no.2 nor he ever submitted any application for his selection on the post of Shiksha Mitra in the year 2004; that the claim of opposite party no.2 for selection by filing three Writ Petitions Nos.13356 of 2006, 69955 of 2009 and 12132 of 2015, has been rejected by this Court vide final orders dated 09.03.2011, 22.12.2009 and 27.02.2015 respectively; that

in Writ-A No.12132 of 2015 filed by the opposite party no.2 seeking appointment to the post of Shiksha Mitra in the Primary School in Village Rustam Nagar near Raipur, Tehsil Swar, District Rampur for the year 2004 has been dismissed by this Court on 27.02.2015 by observing the concealments of facts and narration of wrong and false facts made by opposite party no.2, and imposing a cost of Rs.25,000/- on him, copy at Annexure SA2 to the supplementary affidavit, filed in Application u/s 482 Cr.P.C. No.12023 of 2013; that in furtherance of order dated 22.12.2009 passed by this Court in Writ Petition No.69955 of 2009, the opposite party made a representation to District Magistrate, Rampur, who rejected the same by a reasoned order dated 06.04.2010 (respectively at Annexure 5 and Annexure 3 in two Applications u/s 482 Cr.P.C. Nos.43724 of 2012 and 12023 of 2013), holding that no application for the post of Shiksha Mitra, was ever submitted by the opposite party no.2; that the correctness of order dated 06.04.2010 passed by District Magistrate, Rampur, has been upheld by this Court vide subsequent final orders passed in Writ Petitions as mentioned above; that after loosing battle from Writ Court in Writ Petition Nos.13356 of 2006 and 69955 of 2009 as well as in the representation before District Magistrate, Rampur on 06.04.2010, the opposite party no.2 has, with malafide intention to harm and harass the applicants, concocted a false story regarding alleged demand of Rs.50,000/- for selection in the year 2001 and further the alleged submission of application form (of which no date has been given) and of getting it misplaced by applicants in collusion with each other and lodged the FIR with absolutely false and concocted and new facts; that in view of observations made by the Writ Court, the averments made in the FIR lodged after inordinate delay of over six years from the incident, are proved to be absolutely false and baseless and so the charge sheets as well as proceedings of criminal case no.3665 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, arisen out of case crime no.664 of 2013, pending in the court of Addl. Chief Judicial Magistrate, Rampur are liable to be quashed.

It is not disputed that against the order passed on the application u/s 319 Cr.P.C., for summoning co-accused Ajay Singh and Asaruddin and co-accused persons, revision is pending before the Sessions Judge, under which the proceedings of trial court are bound to have been stayed. The moving of application for recall of order dated 27.02.2015 in Writ A No.12132 of 2015, for recall of an order passed on merits after hearing the parties, has no relevancy in this case.

In view of the discussions made above, I find that since the very moving of the application for appointment of Shiksha Mitra in the year 2004 by the opposite party no.2, has been disbelieved by the Writ Court and as per order passed in Writ-A No.12132 of 2015, the opposite party no.2 had not even moved any such application, it is a fit case, in which the charge sheets as well as entire proceedings of criminal case no.3665 of 2012, arising out of case crime no.664 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, pending in the court of Addl. Chief Judicial Magistrate, Rampur are required to be quashed in exercise of inherent powers of this Court, to prevent the abuse of process of court as well as to secure the ends of justice. Accordingly, the charge sheets as well as entire proceedings of criminal case no.3665 of 2012 arising out case crime no.664 of 2012 are hereby quashed.

The applications u/s 482 Cr.P.C. are allowed accordingly.

Held: Para-

Case Law discussed:

R.P. Kapoor Vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal 1992 SCC (Cr.) 426,

Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque and another (2005) 1 SCC 122,

Devendra and others Vs. State of U.P. and another 2009 (67) ACC 886

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

1. Both the aforesaid Applications u/s 482 Cr.P.C. arise out of same incident and same case crime number, hence are being taken up together.

2. Shri V.D. Ojha, learned counsel for the opposite party no.2 filed counter affidavit on behalf of the opposite party no.2 in Application u/s 482 Cr.P.C. No.43724 of 2012, which is taken on record, but no counter affidavit has been filed in Application u/s 482 Cr.P.C. No.12023 of 2013.

3. Heard learned counsel for applicants and learned AGA for the State, learned counsel for the opposite party no.2 and perused the record.

4. The present Application u/s 482 Cr.P.C. No.43724 of 2012 has been moved for quashing the charge sheet no.288A of 2012 dated 28.09.2012 and Application u/s 482 Cr.P.C. No.12023 of 2013 has been moved for quashing the charge sheet no.288 of 2012 dated 30.08.2012 and prayer has been made in both Applications for quashing of further proceedings of criminal case no.3665 of 2012 (State Vs. Ali Ahmad and others), arising out of case crime no.664 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, pending in the court of Addl. Chief Judicial Magistrate, Rampur.

5. Learned counsel for applicants contends that the applicant Habib Ahmad was secretary of Gram Shiksha Samiti being Headmaster of Primary School of the Village Rustam Nagar, P.S. Swar, District Rampur while the applicants Ali Ahmad and Jagat Singh were members of the Committee being guardians of two students, and Smt. Nanhi Begum was Chairman of the Committee by virtue of being Village Pradhan; that the applicants have been falsely implicated on the false FIR lodged by opposite party no.2 on 03.04.2012 at case crime no.664 of 2012 through application under Section 156(3) Cr.P.C dated 23.02.2011 and the Investigating Officer, without collecting any evidence has submitted charge sheets under the influence of the opposite party no.2; that as per averments made in the FIR, the applicant Habib Ahmad allegedly called the opposite party no.2 at his home on 16.03.2001 and demanded a sum of Rs.50,000/- from him, for making his selection on the post of Shiksha Mitra in Primary School of Village Rustampur, but he refused to make payment and asked for transparent selection. The above selection was set aside by this Court as the post of Shiksha Mitra was reserved for female candidate; that again in the year 2004 the same Principal (applicant Habib Ahmad) allegedly received the application form of opposite party no.2 for Shiksha Mitra on 17.12.2004 and on 19.12.2004, told him of misplacing of his application and when on 20.12.2004, he approached the applicant Habib Ahmad with another application form, he did not accept and got selected Noor Hasan in connivance with other accused persons and is alleged to have committed cheating with the opposite party no.2; that the real fact is that neither any demand was made from the opposite party no.2 nor he ever submitted any application for his selection on the post of Shiksha Mitra in the year 2004; that the claim of opposite party no.2 for selection by filing three Writ Petitions Nos.13356 of 2006, 69955 of 2009 and 12132 of 2015, has been rejected by this Court vide final orders dated 09.03.2011, 22.12.2009 and 27.02.2015 respectively; that in Writ-A No.12132 of 2015 filed by the opposite party no.2 seeking appointment to the post of Shiksha Mitra in the Primary School in Village Rustam Nagar near Raipur, Tehsil Swar, District Rampur for the year 2004 has been dismissed by this Court on 27.02.2015 by

observing the concealments of facts and narration of wrong and false facts made by opposite party no.2, and imposing a cost of Rs.25,000/- on him, copy at Annexure SA2 to the supplementary affidavit, filed in Application u/s 482 Cr.P.C. No.12023 of 2013; that in furtherance of order dated 22.12.2009 passed by this Court in Writ Petition No.69955 of 2009, the opposite party made a representation to District Magistrate, Rampur, who rejected the same by a reasoned order dated 06.04.2010 (respectively at Annexure 5 and Annexure 3 in two Applications u/s 482 Cr.P.C. Nos.43724 of 2012 and 12023 of 2013), holding that no application for the post of Shiksha Mitra, was ever submitted by the opposite party no.2; that the correctness of order dated 06.04.2010 passed by District Magistrate, Rampur, has been upheld by this Court vide subsequent final orders passed in Writ Petitions as mentioned above; that after loosing battle from Writ Court in Writ Petition Nos.13356 of 2006 and 69955 of 2009 as well as in the representation before District Magistrate, Rampur on 06.04.2010, the opposite party no.2 has, with malafide intention to harm and harass the applicants, concocted a false story regarding alleged demand of Rs.50,000/- for selection in the year 2001 and further the alleged submission of application form (of which no date has been given) and of getting it misplaced by applicants in collusion with each other and lodged the FIR with absolutely false and concocted and new facts; that in view of observations made by the Writ Court, the averments made in the FIR lodged after inordinate delay of over six years from the incident, are proved to be absolutely false and baseless and so the charge sheets as well as proceedings of criminal case no.3665 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, arisen out of case crime no.664 of 2013, pending in the court of Addl. Chief Judicial Magistrate, Rampur are liable to be quashed.

6. It was further submitted by learned counsel for the applicants that though the charges have been framed by the trial court in the impugned case and part statement of PW-1 has been recorded, but thereafter upon application moved by opposite party no.2 u/s 319 Cr.P.C., to summon the then Assistant Basic Shiksha Adhikari Sri Ajay Kumar Singh and ultimately selected candidate Asaruddin son of Rahim Bux, they have been summoned by the trial court, against which order a revision is pending before the Sessions Court and further proceedings of trial have been stayed by revisional court till disposal of revision; that the contention of the learned counsel for the opposite party no.2, of having moved any application for recall of the order dated 27.02.2015 passed in Writ-A No.12132 of 2015, is wrong and misconceived because (i) the applicants have not been served with any notice of any such recall application during the period of last more than one and half year from the date of final order dated 27.02.2015 passed in the Writ; (ii) the above order has been passed on merits after hearing the parties and not in absence of counsel for the opposite party no.2; and (iii) the recall application, if any, has been moved with malafide intention and ulterior motive and is legally not maintainable.

7. Per contra learned counsel for the opposite party no.2 vehemently opposed the prayer for quashing the charge sheets as well as proceedings of criminal case no.3665 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, pending in the court of Addl. Chief Judicial Magistrate, Rampur and contended that from the materials available on record, it is proved that the applicants and other co-accused, in collusion with each other, have committed the offence of cheating in making selection of Noor Hasan/ Asaruddin in the year 2004 on the post of Shiksha

Mitra in the Primary School of the Village by deliberately making loss of application form of the opposite party no.2 for selection on the post of Shiksha Mitra for non-fulfillment of their demand of Rs.50,000/- as illegal gratification; that it has been clearly mentioned in para 5 of the application u/s 156(3) Cr.P.C. for lodging FIR that copy of acknowledgment was annexed with the application u/s 156(3) Cr.P.C.; that the Applications u/s 482 Cr.P.C. for quashing the charge sheets as well as entire proceedings of the aforesaid case are malafide and misconceived and there is no sufficient ground for quashing the charge sheets as well as entire proceedings of the aforesaid case.

8. Learned counsel for the opposite party no.2 further submitted that in view of averments made in FIR, the cognizable offence is proved to have been committed by applicants and the trial court has framed charges after hearing them; that the trial is in progress and after framing of charges against the charge sheeted accused persons, the part statement of PW-1 has also been recorded, whereafter on the application u/s 319 Cr.P.C., of the opposite party no.2, two accused namely Asruddin and Ajay Kumar (who were named in the FIR, but not charge sheeted), have been summoned for trial together; that against the order of summoning, the summoned additional accused persons have filed a criminal revision before the Sessions Judge, Rampur, which is pending for disposal; that against the order dated 27.02.2015, the opposite party no.2 has moved recall application and so the findings made in the order passed in Writ A No.12132 of 2015 may not have any adverse effect on the prosecution of accused persons; that the Applications are liable to be dismissed.

9. Upon hearing learned counsel for the parties and perusal of records, I find that according to the prosecution case, the applicant Habib Ahmad allegedly demanded a sum of Rs.50,000/- from the opposite party no.2 on 16.03.2001 for getting him selected on the post of Shiksha Mitra in the year 2001, regarding which no FIR was lodged for the offence allegedly committed by making such demand. In the year 2004 at the time of next selection process for the post, no such demand is alleged to have been made or repeated. As per averments made in the FIR, the applicant Habib Ahmad, mischievously got the application form of the opposite party no.2 misplaced/lost in collusion with co-accused persons and further refused to accept another application form for getting Noor Hasan selected and thus committed the offence.

10. It is pertinent to mention that Writ-A No.12132 of 2015 filed by the opposite party no.2, claiming his appointment on the post of Shiksha Mitra in the year 2004 after quashing the appointment of co-accused Noor Hasan/ Asaruddin, has been dismissed by the Writ Court vide final order dated 27.02.2015 with following observations made in paras 3, 12, 13, 21 & 22:-

"(3) Contention is that the Head-master of the institution had refused to accept the application of the petitioner on the ground that the selection of Noor Hasan shall be renewed and no fresh application would be entertained. Finally, the selection of Noor Hasan was cancelled and the second placed candidate namely Asruddin was appointed.

(12) A perusal of the order dated 6.4.2010 clearly indicates that the claim of the petitioner was considered on merits. In the representation filed on 3.2.2010, the petitioner's claim

was that he has submitted the application form for the post of Shiksha Mitra but it was not accepted by the Principal/Secretary of Gram Shiksha Samiti, Rustam Nagar near Raipur, District Raipur. The petitioner was 'Anaupcharik Anudeshak' and could have secured higher marks than the selected candidates if he would has been allowed to participate.

(13) It was found that the petitioner has not submitted any application form for the post of Shiksha Mitra. Two posts of Shiksha Mitra one from a (female) candidate and another from Sri Asruddin was filled.

(21) Further on merits of the claim of the petitioner, this Court finds that the petitioner has not been able to substantiate that he has applied for the post of Shiksha Mitra in the year 2004. It is apparent from the minutes of meeting of Gram Shiksha Samiti appended as Annexure '7' to the writ petition that only two application forms were received and placed in the meeting held on 23.12.2004. The claim of the petitioner for appointment, therefore, is found devoid of merits.

(22) From the above discussion, it is apparent that the petitioner has utterly misused the process of this Court with full knowledge and deliberation. From his conduct, the petitioner appears to be a habitual litigant having no respect for a Court of Law and Justice. Looking to the conduct of the petitioner, with a view to uphold the solemn procedure of law, and as a deterrent this writ petition is dismissed with cost which I shall quantify to Rs. 25,000/-."

11. It is settled principle of law that at the stage of section 204 Cr.P.C., only a prima facie case is to be seen by the Magistrate as laid down by Supreme Court in cases of **R.P. Kapoor Vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal 1992 SCC (Cr.) 426 and Zandu Pharmaceutical Works Ltd. Vs. Mohd. Sharaful Haque and another (2005) 1 SCC 122**.

12. Generally speaking, at the time of looking into the correctness of summoning order, the defences may not be looked into and the same is to be assessed only on the averments made in complaint and statements as well as the material provided by the complaint, and the defences may be taken into consideration only in exceptional cases. The legal position remains same in case of summoning of accused on submission of charge sheet.

13. It has been held in **(2012) 11 SCC 465** in the case of **Nupur Talwar vs. CBI** and another that "defences may be taken into consideration only if defences raised by accused are factually unassailable and unconvertible and demolish the foundation of prosecution case".

14. In **Devendra and others Vs. State of U.P. and another 2009 (67) ACC 886**, Hon'ble the Apex Court has considered the civil wrong and criminal wrong and has held as under:-

"We may, however, notice that the said decision has been considered recently by this Court in Mahesh Choudhary v. State of Rajasthan & another, 2009 (4) SCC 66 wherein it was noticed:

"Recently in R. Kalyani v. Janak C. Mehta and Ors. JT 2008 (12) SC 279 this Court laid down the law in the following terms:

9. Propositions of law which emerge from the said decisions are:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed, no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.

(10) It is furthermore well known that no hard and fast rule can be laid down. Each case has to be considered on its own merits. The Court, while exercising its inherent jurisdiction, although would not interfere with a genuine complaint keeping in view the purport and object for which the provisions of Sections 482 and 483 of the Code of Criminal Procedure had been introduced by the Parliament but would not hesitate to exercise its jurisdiction in appropriate cases. One of the paramount duties of the Superior Courts is to see that a person who is apparently innocent is not subjected to persecution and humiliation on the basis of a false and wholly untenable complaint."

15. The contents of para 3 of above judgment dated 27.02.2015 passed in Writ A No.12132 of 2015, shows that in above Writ Petition as well as in his earlier writ petitions, the opposite party no.2 had taken a stand that his application form for the post of Shiksha Mitra was not accepted by the applicant Habib Ahmad, without making any whisper of alleged demand of Rs.50,000/- as illegal gratification or of misplacement/ loss of earlier application moved in 2004. The contents of paras 12 and 13 of the above judgment makes it clear that the District Magistrate, Rampur in his order dated 06.04.2010 held that the opposite party no.2 (petitioner in the Writ Petition) had not submitted any application form for the post of Shiksha Mitra, which was affirmed by this Court in two Writ Petition Nos.13356 of 2006 and 12132 of 2015. It is also clear that after rejection of representation by the District Magistrate, Rampur vide order dated 06.04.2010, the opposite party

no.2 changed his stand (taken in Writ Petitions) and moved an application under Section 156(3) Cr.P.C. on 23.02.2011 (after a period of over five years) and by way of improvement took new plea of alleged demand of Rs.50,000/- and alleged loss of his first application from for the year 2004, by applicant Habib Ahmad.

16. In view of the discussions made above and facts & circumstances of the case, since it has been held by Writ Court that the opposite party no.2 did not submit any application form for the post of Shiksha Mitra in the year 2004, and his claim for the said post has been dismissed, the opposite party no.2 may not have any prima facie case for prosecution of applicants on the ground of alleged loss of his application form (which was never submitted) by the applicant Habib Ahmad in collusion with members of Committee Ali Ahmad and Jagat Singh or any other accused persons. In the circumstances, there can be no possibility of conviction of applicants Habib Ahmad, the Secretary or applicants Ali Ahmad and Jagat Singh, the members of the Committee and the proceedings of criminal case no.3665 of 2012, arising out of two charge sheets no.288 and 288A of 2013 submitted in case crime no.664 of 2012 are only futile exercise, which will waste the valuable time of the Court, which may be utilized for disposal of several important cases as well as cases of poor litigants. I am of the considered view that the proceedings of criminal case are abuse of process of court, and in order to prevent the abuse of process of court as well as to secure the ends of justice, the exercise of inherent powers by this Court is required for quashing the frivolous proceedings of criminal case no.3665 of 2012 based on FIR lodged by the opposite party no.2 in case crime no.664 of 2012.

17. It is not disputed that against the order passed on the application u/s 319 Cr.P.C., for summoning co-accused Ajay Singh and Asaruddin and co-accused persons, revision is pending before the Sessions Judge, under which the proceedings of trial court are bound to have been stayed. The moving of application for recall of order dated 27.02.2015 in Writ A No.12132 of 2015, for recall of an order passed on merits after hearing the parties, has no relevancy in this case.

18. In view of the discussions made above, I find that since the very moving of the application for appointment of Shiksha Mitra in the year 2004 by the opposite party no.2, has been disbelieved by the Writ Court and as per order passed in Writ-A No.12132 of 2015, the opposite party no.2 had not even moved any such application, it is a fit case, in which the charge sheets as well as entire proceedings of criminal case no.3665 of 2012, arising out of case crime no.664 of 2012, under Sections 420, 467, 478, 471 IPC, P.S. Swar, District Rampur, pending in the court of Addl. Chief Judicial Magistrate, Rampur are required to be quashed in exercise of inherent powers of this Court, to prevent the abuse of process of court as well as to secure the ends of justice. Accordingly, the charge sheets as well as entire proceedings of criminal case no.3665 of 2012 arising out case crime no.664 of 2012 are hereby quashed.

19. The applications u/s 482 Cr.P.C. are allowed accordingly.

(2016) 9 ILRA 750
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 44424 Of 2016

Smt. Sunita Singh Kushwaha ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Jitendra Pandey, Birendra Pandey

Counsel for the Respondents:
C.S.C., Qamrul Hasan Siddiqui

This writ petition has been filed for the following relief:

(i) Issue a writ in the nature of mandamus directing the respondent no.2 to consider the employment of petitioner as per Dying-in-Harness Rules.

FACTS

Briefly stated facts of the present case are that the mother of the petitioner Smt. Vimla Devi was working on the post of Peon in Jal Nigam, Varanasi. She died on 31.10.2014. Petitioner is a married daughter of the deceased Vimla Devi. She has filed this writ petition with the allegation that she is a divorced lady and, therefore, in view of the Division Bench Judgement of this Court in Writ - C No.60881 of 2015, Smt. Vimla Srivastava Vs.State of U.P. and another, she is entitled for appointment on compassionate ground. It is alleged that after the death of her mother her husband filed a divorce petition No.813 of 2014 on 20.11.2014 in Family Court, Azamgarh. However, despite being asked repeatedly, learned counsel for the petitioner could not inform about further development in the aforesaid divorce petition and its present status. In the writ petition also there is no averment in this regard except that a divorce petition No.813 of 2014 was filed by her husband .

The petitioner has neither impleaded her husband as respondent against whom allegation of filing a divorce petition has been levelled nor she has disclosed the source of livelihood, earning and financial status of her husband. After the death of the deceased employee and yet her death is not recorded in it. This register also does not record the name of two children of the petitioner.

No documents indicating dependency of the petitioner and her children on the deceased employee has been filed alongwith writ petition. The petitioner has also not filed her address proof and address proof of her son and daughter. In paragraph 9 of the writ petition, the petitioner has alleged that she moved a representation on 7.1.2015 before the Executive Engineer for her compassionate appointment. Copy of the representation dated 7.1.2015 has been filed as Annexure No.5 to the writ petition. Perusal of this representation dated 7.1.2015 shows that it was allegedly filed alongwith proof of divorce of the petitioner and death certificate of

the deceased employee which was issued on a subsequent date on 9.5.2015 as per Annexure No.2. Thus the averments made in the writ petition are apparently false.

The sequence of the events as discussed above shows that the petitioner has cooked up the entire story so as to obtain illegally the Government employment on compassionate ground without actually being dependent of the deceased Government employee. The writ petition is based on false and misleading averments and suppression of important facts.

In view of the aforesaid, I do not find any good reason to grant the relief as prayed by the petitioner.

Consequently, writ petition fails and is hereby dismissed.

Held: Para-

Case Law discussed:
Writ – C No.60881 of 2015, Smt. Vimla Srivastava Vs.State of U.P. and another,

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Jitendra Pandey, learned counsel for the petitioner, learned standing counsel for respondent no.1 and Sri Saiful Islam Siddiqui holding brief of Sri Q.H. Siddiqui, learned counsel for respondent nos. 2 to 4.

2. This writ petition has been filed for the following relief:

(i) Issue a writ in the nature of mandamus directing the respondent no.2 to consider the employment of petitioner as per Dying-in-Harness Rules.

FACTS

3. Briefly stated facts of the present case are that the mother of the petitioner Smt. Vimla Devi was working on the post of Peon in Jal Nigam, Varanasi. She died on 31.10.2014. Petitioner is a married daughter of the deceased Vimla Devi. She has filed this writ petition with the allegation that she is a divorced lady and, therefore, in view of the Division Bench Judgement of this Court in **Writ - C No.60881 of 2015, Smt. Vimla Srivastava Vs.State of U.P. and another**, she is entitled for appointment on compassionate ground. It is alleged that after the death of her mother her husband filed a divorce petition No.813 of 2014 on 20.11.2014 in Family Court, Azamgarh. However, despite being asked repeatedly, learned counsel for the petitioner could not inform about further development in the aforesaid divorce petition and its present status. In the writ petition also there is no averment in this regard except that a divorce petition No.813 of 2014 was filed by her husband.

Submissions

4. Learned counsel for the petitioner submits that the petitioner being a divorcee is entitled for appointment on compassionate ground in view of the Division Bench judgment in the case of Smt. Vimla Srivastava (supra). Learned standing counsel submits that a married woman does not fall within the category of dependent under the Dying-in-Harness Rules, 1974. He submits that the Division Bench judgment in the case of Smt. Vimla Srivastava (supra) has been stayed by Hon'ble Supreme Court. He submits that there is no evidence of divorce decree and as such it can not be said that the petitioner is a divorced lady.

Discussion and Findings:

5. I have carefully considered the submissions of learned counsel for the parties. Rule 2 (c) of the Uttar Pradesh Recruitment of Dependents of Government Servants, Dying-in-Harness Rules, 1974 (hereinafter referred to as "Dying-in-Harness Rules") defines the word "family" as under:

"2(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons/adopted sons;

(iii) Unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent Court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

6. In the case of Smt. Vimla Srivastava (supra) decided on 4.12.2015 the word "unmarried" before the word "daughters" occurring in sub clause (iii) of Clause C of Rule 2 was struck down by the Division Bench in the case of Smt. Vimla Srivastava (supra) and a direction was issued to the concerned respondents to reconsider the claim of Smt. Vimla Srivastava for compassionate appointment on the basis of relevant facts and circumstance and she shall not be excluded from consideration only on the ground of marital status.

7. Solely relying upon the judgment in the case of Smt. Vimla Srivastava (supra) another Division Bench in Special Appeal Defective No.863 of 2015 (Neha Srivastava Vs. State of U.P. another) took the same view and allowed the special appeal by judgment dated 23.12.2015. Against the judgment in the case of Neha Srivastava (supra) the State of U.P. preferred a Special Leave to Appeal (C) CC No. 13846 of 2016 in which Hon'ble Supreme Court passed an interim order on 29.7.2016 as under:

"Delay condoned.

Issue notice.

In the mean time, the operation of the impugned final judgment and order shall remain stayed."

8. The basic rationale and the foundation for granting compassionate appointment is the financial need of the family of a deceased government servant who has died in harness and it is with a view to alleviate financial distress that compassionate appointment is granted as per provisions of Rule 5 of the Dying-in-Harness Rules. It is settled law that compassionate appointment is an exception to the basic rule that there must be equality of opportunity in matters of public employment. Equality of opportunity postulates a level playing field where all eligible persons are entitled to compete in an effort to secure public employment. The basis of the exception that is carved out by the Dying-in-Harness Rules is that the death of a wage earner while in the service of the State may result in severe financial hardship on the family faced with an untimely death. Compassionate appointment is intended to provide immediate financial support to such a family by stipulating that upon the death of its wage earner while in harness as a government servant, another member of the family would be granted appointment. It is, thus not a reservation of a post in public employment but it is in the nature of an enabling provision under which a member of the family of a deceased government servant who died while in harness, can seek appointment based on financial dependency and need. Keeping in mind the aforesaid settled principles of compassionate appointment, I proceed to examine as to whether the petitioner has made out a prima facie case for compassionate appointment on the facts disclosed in the writ petition.

9. The petitioner has neither impleaded her husband as respondent against whom allegation of filing a divorce petition has been levelled nor she has disclosed the source of livelihood, earning and financial status of her husband. According to her own case her mother died on 31.10.2014 and allegedly thereafter a divorce petition was filed by her husband on 28.11.2014. A photostate copy of the said divorce petition has been filed as Annexure No.7 without disclosing that how petitioner has obtained it. Nothing has been brought on record about the status of the aforesaid alleged divorce petition. In paragraph 6 of the writ petition the petitioner has alleged that she alongwith her son aged 14 years and daughter aged 7 years were living with the deceased employee, Smt. Vimla Devi and were fully dependent on her. This para has been sworn on personal knowledge in the affidavit dated 7.9.2016. In the alleged divorce petition the age of aforesaid two children is mentioned as 15 Years and 13 years as on 28.11.2014. The alleged copy of family register filed as

Annexure No.3 to the writ petition was obtained on 29.12.2014 i.e. after the death of the deceased employee and yet her death is not recorded in it. This register also does not record the name of two children of the petitioner.

10. No documents indicating dependency of the petitioner and her children on the deceased employee has been filed alongwith writ petition. The petitioner has also not filed her address proof and address proof of her son and daughter. In paragraph 9 of the writ petition, the petitioner has alleged that she moved a representation on 7.1.2015 before the Executive Engineer for her compassionate appointment. Copy of the representation dated 7.1.2015 has been filed as Annexure No.5 to the writ petition. Perusal of this representation dated 7.1.2015 shows that it was allegedly filed alongwith proof of divorce of the petitioner and death certificate of the deceased employee which was issued on a subsequent date on 9.5.2015 as per Annexure No.2. Thus the averments made in the writ petition are apparently false.

11. The sequence of the events as discussed above shows that the petitioner has cooked up the entire story so as to obtain illegally the Government employment on compassionate ground without actually being dependent of the deceased Government employee. The writ petition is based on false and misleading averments and suppression of important facts.

12. In view of the aforesaid, I do not find any good reason to grant the relief as prayed by the petitioner.

13. Consequently, writ petition fails and is hereby dismissed.

(2016) 9 ILRA 755
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2016

BEFORE

THE HON'BLE V. K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 54464 Of 2014

Nanak Chand ...Petitioner
Versus
Union of India thru' Secy. & Ors. ...Respondents

Counsel for the Petitioner:
Bidhan Chandra Rai

Counsel for the Respondents:
A.S.G.I., Anil Kumar Singh, J.S. Pandey, Pranjal Mehrotra, S.C.

Nanak Chand is before this Court assailing the order dated 22.9.2014 passed by the Competent Authority (Special Land Acquisition Officer), National Highways Tribunal, Mathura-respondent no.3 and for direction to the respondent no.3 to refer the dispute regarding apportionment of the amount of compensation to the District Judge, Mathura in terms of Section 3H (4) of the National Highways Act, 1956.

Record in question reflects that in the year 1979 Shri Tej Singh (father of the petitioner) purchased a part of Gata No.41 situate in revenue village Chhata, District Mathura from Shri Mool Chand. Shri Tej Singh constructed a hotel in the name and style of 'Marwari Bhojnalaya' on the land in question situated alongside of National Highway-2 in Kasba Chhata, District Mathura and was running the hotel in question. Shri Tej Singh has died and after his death, the petitioner is running the hotel in question. The National Highways Authority of India (in short, NHAI) had taken a policy decision to undertake and develop Six-Lane of Delhi – Agra Section of NH-2 from Km. 20.500 to Km. 200 through DBFOT basis under NHDP Phase-V. The NHAI is the Nodal Agency for execution of the said project. Consequently, the Ministry of Road Transport and Highways, Government of India, in exercise of powers conferred by sub clause (a) of Section 3 of the National Highways Act, 1956 (in short, the 1956 Act), published a notification dated 10.8.2009 in official Gazette authorising the Special Land Acquisition Officer, Mathura as the Competent Authority to perform the functions of such authority under the said 1956 Act in respect of the stretch land from KM 93.800 to KM 176.760 of the National Highway No.2 for building (widening/six laning, etc.), maintenance, management and operation of the said National Highway in the State of Uttar Pradesh. The said gazette notification was also published in newspapers namely 'Dainik Jagaran' and 'Hindustan Times' on 26.12.2009 and 25.12.2009 respectively.

Learned counsel for the petitioner precisely submits that while filing the objection the petitioner had submitted the relevant record but the Competent Authority in most arbitrary manner had

rejected the objection of the petitioner holding that the petitioner has failed to produce any evidence regarding ownership of the hotel in question. The Competent Authority has not even looked into the provisions of Section 3-H (4) of 1956 Act as well as the bundle of evidences filed by the petitioner and as such, the impugned order is contrary to the mandatory provisions of Section 3-H (4) of the 1956 Act. It is sought to be contended that as per provisions contained under Section 3-H (4) of 1956 Act, it was incumbent upon the Competent Authority to make a reference of the dispute to the Principal Civil Court of original jurisdiction i.e. District Judge, Mathura. He further makes submission that even Sections 3-H (3) & (4) of 1956 Act are somewhat similar to Sections 11 and 18 of the Land Acquisition Act, 1894 (in short, the 1894 Act). Under Section 3-H (3) of the 1956 Act, where several persons claim to be interested in the amount deposited under sub-section (1) of Section 3H of 1956 Act, the Competent Authority shall determine the persons, who in its opinion, are entitled to receive the amount payable to each of them but in case there are several persons who claim stake in the property in question, the said claim cannot be resolved under sub-section (1) of Section 3H of 1956 Act and the same is to be dealt with as per provisions contained under Section 3H (4) of the 1956 Act. In support of his submission, he has placed reliance on a Division Bench judgement of Punjab and Haryana High Court in Nirmal Singh vs. Union of India and ors, CWP No.19838 of 2009 (O&M) decided on 11.11.2011 and the judgement of High Court of Jharkhand at Ranchi in Sangeeta Agrawal vs. The Union of India and ors in W.P. (C) No.1540 of 2013 decided on 17.6.2013.

In view of aforesaid facts and circumstances, we are of the considered opinion that while passing the impugned order the Competent Authority has considered the objection filed by the petitioner in detail and has proceeded to make a mention that the petitioner at no point of time had produced any revenue record to indicate any claim over the property in question and the entire claim has been set up on the basis of electricity bill, telephone connection and as such, the order impugned is based upon on concrete finding that at no point of time the petitioner could produce any valid title to claim right over the property in question. Even this Court has also asked a pointed query to learned counsel for the petitioner but he has failed to substantiate his claim or to produce any revenue record to indicate that the petitioner has got the valid claim or title over the property in question.

We do not find any illegality or infirmity in the impugned order.The writ petition sans merit and is, accordingly, dismissed.

Held: Para-

Case Law discussed:

Mehr Rusi Dalal vs. Union of India 2004 (7) SCC 362, Sharda Devi vs. State of Bihar 2003 (3) SCC 128,
Nirmal Singh vs. Union of India and ors, CWP No.19838 of 2009 (O&M)
High Court of Jharkhand at Ranchi in Sangeeta Agrawal vs. The Union of India and ors in W.P. (C) No.1540 of 2013

(Delivered by Hon'ble V. K. Shukla, J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Nanak Chand is before this Court assailing the order dated 22.9.2014 passed by the Competent Authority (Special Land Acquisition Officer), National Highways Tribunal, Mathura-respondent no.3 and for direction to the respondent no.3 to refer the dispute regarding apportionment of the amount of compensation to the District Judge, Mathura in terms of Section 3H (4) of the National Highways Act, 1956.

2. Record in question reflects that in the year 1979 Shri Tej Singh (father of the petitioner) purchased a part of Gata No.41 situate in revenue village Chhata, District Mathura from Shri Mool Chand. Shri Tej Singh constructed a hotel in the name and style of 'Marwari Bhojnalaya' on the land in question situated alongside of National Highway-2 in Kasba Chhata, District Mathura and was running the hotel in question. Shri Tej Singh has died and after his death, the petitioner is running the hotel in question. The National Highways Authority of India (in short, NHAI) had taken a policy decision to undertake and develop Six-Lane of Delhi - Agra Section of NH-2 from Km. 20.500 to Km. 200 through DBFOT basis under NHDP Phase-V. The NHAI is the Nodal Agency for execution of the said project. Consequently, the Ministry of Road Transport and Highways, Government of India, in exercise of powers conferred by sub clause (a) of Section 3 of the National Highways Act, 1956 (in short, the 1956 Act), published a notification dated 10.8.2009 in official Gazette authorising the Special Land Acquisition Officer, Mathura as the Competent Authority to perform the functions of such authority under the said 1956 Act in respect of the stretch land from KM 93.800 to KM 176.760 of the National Highway No.2 for building (widening/six laning, etc.), maintenance, management and operation of the said National Highway in the State of Uttar Pradesh. The said gazette notification was also published in newspapers namely 'Dainik Jagaran' and 'Hindustan Times' on 26.12.2009 and 25.12.2009 respectively.

3. As per Gazette notification, objections were invited under Section 3C of 1956 Act. The land owners of the village in question filed their objections before the Competent Authority and their objections were heard and disposed of by the Competent Authority. Thereafter the Gazette notification under Section 3-G (3) of the 1956 Act was also issued on 25.6.2010. A notice under Section 3-G (3) of 1956 Act was published by the Competent Authority in daily newspapers 'Dainik Jagaran' and 'Hindustan Times' on 5.7.2010, inviting claims from the land owners with respect to determination of the compensation. A short public notice was also published in Hindustan Times (Hindi & English) on 14.12.2012 inviting claims regarding land acquisition from the land owners by the Competent Authority/Special Land Acquisition Officer, Mathura. Thereafter, the Competent Authority invited the claims from the land owners, heard the objections/claims at Tehsil office and in presence of revenue inspector of the concerned village, the said objections/claims were decided by the Competent Authority according to on-spot position, land use, available records etc. Finally, the Competent Authority announced the award under Section 3-G of 1956 Act on 29.7.2013 and determined the compensation for agricultural land @ Rs.1250/- per sqm. and non-agricultural/residential land @ Rs.5000/- per sqm. and 10% additional compensation apart from additional compensation for improvements/constructions over the land.

4. This much is also reflected from the record in question that the petitioner filed an objection inter-alia on the ground that out of total area of 5.876 hec. land from Gata No.41(M),

6480 sqm. land was acquired. The father of the petitioner had constructed the hotel in the year 1979 and after his death, the petitioner is running the said hotel and as such, he was liable to receive the compensation of the land and building comprised in Gata no.41.

5. Learned counsel for the petitioner precisely submits that while filing the objection the petitioner had submitted the relevant record but the Competent Authority in most arbitrary manner had rejected the objection of the petitioner holding that the petitioner has failed to produce any evidence regarding ownership of the hotel in question. The Competent Authority has not even looked into the provisions of Section 3-H (4) of 1956 Act as well as the bundle of evidences filed by the petitioner and as such, the impugned order is contrary to the mandatory provisions of Section 3-H (4) of the 1956 Act. It is sought to be contended that as per provisions contained under Section 3-H (4) of 1956 Act, it was incumbent upon the Competent Authority to make a reference of the dispute to the Principal Civil Court of original jurisdiction i.e. District Judge, Mathura. He further makes submission that even Sections 3-H (3) & (4) of 1956 Act are somewhat similar to Sections 11 and 18 of the Land Acquisition Act, 1894 (in short, the 1894 Act). Under Section 3-H (3) of the 1956 Act, where several persons claim to be interested in the amount deposited under sub-section (1) of Section 3H of 1956 Act, the Competent Authority shall determine the persons, who in its opinion, are entitled to receive the amount payable to each of them but in case there are several persons who claim stake in the property in question, the said claim cannot be resolved under sub-section (1) of Section 3H of 1956 Act and the same is to be dealt with as per provisions contained under Section 3H (4) of the 1956 Act. In support of his submission, he has placed reliance on a Division Bench judgement of Punjab and Haryana High Court in **Nirmal Singh vs. Union of India and ors, CWP No.19838 of 2009 (O&M)** decided on 11.11.2011 and the judgement of High Court of Jharkhand at Ranchi in **Sangeeta Agrawal vs. the Union of India and ors** in W.P. (C) No. 1540 of 2013 decided on 17.6.2013.

6. On the other hand, Shri Pranjal Mehrotra, learned counsel for respondent no.2 has vehemently opposed the writ petition and submits that there is no infirmity or illegality in the impugned order and each and every objection of the petitioner has been considered. The petitioner at the relevant point of time could not produce legal ownership record before the Competent Authority and as such, no interference is required to be made in the matter.

7. Shri Anil Kumar Singh, Advocate has filed a counter affidavit on behalf of respondent no.4 stating that previously Sri Tej Singh (father of the petitioner) was running the hotel situated on the land of Public Works Department (Road Patari) but the hotel was not registered in his name. Sri Tej Singh has died leaving 3 sons including the petitioner. The petitioner is not occupier of the hotel in question and there is no record of the aforesaid claim of the petitioner. The Competent Authority has passed the order dated 22.9.2014 after considering the objection of the petitioner as well as the respondent no.4 and the relevant documents produced by both the parties. He further makes submission that even before this Court the petitioner could not show any valid and legal right or claim over the property in question and as such, his claim is unsustainable under sub-section (4) of Section 3H of 1956 Act and the writ petition is liable to be dismissed.

8. In order to resolve the controversy, it would be necessary to read Sections 3A, 3C, 3D and 3H(1) to (4) of the 1956 Act, which are reproduced as under:-

"3A. **Power to acquire land**, etc.-

(1) Where the Central Government is satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, it may, by notification in the Official Gazette, declare its intention to acquire such land.

(2) Every notification under sub-section (1) shall give a brief description of the land.

(3) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language."

"3C. **Hearing of objections**.-

(1) Any person interested in the land may, within twenty-one days from the date of publication of the notification under sub-section (1) of section 3A, object to the use of the land for the purpose or purposes mentioned in that sub-section.

(2) Every objection under sub-section (1) shall be made to the competent authority in writing and shall set out the grounds thereof and the competent authority shall give the objector an opportunity of being heard, either in person or by a legal practitioner, and may, after hearing all such objections and after making such further enquiry, it any, as the competent authority thinks necessary, by order, either allow or disallow the objections.

Explanation.- For the purposes of this sub- section, "legal practitioner" has the same meaning as in clause (i) of sub-section (1) of Section 2 of the Advocates Act, 1961 (25 of 1.961).

(3) Any order made by the competent authority under sub-section (2) shall be final.

3D. **Declaration of acquisition**.-

(1) Where no objection under sub-section (1) of Section 3C has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objection under subsection (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of Section 3A.

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of Section 3A for its acquisition but no declaration under sub-section (1) has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1.) of Section 3A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority.

3H. **Deposit and payment of amount**.-

(1) The amount determined under Section 3G shall be deposited by the Central Government in such manner as may be laid down by rules made in this behalf by that Government, with the competent authority before taking possession of the land.

(2) As soon as may be after the amount has been deposited under sub-section (1), the competent authority shall on behalf of the Central Government pay the amount to the person or persons entitled thereto.

(3) Where several persons claim to be interested in the amount deposited under sub- section (1), the competent authority shall determine the persons who in its opinion are entitled to receive the amount payable to each of them.

(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal civil court of original jurisdiction within the limits of whose jurisdiction the land is situated.

(5) Where the amount determined under Section 3-G by the arbitrator is in excess of the amount determined by the competent authority, the arbitrator may award interest at nine per cent per annum on such excess amount from the date of taking possession under Section 3-D till the date of the actual deposit thereof.

(6) Where the amount determined by the arbitrator is in excess of the amount determined by the competent authority, the excess amount together with interest, if any, awarded under sub-section (5) shall be deposited by the Central Government in such manner as may be laid

down by rules made in this behalf by that Government, with the competent authority and the provisions of sub-sections (2) to (4) shall apply to such deposit."

9. It is true that the 1956 Act is a special statute which has clothed the Central Government with the power to acquire any land for a public purpose, which is required for building, maintenance, management or operation of a National Highway or part thereof. But many provisions of the 1956 Act are akin to the provisions of the 1894 Act. A perusal of Sections 3A, 3C and 3D of the 1956 Act would show that they are similar to Sections 4, 5A and 6 of the 1894 Act respectively in their contents and intendment. Even Section 3H (3) and (4) of the 1956 Act are somewhat similar to Sections 18 and 30 respectively of the 1894 Act. Likewise, further provisions like Sections 3H and 3G of the 1956 Act are equivalent to Sections 16 and 11 of the 1894 Act. Then it follows that the Competent Authority under the 1956 Act designated by respondent Nos. 1 and 2 would not be clothed with the power to adjudicate the claim of apportionment made by the parties in respect of the land for which notifications for acquisition have been issued under the 1956 Act. Under sub-section (3) of Section 3H of the 1956 Act, the Competent Authority may determine the persons who would be entitled to receive the amount payable to each of them where several persons make claim in respect of the amount deposited under sub-section (1) of Section 3H of the 1956 Act. This Section does not talk about any dispute between several claims, which in fact, has been specifically dealt with in sub-section (4) of Section 3H of the Act. Sub-section (4) of Section 3H of the 1956 Act opens with the words 'If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable', then the Competent Authority nominated by the State Government like respondent No.3 is under obligation to refer the dispute to the decision of the principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated.

10. As indicated above, sub-sections (3) and (4) of Section-3H of the 1956 Act are somewhat similar to Sections 18 and 30 respectively of the 1894 Act. For ready reference Sections 18 and 30 of 1894 Act are reproduced herein under:-

"18. **Reference to Court**.-

(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken: Provided that every such application shall be made,-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

30. **Dispute as to apportionment**- When the amount of compensation has been settled under Section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof, is payable, the Collector may refer such dispute to the decision of the Court."

11. From perusal of the aforesaid provisions, it appears that in a similar provision contained in 1894 Act the word "may" is used, whereas in Section 3H (4) of 1956 Act, the word "shall" is used.

12. The persons, who have notice of acquisition proceedings, would have to apply for a Reference under Section 18 of the 1894 Act. Under Section 18 reference could be in respect of the measurement of the land and/or the amount of compensation and/or in respect of persons to whom it is payable and/or for apportionment of compensation amongst persons interested. Section 30 of 1984 Act merely deals with apportionment of compensation when the amount of compensation has been settled. Thus, it is clear that Section 18 is to be invoked when a person claiming a pre-existing right has notice of the acquisition proceedings, whereas Section 30 comes into play only if a person had no notice of the acquisition proceedings or the rights came into existence after the acquisition proceedings. The 1894 Act clearly proceeds to mention that a person who had notice of the acquisition proceedings and who, by virtue of Section 50, is debarred from filing a Reference under Section 18 of 1894 Act cannot be allowed to apply for a Reference under Section 30. The view expressed by us is the same view that has been so expressed by the Apex Court, in the case of **Mehr Rusi Dalal vs. Union of India 2004 (7) SCC 362** after following the judgement in the case of **Sharda Devi vs. State of Bihar 2003 (3) SCC 128**.

13. What we find from the record in question is that in the present matter the gazette notification under Section 3 of 1956 Act was issued on 4.12.2009/8.2.2011 and the same was also published in two daily newspapers namely "Hindustan Times" (English) and "Dainik Jagaran" (Hindi) on 25.12.2009 and 26.12.2009 respectively. Again the same was published in Hindustan (English) and "Amar Ujala" (Hindi) on 25.2.2011. In the said acquisition the objections were also decided under Section 3-C of the 1956 Act and as per provisions contained under Section 3-C the declaration of acquisition was made through notifications dated 25.6.2010 and 2.6.2011. It is relevant to indicate that at the time of publication under Section 3D (declaration of acquisition) the name of respondent no.4 was also mentioned and the petitioner, neither at the time of initial publication nor declaration under Section 3D of 1956 Act, has raised any grievance. Inspite of notice at no point of time the petitioner filed any objection and at the belated stage he has prayed that as per Section 3H (4) of 1956 Act, his case is liable to be transferred to the Principal Civil Court of original jurisdiction by the Competent Authority. The property in question was purchased by respondent no.4 through registered sale deed on 27.3.2004 and on account of deficiency of stamp, the Additional District Magistrate (Finance and Revenue), Mathura vide order dated

28.11.2006 has held that the disputed land belonged to the contesting respondent no.4 and as such, he passed an order asking an amount of Rs.4,20,500/- as interest @ 1.5% per month till the payment against the deficiency of stamp duty on the registered sale deed through which the respondent no.4 had purchased the property in question. Admittedly, the petitioner for the first time as per his own showing had proceeded to file an objection on 11.1.2013 for apportionment of compensation. We have also considered the judgements cited by the petitioner in Nirmal Singh's case (supra) and Sangeeta Agrawal's case (supra) and find that the aforesaid judgements would not be of any help to the petitioner under the facts and circumstances of the present case.

14. In view of aforesaid facts and circumstances, we are of the considered opinion that while passing the impugned order the Competent Authority has considered the objection filed by the petitioner in detail and has proceeded to make a mention that the petitioner at no point of time had produced any revenue record to indicate any claim over the property in question and the entire claim has been set up on the basis of electricity bill, telephone connection and as such, the order impugned is based upon on concrete finding that at no point of time the petitioner could produce any valid title to claim right over the property in question. Even this Court has also asked a pointed query to learned counsel for the petitioner but he has failed to substantiate his claim or to produce any revenue record to indicate that the petitioner has got the valid claim or title over the property in question.

15. We do not find any illegality or infirmity in the impugned order. The writ petition sans merit and is, accordingly, dismissed.

(2016) 9 ILRA 764
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2016

BEFORE

THE HON'BLE SHRI NARAYAN SHUKLA, J.
THE HON'BLE ANANT KUMAR, J.

First Appeal No.- 10 Of 2006
&
Connected With Other Cases

Housing Commissioner, U.P. Avas Evam Vikas Parishad, Lucknow ...Appellant
Versus
Rajiv Kapoor & Ors. ...Respondents

(For Khasra Plot No.128, 174, area 0-14-16, 7-15-1 total measuring 8 bigha, 9 biswa, 17 biswansi, situated at Village Khurram Nagar, Pergana Tehsil & District - Lucknow)
Lower Court Misc. Case No.6/1997

Counsel for Appellant:
Shri Madan Gopal Mishra

Counsels for Respondents:
Shri Arun Kr. Jaiswal, Shri A.K. Jaiswal, Shri Amit Jaiswal

Held –
Paras 1 & 2: Five connected first appeals under Section 54 of the Land Acquisition Act, 1894 were filed challenging the common award/decree dated 25.07.2005 passed by the U.P. Avas Evam Vikas Parishad Tribunal, Lucknow in Misc. Case Nos. 3, 4, 5, 6, and 7 of 1997. Due to their common origin, the High Court decided all appeals together.
Para 3: The U.P. Avas Evam Vikas Parishad acquired the respondents' land for a land development scheme titled *"Kursi Road, Lucknow Bhumi Vikas Evam Grih Esthan Yojna"* under Sections 28 and 32 of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965.
Para 4: The initial Section 28 notification (equivalent to Section 4 of the Land Acquisition Act) was published on 25.08.1973. Following writ proceedings and a Special Leave Petition (*S.D. Kapoor v. State of U.P. | Gauri Shankar Gaur v. State of U.P.*), the Supreme Court on 12.08.1993 directed that compensation be paid based on the market rate prevalent when the Section 6 declaration (Section 32 of the Adhiniyam) was issued.
Para 5: The Land Acquisition Officer initially awarded compensation @ ₹1.22 per sq. ft. on 06.11.1996 (possession was taken on 05.12.1986). The claimants sought a reference to the Tribunal, arguing that the rate was arbitrary given the prime location within Lucknow Nagar Mahapalika (near Mahanagar, Aliganj, etc., with full civic amenities) and citing judicial precedents awarding ₹2.75–₹3.50 per sq. ft. The Tribunal framed primary issues regarding market value on 20.09.1980 (Section 6 date), eligibility for Act 68/1984 benefits, Urban Land Ceiling bar, and specific claims for trees/constructions.

Para 6: Based on oral and documentary evidence, the Tribunal evaluated the market value at ₹3.50 per sq. ft. Applying the Supreme Court decision in *BYDA, Bagalkot v. Mohd Hanif Sahib Bawa Sahib*, the Tribunal added a 10% annual appreciation (₹2.44 per sq. ft.), granting total compensation of ₹5.95 per sq. ft. Aggrieved, the Parishad filed these appeals.

Paras 7–10: The High Court heard arguments on the appeals and considered the claimants' applications under Order 41 Rule 33 read with Section 151 C.P.C. seeking additional 12% per annum compensation under Section 23(1-A) of the Land Acquisition Act for the period between the Section 4 notification and the award/possession date.

Para 11: The High Court rejected the claimants' Order 41 Rule 33 application, holding that the Tribunal had already accounted for Section 23(2) benefits and granted 10% annual enhancement under the *Mohd Hanif Sahib* precedent, making further interest enhancement unnecessary.

Paras 12 & 13: Counsel for the appellants (Parishad) argued that the Tribunal ignored sale exemplars showing 1980 market rates at ~₹1.00 per sq. ft. and a 1973 purchase by the respondents at ₹0.12 per sq. ft. Citing *Satish v. State of U.P.* (referencing the Constitution Bench decision in *Cement Corpn. of India v. Purya* regarding Section 51-A), the appellants contended that certified sale deeds were improperly disregarded and that the 10% annual enhancement was improperly calculated from the 1973 purchase price.

Para 14: The High Court rejected the appellants' contentions, holding that the Tribunal properly evaluated prior awards and High Court decisions for adjoining land in Village Khurram Nagar (granting ₹3.50 per sq. ft.), which served as the best exemplars. Furthermore, per the Supreme Court's mandate in *Gauri Shankar Gaur*, the market value had to be determined as of the Section 6 notification date (20.09.1980), rendering the 1973 purchase rate of ₹0.12 per sq. ft. irrelevant.

Para 15: The Court noted the precedent cited by the respondents—*Om Prakash v. Union of India*—which approved progressive annual market value escalations (10% to 12% per annum) where no abnormal market fluctuations were shown.

Para 16: The Court noted the precedent cited by the respondents—*Bhim Singh v. State of Haryana*—which established that where compensation has already been fixed by courts for adjacent/similar lands in earlier proceedings, relying on those judicial awards is preferable to averaging miscellaneous sale instances.

Para 17: The High Court highlighted that a Division Bench of the same Court in *B.N. Tandon v. State of U.P. Avas Evam Vikas Parishad* (First Appeal No. 10 of 1995) had similarly awarded compensation @ ₹3.50 per sq. ft. for the same village (Khurram Nagar).

Para 18: The High Court reaffirmed that market value must be fixed as of the Section 6 notification date (20.09.1980), and the 10% per annum enhancement granted by the Tribunal aligned fully with Supreme Court precedents.

Paras 19 & 20: Finding no material irregularity or illegality in the Tribunal's award, the High Court affirmed the assessment and dismissed all five appeals.

Para 21: The claimants' application (C.M. Application No. 27062 of 2015) under Order 41 Rule 33 C.P.C. was formally rejected.

List of Case Laws Cited

S.D. Kapoor v. State of U.P.— *S.L.P.(C) No. 6400/1992 / Civil Appeal No. 965/1991 (Decided on 12.08.1993)*

Special Land Acquisition Officer, BYDA, Bagalkot v. Mohd Hanif Sahib Bawa Sahib — *AIR 2002 Supreme Court 1558*

Satish and others v. State of Uttar Pradesh and others — *(2009) 14 SCC 758*

P. Venkaiah v. State of A.P. — *(Referred inside Satish v. State of U.P.)*

Cement Corpn. of India v. Purya — *(Referred inside Satish v. State of U.P. regarding Section 51-A interpretation)*

Collector v. Kurra Sambasiva Rao — *(Overruled in Cement Corpn. of India v. Purya)*
Land Acquisition Officer & Mandal Revenue Officer v. V. Narasaiah — *(Referred in Cement Corpn. of India v. Purya & Bhim Singh v. State of Haryana)*
Om Prakash (D) by L.Rs. and others v. Union of India and another — *AIR 2004 SC 4135*
Bhim Singh and others v. State of Haryana — *AIR 2003 SC 4382*
B.N. Tandon v. State of U.P. Avas Evam Vikas Parishad and others — *First Appeal No. 10 of 1995 (Allahabad High Court)*

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

(1) These first appeals under Section 54 of the Land Acquisition Act, 1894 have been filed against award / decree dated 25.07.2005 made by the Presiding Officer, U.P. Avas Evam Vikas Parishad Tribunal, Lucknow (hereinafter referred to as 'the Tribunal') in Misc. Case Nos.6, 5, 3, 4 and 7 all of 1997.

(2) Since all these appeals are connected with each other and have been filed against a common award dated 25.07.2005, as such, all these appeals are being decided altogether.

(3) Brief facts relevant for disposal of these appeals are that U.P. Avas Evam Vikas Parishad, Lucknow had prepared a land development scheme known as "*Kursi Road, Lucknow Bhumi Vikas Evam Grih Esthan Yojna*" and for the said purpose the land of the respondents herein was acquired under Section 28/32 of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as 'the Parishad Adhiniyam, 1965'). Since the land which was notified to be acquired is not under dispute, we do not want to submit a detail of the same in our judgment and in fact the said land is detailed in the award of the Presiding Officer, U.P. Avas Evam Vikas Parisad Tribunal, Lucknow, which is impugned here.

(4) When the notification under Section 28 of the Parishad Adhiniyam, 1965 was published on 25.08.1973, which is equivalent to Section 4 of the Land Acquisition Act, 1894, the respondents-claimants had challenged the said notification before the High Court by way of writ petition which was dismissed by this Court. The respondents-claimants, thereafter, preferred a special leave petition before the Hon'ble Apex Court as ***S.L.P.(C) No.6400/1992 (S.D. Kapoor v. State of U.P.)*** connected with the leading case ***Civil Appeal No.965/1991 (Gauri Shankar Gaur and others v. State of U.P. And others)*** and the said civil appeal was decided by the Hon'ble Apex Court on 12.08.1993 with the direction that "petitioners shall be paid compensation on the market rate prevalent in the year the declarations analogous to section 6 of the land acquisition Act, 1894 were issued."

(5) At the very initial stage, objections were filed against the said land acquisition before the Land Acquisition Officer. After hearing the objections, the Land Acquisition Officer had passed an award regarding the said land @ Rs. 1.22 per sq. ft. It is pertinent to mention here that the possession over the land of the respondents was taken by the Competent Authority on 05.12.1986, whereas award regarding the compensation was made on 06.11.1996 and the Land Acquisition Officer passed an award @ 1.22 per sq. ft. Aggrieved by the said award, the references were made

before the Tribunal. It was stated by the respondents before the Tribunal that the Land Acquisition Officer had passed the award arbitrarily and had not taken into account the situation of the land, whereas the said land is within the limit of Nagar Mahapalika, Lucknow and is equipped with all the facilities and is situated by the side of the road and the nearby localities are Mahanagar, Rahim Nagar, Shakhupura Colony, Vishnu Puri Colony and Aliganj Housing Scheme in the close vicinity. The said land is also developed land and is situated near Mahanagar Picnic Spot Road. All the communication facilities like road, transportation, electricity, school, bank, post-office, etc are also available nearby. It was also stated that regarding the same scheme in different judicial pronouncement an award of Rs.2.75- Rs.3.50 per sq. ft. has been passed which has not been taken into account. These assertions of the claimants / respondents were denied by the opposite parties. On the pleadings of the parties, following issues were framed by the Tribunal:-

1. Whether the award made by the Land Acquisition Officer is insufficient and if so, what was the value of the land on 20.09.1980, i.e. the date on which the notification under Section 6 of the Land Acquisition Act, 1894 was published?

2. Whether claimants are entitled for the benefit of Act No.68/1984?

3. Whether the claim of the claimants is barred by the provisions of Urban Land Ceiling Act, 1976?

4. Whether the reference is barred by time?

5. Whether the claimants are entitled for any other relief?

For Misc. Case No. 6/1997 following two issues were also framed:

6. Whether the claimants are entitled for a sum of Rs. 3 lac as compensation for trees?

7. Whether the claimants are entitled for a sum of Rs. 88005/- as a compensation for the construction situated on the said land?

In Misc. Case No.7/1997 following issue as Issue No.6 was framed:

6. Whether the claimants are entitled for a sum of Rs.1,75,000/- as compensation for standing trees and construction?

In Misc. Case No. 3/97 Issue No.6 was framed as:

6. Whether the claimants are entitled to receive a sum of Rs.48,000/- as compensation for construction?

(6) On behalf of parties, documentary as well as oral evidences were adduced and while deciding issues after considering the material on record, the learned Tribunal came to the conclusion that the respondents / claimants are entitled to the compensation of Rs.3.50 per sq. ft. The learned Tribunal while considering a case law reported in ***AIR 2002 Supreme Court 1558; (Special Land Acquisition Officer, BYDA, Bagalkot v. Mohd Hanif Sahib Bawa Sahib)*** has concluded that apart from the said compensation claimants are entitled for an enhancement @ 10 per cent per annum, which comes to Rs.2.44 per sq. ft., so a sum for which the claimants were found entitled was Rs.5.95 per sq. ft., the rate on which any bonafide purchaser would have purchased the land. Accordingly, the references were allowed and the award passed by the Land Acquisition Officer was also enhanced. Aggrieved with the said award, the present appeals have been filed by the appellants.

(7) We have heard learned counsel for the parties and have perused the material on record.

(8) Learned counsel for the respondents have moved applications under Order 41 Rule 33, readwith Section 151 C.P.C. with the prayer that this appellate Court, which granted additional compensation in view of Section 23 (1-A) of the Land Acquisition Act, which provides that in addition to the market value of the land, as above provided, the Court shall in every case award an amount calculated @ 12 per cent per annum on such market value for the period commencing on and from the date of the publication of the notification under Section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

(9) On this ground, learned counsel for the respondents has stated that in fact the notification under Section 28 of the Parishad Adhiniyam, 1956, which is equivalent to Section 4 of the Land Acquisition Act was published on 25.08.73, whereas declaration under Section 32 of the Parishad Adhiniyam, 1956 was published on 20.09.1980, which is equivalent to Section 6 of the Parishad Adhiniyam, 1956 and the possession of the land was taken on 5.12.86 and the relevant award in Section 11 of the Land Acquisition Act was declared on 6.11.1996 @ 1.22 per sq. ft. In this light, a prayer has been made for grating benefit of Section 23 (1-A) of the Land Acquisition Act, as stated above.

(10) It was ordered that the application under Order 41 Rule 33 of the Code of Civil Procedure shall be considered at the time of final disposal of the appeal. Accordingly, we have heard learned counsel for the applicants on this application also.

(11) Perusal of the award of the Tribunal reflects that the learned Tribunal while passing the award has taken into account the effect of Section 23 (2) of the Land Acquisition Act and has granted the relief. This apart, when in compliance of the Hon'ble Apex Court's order passed in ***Special Land Acquisition Officer, BYDA, Bagalkot v. Mohd Hanif Sahib Bawa Sahib (Supra)***, they have already been granted 10 per cent enhancement, so to our view, there is no need to grant any further enhanced interest thereon as particularly in the facts and situation the learned Tribunal

has already considered this aspect in its award. So, to our view, the application under Order 41 Rule 33 readwith Section 151 C.P.S. is not maintainable and is accordingly, rejected.

(12) The learned counsel for the appellants has stated that the award / decree passed by the learned Tribunal is erroneous as the learned Tribunal has not considered the sale exemplars filed by the appellants reflecting the market value of the land in question in the year 1980, which was approximately @ Rs. 1.00 per sq. ft. It is also argued that the learned Tribunal has erred in not considering the transactions of land, which is subject matter of Misc. Case No.8/97, which was purchased by the respondents @ 0.12 per sq. ft. on 07.08.1973, just before 18 days from the date of notification dated 25.08.1973 published under Section 28 of the Parishad Adhiniyam, 1965. It is also argued that the principal of adding 10 per cent per annum appreciation for determination of market value from the date of publication of notification under Section 28 of the Parishad Adhiniyam, 1965 up to the date of publication of notification under Section 32 of the Parishad Adhiniyam, 1965 is erroneous. The Tribunal has erred in not determining the market value of the land in question by adding appreciation of market value @ 10 per cent per annum to the value of land Rs. 0.12 per sq. ft. It is also stated that the learned Tribunal has relied upon the judgment of this Court passed in First Appeal No. 37 of 1985, which is also impugned in the appeal filed under Section 54 of the Land Acquisition Act by the appellants before the Hon'ble Apex Court in Special Leave Petition (Civil) No.26624 of 2004. In support of his argument, learned counsel for the appellants has cited a case law reported in ***(2009) 14 SCC page 758 Satish and others v. State of Uttar Pradesh and others***, wherein the Honble Apex Court has held in paragraphs 20 and 23, which is as under:

20. At the outset, it must be noticed that the learned Reference Judge as also the High Court refused to take into consideration a large number of deeds of sale relying on or on the basis of a decision of this Court in P. Venkaiah. Section 51-A of the Land Acquisition Act construction of which fell for consideration before this Court therein reads as under:

"51-A. Acceptance of certified copy as evidence - In any proceeding under this Act, a certified copy of a document registered under the Registration Act, 1908 (16 of 1908), including a copy given under Section 57 of that Act, may be accepted as evidence of the transaction recorded in such document."

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23. A Constitution Bench of this Court in Cement Conpn. Of India v. Purya opined that by reason of the insertion of Section 51-A, Parliament merely enabled a party to get over the problem, namely, calling for the original form the vendor or the vendee and proving the same and, thus, the decision of this Court in Collector v. Kurra Sambasiva Rao was held to be not laying down the correct proposition of law, holding : (Purya case, SCC p. 279, paras 18-20)

"18. From the above, it is seen that till the judgment of the three-judge Bench in Narasaiah case, the consensus of judicial opinion was that Section 51-A was enacted for the limited purpose of enabling a party to produce a certified copy of a registered sale transaction in evidence only and for proving the contents of the said document the parties had to lead oral evidence as contemplated in the Evidence Act.

19. A careful perusal of the judgment in Kurra Sambasiva Rao Case and other cases which fall in line with the said view discloses that they proceeded on the basis that prior to the insertion of Section 5-A in the LA Act, the evidence Act did not permit the production of a certified cop of the registered sale transaction in evidence. Therefore, by the insertion of Section 51-A the legislature merely enabled a party to get over that problem. Thereafter, according to the said judgments, the party concerned had to prove the contents of the document by adducing oral evidence separately to prove the contents of the document.

20. The above view of the Court in Kurra Sambasiva Rao case, in our opinion, is not the correct position in law. Even prior to the insertion of Section 51-A of the Act the provisions of the Evidence Act and the Registration Act did permit the production of a certified copy in evidence. This has been clearly noticed in narsaiah case wherein the Court relying on Sections 64 and 65(f) of the Evidence Act read with Section 57(5) of the Registration Act held that production of a certified copy of a registered sale document in evidence was permissible in law even prior to insertion of Section 51-A in the LA Act. We are in agreement with the said view expressed by this Court in Narasaiah case.

The Constitution Bench, thus, laid down the law that for paying for a certified copy of a registered deed of sale, the vendor and vendee thereof need not be examined.

(13) Basing this case law, learned counsel for the appellants has stressed that the learned Tribunal had not relied upon the exemplars produced on behalf of appellants and also has failed to appreciate that the respondents had purchased the land on the very meager amount and on calculation it comes to Rs.0.12 per sq. ft. and the Tribunal has granted compensation arbitrarily on a very high rate which is not admissible in law.

(14) So far as the grounds raised by the learned counsel for the appellants in these appeals to the effect that the learned Tribunal has not taken the exemplars produced on their behalf in their right prospective and has wrongly assessed the value of the land under appeals @ 3.50 per sq. ft. is concerned, it is evident from the impugned judgment that the learned Tribunal has referred the various exemplars, which are from paper no. Ga-41 to Ga-61 and has taken into account these documents. This apart, the learned Tribunal has also taken into account various cases decided by the Tribunal itself and by this Court regarding a similar notification of the village Khurram Nagar. The learned Tribunal has considered the paper nos.Ga-64, Ga-65, and Ga-66, which are the cases decided by the Tribunal and by this Court regarding the same area of land and has come to the conclusion that the Tribunal as well as this Court has already granted compensation to the land which is in the vicinity of the land covered under the appeals at a sum of Rs.3.50 per sq. ft.. To our

view, very purpose of considering the exemplars is to enable the authority who is assessing the value of the land to come to a correct conclusion, so far as the land under reference is concerned, the exemplars are usually produced before the authority concerned just to show the example regarding the value of the land which is prevailing at the relevant time in the locality where the land is situating. To our view, when the tribunal has considered its own judgment as well as judgment of this Court regarding the land of village - Khurram Nagar, which was already decided, this was the best piece of exemplars before the Tribunal and to our view in considering those judgments, the learned Tribunal has not committed any error. The perusal of the order of the learned Tribunal also reflects that the learned Tribunal has also considered the paper nos. Ga-31, Ga-32, Ga-33, Ga-34 and Ga-35, which are the orders passed by the learned Tribunal as well as the order passed by this Court regarding the land situating at village Khurram Nagar, wherein the value of the land has been assessed @ 3.50 per sq. ft, so to our view, there is no force in the argument of learned counsel for the appellants that the value of the land assessed by the Tribunal had a higher side and also there is no force in the argument that the Tribunal has not considered the exemplars produced on their behalf. So far as, the arguments of learned counsel for the appellants to the effect that in fact Shri Rajeev Kapoor has purchased the land in dispute few days before the notification @ 12 paisa per sq. ft has also not much relevance because of the fact that as per the judgment passed in the matter of **Gauri Shankar Gaur** (Supra), the Hon'ble Apex Court has directed to assess the value of the land on the date of notification under Section 6 of the Land Acquisition Act, so the value of the land on the date of the purchase of the land which is in the year 1973 has got no relevance and in fact the value of the land is to be assessed on the date of notification under Section 6 of the Land Acquisition Act, which is dated 20.09.1980 and taking into account the various factors as stated above, to our view, the learned Tribunal has not committed any error in assessing the value of the land @ 3.50 per sq. ft. This apart, learned counsel for the appellants has not pressed any other point before this Court like rate of interest or the rate of solatium etc. So to our view, the assessment of value of the land @ 3.50 per sq. ft as well as the rate of interest as granted by the Tribunal while deciding Issue No.2 has got no error and is liable to be affirmed. 10 per cent per year enhancement granted by the learned Tribunal following the case law reported in the case of ***Special Land Acquisition Officer, BYDA, Bagalkot v. Mohd Hanif Sahib Bawa Sahib (Supra)*** is also said to be payment of calculation factor were detailed by the appellants for petty long period.

(15) A case law cited on behalf of respondents is ***AIR 2004 SC 4135 (Om Prakash (D) by L.Rs. And others v. Union of India and another),*** relevant portion of the judgment is as under:

"In the circumstances, the High Court was justified in working out the fair market value of the lands in question on the basis of Rs.16,750/- per bigha as on 30-10-1963. The High Court noticed that in several judgments of this Court escalation at different and varying rates i.e. 6% per annum for every year from 1966 to 1978 and @ 12% per annum from 1975 had been considered to be reasonable increase to arrive at the fair market value, assuming that the pace of escalation during this period was normal for the entire period from 1959 had been considered to be reasonable increase to arrive at the fair market value assuming that the pace of escalation during this period was normal for the entire period from 1959 onwards. Since no material was placed on record to show that there was any obnormality during the period, the High Court applied the same

principle to the facts and circumstances before it, and accepted increase of 10 % every year progressively from 1963 to 1973 and thereafter @ 12% every year progressively up to the date of acquisition."

(16) Another case law cited on behalf of learned counsel for the respondents is ***AIR 2003 SC 4382 (Bhim Singh and others v. State of Hariyana)***. In para 6 of the judgment, the Hon'ble Apex Court has held as under:

"6. On behalf of the Appellants it was submitted that the High Court erred in not taking into account the sale instances which had been brought on record. It was pointed out that the High Court had held, in respect of most of the sale instances, that they could not be relied upon as the vendor and/or vendee had not been examined. Reliance was placed upon the Judgment of this Court in the case of Land Acquisition Officer & Mandal Revenue Officer v. V. Narasaiah . In this case reliance was placed upon Section 51A of the Land Acquisition Act and it was held as follows:

"If the only propose served by Section 51A is to enable the court to admit the copy of the document in evidence there was no need for a legislative exercise because even otherwise the certified copy of the document could have been admitted in evidence.

The State has the burden to prove the market value of the lands acquired by it for which the State may have to depend upon the prices of lands similarly situated which were transacted or sold in the recent past, particularly those lands situated in the neighbouring areas. The practice had shown that for the state officials it was a burden to trace out the persons connected with such transactions mentioned in the sale deeds and then to examine them in court for the purpose of proving such transactions. It was in the wake of the aforesaid practical difficulties that the new Section 51A was introduced in the LA Act. When the section says that certified copy of a registered document "may be accepted as evidence of the transaction recorded in such document" it enables the court to treat what is recorded in the document, in respect of the transactions referred to therein, as evidence.

The words "may be accepted as evidence" in the section indicate that there is no compulsion on the court to accept such transaction as evidence, but it is open to the court to treat them as evidence. Merely accepting them as evidence does not mean that the court is bound to treat them as reliable evidence. What is sought to be achieved in that the transactions recorded in the documents may be treated as evidence, just like any other evidence, and it is for the court to weigh all the pros and cons to decide whether such transaction can be relied on for understanding the real price of the land concerned."

It was submitted that even though the Reference Court and the High Court had not taken the sale instances into account in view of the then prevailing law, this Court can and should took into the sale instances to arrive at the compensation payable. A number of sale documents were shown in this Court. It was submitted that if an average of all these sale instances is taken the price would come to over Rs. 500 per square yards. We are unable to accept this submission. In

many of the sale instances the price is inclusive of price of the structures standing on the land. Even otherwise when compensation has already been fixed by the High Court in earlier proceedings and when in one such proceeding this Court has already approved the rate fixed then in our view the best method would be to look at the earlier Judgments and Awards. Therefore the High Court cannot be faulted for having fixed compensation on the basis of earlier Judgments.

(17) In a similar matter of village Khurram Nagar, the Division Bench of this Court while deciding First Appeal No.10 of 1995 ***(B.N. Tandon v. State of U.P. Avas Evam Vikas Parishad and others)*** has also granted compensation @ Rs. 3.50 per sq. ft.

(18) Whereas, learned counsel for the respondents has stated that in fact now it is well settled proposition of law that respondents-claimants are entitled to get the market value of the acquired land prevalence on the date of notification under Section 6 of the Land Acquisition Act, which is akin to the notification under Section 28 of the Parishad Adhiniyam, 1965, so it is wrong to say that the calculation should have been made @ Rs.0.12 per sq. ft., the rate on which the claimants had purchased the land in the year 1973. It is evident that the notification under Section 28 of the Parishad Adhiniyam, 1965 was published on 20.9.1980 and the award was passed on 06.11.1996. It is also argued on behalf of the respondents that the learned Tribunal has considered various case laws and the orders passed by this Court, wherein for the same award @ 3.50 per sq. ft. was passed. This apart, the learned Tribunal has rightly granted 10 per cent enhancement while applying the law enumerated by Hon'ble Apex Court in the case of ***Special Land Acquisition Officer, BYDA, Bagalkot v. Mohd Hanif Sahib Bawa Sahib (Supra),*** so the order passed by the Tribunal is justified and it does not require any interference of this Court.

(19) In view of the aforesaid facts, to our view, the learned Tribunal has rightly assessed the value of the land, interest factors and the learned counsel for the appellants has failed to persuade us to take any different view than what has been taken by the learned Tribunal and there is no material on record to take any different view in the matter and to our view there is no such material irregularity or illegality in the order of the Tribunal, which may be interfered with in this appellate jurisdiction, so these appeals have got no force and are liable to be dismissed.

(20) Accordingly, these appeals are **dismissed**.

(21) The application under Order 41 Rule 33 readwith Section 151 C.P.C. (C.M. Application No. 27062 of 2015 in First Appeal No.10 of 2006), moved by the respondents is also **rejected**.

(2016) 9 ILRA 774
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 236 Of 2013

Sunita **...Revisionist**
Versus
State Of U.P. & Anr. **...Opposite parties**

Counsel for the Revisionist:
Shri Sanjay Mishra

Counsels for the Opposite Parties:
G.A., Shri Ashish Nigam, Shri M. Asif

Held –

Para 1 — Appearance of Counsel: The Court heard Sri Sanjay Mishra, learned counsel for the revisionist (Sunita), Sri M. Aasif, learned counsel for Opposite Party No. 2 (husband Lalit Prasad), and the learned A.G.A. representing Opposite Party No. 1 (State of U.P.).

Para 2 — Case Background & Lower Court Orders: The revisionist, Sunita, filed this criminal revision against the judgment dated 01.11.2012 passed by the Additional Sessions Judge (Court No. 11, Aligarh) in Criminal Revision No. 162 of 2008. The Sessions Court had partly allowed the husband's revision by confirming maintenance of ₹1,500/month for the minor daughter (Rinkashu) until majority, but set aside/dismissed the maintenance awarded to the wife (Sunita).

Para 3 — Submissions by Revisionist's Counsel: Counsel for the wife argued that pleadings and evidence clearly established she was living separately for valid reasons. The trial court (Judicial Magistrate) had initially awarded ₹1,500/month each to the wife and daughter on 07.02.2008. He contended that the Sessions Court committed a manifest error of law in setting aside the wife's maintenance.

Para 4 — Submissions by Respondents: Counsel for the husband and the learned A.G.A. opposed the revision, supporting the findings of the court below.

Para 5 — Decision on Issue No. 2 by Trial Court: The Judicial Magistrate had originally discussed four issues, specifically deciding Issue No. 2 ("whether the applicant is living separately with her husband due to proper reasons") in favor of the wife after a detailed appreciation of the evidence.

Para 6 — Contrary Finding by Revisional Court: Upon revision, the Additional Sessions Judge took a reverse view on Issue No. 2, deciding it against the wife and disentitling her from maintenance.

Para 7 & 8 — Revisional Jurisdiction & Need for Re-adjudication: While revisional courts generally have a narrow scope for re-appreciating evidence, the existence of directly conflicting findings between the Magistrate and the Sessions Judge on Issue No. 2—a pivotal issue under Section 125 Cr.P.C.—necessitates that it be adjudicated afresh in the interest of justice.
Para 9 & 10 — Operative Order & Remand: The criminal revision is allowed, and the matter is remanded back to the Sessions Judge, Aligarh, to re-decide Issue No. 2 afresh based on the existing evidence within one month from receiving a certified copy of the order.

Citations Listed in the Judgment
Islamuddin v. State, 1975 Cri LJ 841, 842 (Del HC)

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

1. Heard Sri Sanjay Mishra, learned counsel for the revisionist, Sri M. Aasif, learned counsel for the opposite party no. 2 and learned A.G.A. for the opposite party no. 1.

2. The revisionist Sunita has filed this revision against the judgment and order dated 01.11.2012 passed by the learned Additional Sessions Judge, Court No. 11, Aligarh in Criminal Revision No. 162 of 2008-Lalit Prasad Vs. State of U.P. and Sunita, whereby the learned Additional Sessions Judge has partly allowed the criminal revision and confirmed the judgment and order dated 07.02.2008 passed by the learned Judicial Magistrate, Court No. 1, Aligatrh in Case No. 250/11/07-Sunita Vs. Lalit Prasad, with regard to the maintenance allowance of the daughter Rinkashu and directed that minor daughter Rinkashu will be entitled for the maintenance allowance of Rs. 1500/- per month from the date of judgment and order dated 07.02.2008 till she becomes major. This maintenance allowance shall be given on the 10th day of every Gregorian Calendar month. However, the learned Additional Sessions Judge by the impugned judgment and order dated 01.11.2012 has dismissed the maintenance allowance application of Smt. Sunita (wife). Aggrieved by the said judgment and order, the revisionist Smt. Sunita has preferred this criminal revision.

3. Learned counsel for the revisionist submitted that from the pleadings and evidence of the parties, it is abundantly established that the revisionist is living separately from her husband opposite party no. 2. It is further submitted that an application under Section 125 Cr.P.C. was filed by the revisionist before the learned Judicial Magistrate, Court No. 1, Aligarh which was allowed vide order dated 07.02.2008 with the direction to opposite party no. 2 to pay Rs. 1500/- per month to her and Rs. 1500/- to her minor daughter Rinkashu. The said order was challenged by the husband opposite party no. 2 in Criminal Revision No. 162 of 2008, which has been partly allowed by the impugned judgment and order dated 01.11.2012. It is further submitted that the learned Additional Sessions Judge has committed manifest error of law in passing the impugned order, which is not sustainable in the eyes of law and is liable to be quashed.

4. Learned counsel for the opposite party no. 2 and learned A.G.A. opposed the submission advanced by learned counsel for the revisionist and submitted that the impugned judgment and order has rightly been passed by the learned Judicial Magistrate, Court No. 1, Aligarh.

5. The learned Judicial Magistrate, Court No. 1, Aligarh in it's judgment and order dated 07.02.2008 has discussed in detail all the four issues which were framed in the case. The main issue which has been assailed in the present criminal revision is regarding Issue No. 2 which was framed as "*whether the applicant is living separately with her husband due to proper reasons*". This issue has been decided on merits after discussing the evidence available before the learned Judicial Magistrate, Court No. 1, Aligarh.

6. The Issue No. 2 again came up for scrutiny before the learned Additional Sessions Judge, Court No. 11, Aligarh while deciding the criminal revision No. 162 of 2008 and the learned Additional Sessions Judge, Court No. 11, Aligarh has taken a reverse view and decided the Issue No. 2 against the present revisionist Smt. Sunita.

7. In revisional jurisdiction, re-appreciation of evidence has a scope of very narrow compass.

8. The revisional jurisdiction does not postulate re-appreciation of evidence, but that should be appreciated in the light of the limitation on the right to go in appeal, *Islamuddin v. State, 1975 Cri LJ 841, 842 (Del HC)*.

9. However, there is conflicting finding by the learned Judicial Magistrate, Court No. 1, Aligarh and the learned Additional Sessions Judge, Court No. 11, Aligarh regarding appreciation of evidence while discussing and adjudicating upon the Issue No. 2. The Issue No. 2 plays a pivotal role in deciding this case. The ends of justice requires that the Issue No. 2 must be adjudicated afresh.

10. Resultantly, this criminal revision deserves to be allowed.

11. The criminal revision is **allowed**.

12. The matter is remanded back. The learned Sessions Judge, Aligarh is directed to decide the Issue No. 2 afresh after appreciation of evidence already available on record, in accordance with law within a period of one month from the date of production of a certified copy of this order.

(2016) 9 ILRA 777
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal No.- 246 Of 1998

Ram Pal & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
Shri M.L. Syal, Shri P.K. Singh, Shri Param Shankar (Amicus Curiae)

Counsel for Respondent:
Govt. Advocate

Held –
Para (1) — Representation: Heard arguments from Sri Param Shankar (Amicus Curiae for the accused-appellants) and Sri Sharad Dixit (Learned AGA for the State).
Para (2) — Appeal Background: Criminal appeal challenging the judgment dated 27.03.1998 of the Special Judge, Hardoi, convicting appellants (Rampal, Munshi, Sri Krishana, and Surendra) under Sections 302/34 IPC (life imprisonment) and 308/34 IPC (3 years R.I.).
Para (3) — Prosecution Narrative: Complainant Prakash reported that after disabled land-owner Sukhai's wife (Ramkali) gave their field to Prabhu for ploughing instead of the accused nephews, the annoyed accused attacked Ramkali. Prabhu intervened to rescue her and was fatally beaten, dying on the way to the hospital.
Para (4) — FIR & Post-Mortem Initiation: Case Crime No. 267/1995 registered under Sections 302/307 IPC. S.I. Harish Chandra initiated the investigation, and Dr. A.K. Srivastava conducted the post-mortem on 20.10.1995.
Para (5) — Charge-Sheet & Trial: Charge-sheet filed under Sections 302/34 and 307/34 IPC. The accused pleaded not guilty and claimed trial.
Para (6) — Prosecution Evidence (PW-1 to PW-4): Key testimonies recorded from Prakash (PW-1), Sitaram (PW-2), injured Ramkali (PW-3), and Dr. Srivastava (PW-4), who detailed four ante-mortem injuries (incised, stab, and lacerated wounds) on the deceased.
Para (7) — Internal Injuries & Cause of Death: Autopsy revealed a fracture of the left parietal bone and lacerated brain membranes; cause of death was shock and hemorrhage from ante-mortem injuries.
Para (8) — Police & Medical Testimony (PW-5 to PW-9): Testimonies of IOs and police personnel detailing FIR registration, inquest, site plan, and post-mortem transfer. Dr. Chandra Kishore Gupta (PW-9) detailed Ramkali's scalp and body injuries.
Para (9) — Medical Opinion on Injured: Following X-ray evaluation, PW-9 opined that Ramkali's injuries were simple in nature.
Para (10) — Statement under Section 313 Cr.P.C.: Accused denied charges, claimed false implication, and filed two documents in defense.

Para (11) — Trial Court Finding: Trial court found the accused guilty beyond reasonable doubt and sentenced them under Sections 302/34 and 308/34 IPC.
Para (12) — High Court Appeal: Appellants appealed against the trial court's conviction and order.
Para (13)–(14) — Defense Arguments: Defense argued failure to establish place of occurrence (no blood found), self-inflicted injuries on PW-3, lack of motive, general non-specific roles assigned, and unreliability of related/interested witnesses (PW-1 and PW-3).
Para (15) — Prosecution Counter-Arguments: State argued the FIR was prompt, motive was established (dispute over land cultivation), eyewitnesses were credible, and lack of blood recovery was merely a defect in investigation.
Para (16) — Medical Corroboration (Deceased): Court observed that post-mortem injuries (stab, incised, lacerated) on Prabhu matched the alleged weapons (*ballam* and *lathi*) and were sufficient to cause death.
Para (17) — Medical Corroboration (Injured): Ramkali's lacerated scalp injury aligned with the prosecution's claim of a *lathi* strike.
Para (18) — Promptness of FIR: FIR was lodged at 7:15 PM, shortly after the 6:00 PM incident, with the police station being only 1.5 furlongs away, giving full credibility to the timeline.
Para (19)–(21) — Precedents on FIR Delay: Citing Supreme Court precedents, the court noted that prompt reporting eliminates chances of a fabricated story or prior deliberation.
Para (22)–(24) — Reliability of Related Witnesses: Reviewing Supreme Court jurisprudence, the court affirmed that testimonies of related or interested witnesses cannot be discarded if consistent and corroborated by medical evidence.
Para (25) — Establishment of Motive: Prosecution successfully proved motive—accused were enraged because Ramkali transferred cultivation rights from them to Prabhu.
Para (26)–(27) — Legal Principle on Motive: Citing Supreme Court rulings, the court emphasized that where reliable direct eye-witness testimony exists, absence or proof of motive is secondary.
Para (28)–(30) — Eyewitness Consistency: Eye-witness accounts of PW-1 and injured witness PW-3 consistently established the sequence of events, weapon usage, and presence at the scene.
Para (31)–(33) — Challenge to Place of Occurrence Rejected: Citing Supreme Court precedent, the court held that an IO's failure to collect blood-stained earth does not disprove the place of occurrence when reliable ocular testimony exists.
Para (34) — Court's Finding: High Court found no infirmity in the prosecution's case and concluded that guilt was proven beyond reasonable doubt.
Para (35) — Final Order: Appeal dismissed; conviction and sentence affirmed. Bail of appellants Rampal, Sri Krishna, and Surendra cancelled with orders to surrender immediately.
Para (36) — Administrative Directions: Office directed to communicate the order to the trial court immediately and return the lower court record for execution.

List of Case Cited:
Kishan Singh through LRs v. Gurpal Singh and others, (2010) 8 SCC 775
Nanhe v. State of Uttar Pradesh, 1973 (3) SCC 317
Nagappan v. State (by Inspector of Police, Tamil Nadu), (2014) 3 SCC (Cri) 660
Darbara Singh v. State of Punjab, (2012) 10 SCC 476
Ram Avtar Rai and Ors. v. State of Uttar Pradesh, (1985) 2 Supreme Court Cases 61

(Delivered by Hon'ble Anil Kumar, J.
&
Hon'ble Anil Kumar Srivastava-II, J.)

(1) Heard Sri Param Shankar, Amicus Curiae on behalf of the accused-appellants and Sri Sharad Dixit, learned AGA for the State.

(2) Instant criminal appeal has been preferred by the accused-appellants Rampal, Munshi, Sri Krishana and Surendra challenging the judgment and order dated 27.3.1998 passed by Special Judge (E.C. Act)/ Additional District and Sessions Judge, Hardoi in Session Trial No.14 of 1996, arising out of Case Crime No. 267 of 1995, under Section 302/307 IPC, Police Station Pihani, District Hardoi convicting and awarding them imprisonment for life under Section 302/34 IPC, they have been further convicted and sentenced to three years' R.I. under Section 308/34 IPC.

(3) According to the prosecution version, complainant Sri Prakash lodged an FIR at Police Station-Pihani, District-Hardoi on 19.10.1995 at about 19.15 hours alleging that Sukhai and Chhatai were the real brothers. Sukhai was physically disabled so he was not able to look after his field. As such, the work to look after the field had been entrusted to accused who were son of brother of Sukhai. On 18.10.1995 Ramkali wife of Sukhai, had got the field ploughed through Prabhu, as a result of which the accused got annoyed. On 19.10.1995 at about 6.00 PM, accused Munshi armed with Ballam, Rampal, Sri Krishna and Surendra armed with lathi came to the house of Ramkali and started beating her in front of the house. On raising alarm by Ramkali, brother of the complainant Prabhu along with Rajendra, Chhannoo son of Radhey Shyam and Sitaram son of Bhagwati Dhobi and others residents of the same village/muhalla reached at the spot Prabhu in order to rescue Smt. Ramkali firstly reached the spot. When Prabhu tried to rescue Smt. Ramkali then he was beaten by the accused. Prabhu, received the injuries. He was being taken to Pihani Hospital but succumbed to his injuries on the way. Ramkali also received the injuries in the incident.

(4) FIR was lodged at case crime no.267 of 1995 under Section 302/307 IPC. Investigation was handed over to S.I. Harish Chandra. S.I. Harish Chandra proceeded to hospital; prepared the inquest, recorded the statements of witnesses and prepared a site plan. The dead body was sealed and sent for postmortem and postmortem was done on 20.10.1995 at 3.00PM by Dr. A.K. Srivastava P.W.4. at District Hospital, Hardoi.

(5) After conclusion of the investigation charge-sheet was submitted against the accused-appellants. Accused-appellants were charged under Section 302 IPC read with Section 34 and Section 307 IPC read with Section 34 IPC. They denied the charges and claimed trial.

(6) Prosecution has produced P.W.1 Prakash complainant and eye witness, P.W. 2 Sitaram eye witness, P.W.3 Smt. Ramkali injured and eye witness, P.W. 4 Dr. A. K. Srivastava who has conducted the postmortem examination of the dead body of the deceased and found the following ante mortem injuries on the body of the deceased:-

(1) A incised wound 2.5cm x 1cm x bone deep on left side parietal region skull. Direction oblique. Clotted blood present.

(2) A stab wound 1.5cm x 1 cm x abdominal cavity on right side upper part abdomen at right nipple hypocnondrium region, 11cm from left nipple at 5 O'Clock position.

(3) A stab wound 1cm x .5cm x abdominal cavity deep on right side abdomen, 11cm above from right iliac crest.

(4) A lacerated wound 1/2cm x1/2cm x skin deep on back of left index finger, 4cm above from the base of index finger.

(7) On internal examination, he found fracture on left parietal bone under injury no.1 membranes of skull of brain was also found lacerated. According to Dr. A. K. Srivastava cause of death was shock and haemorrhage as a result of ante mortem injuries. Duration was about one day.

(8) P.W. 5 S.I. Ram Samujh Misra is the investigating officer in whose presence, the case was registered at the police station. He conducted the inquest proceedings recorded the statement of complainant, prepared the site plane and sent the dead body for postmortem. P.W.6 Constable Shiv Mangal Yadav has taken the dead body in sealed condition to the hospital to the postmortem. P.W. 7 S.I. H.C.Jagdish Prasad Dwivedi has prepared the chick FIR and entered the same in the G.D. of the Police Station. P.W. 8 S.O Harish Chandra Singh has taken over the investigation from S.I. Ram Samuj Misra concluded the investigation and submitted the charge against the accused. P.W. 9 Dr. Chandra Kishore Gupta has conducted the medico legal examination of injured Ramkali on 19.10.1995 at 9.40PM and found following injuries on her body:-

(1) Lacerated wound scalp right side 6cm above right ear, size 3.5cm x 0.5cm subcut deep. Fresh clot present.

(2) Complaint of pain right shoulder. No visible injury.

(3) Complaint of pain right, ankle. No visible injury. Condition Poor, Pulse 96p.m. B.P.100/70.

(9) X-ray of injury no.1 was also advised but after the receipt of the X-ray plate and X-ray report he had opined that the injuries of the injured were simple in nature.

(10) In statement under Section 313 Cr.P.C. of the accused were recorded and they have stated that they have been falsely implicated in this case. Two papers were filed in their defence.

(11) After appreciating the evidence on record, learned trial court has recorded a finding of guilt against the appellants and came to the conclusion that the prosecution has successfully proved the charges against the accused-appellants. Accordingly convicted and sentenced them under Section 302 IPC read with 34 IPC and Section 308 read with 34 IPC.

(12) Feeling aggrieved by the impugned judgment and order appellants have preferred the present appeal.

(13) Learned Amicus Curiae for the appellants has submitted that the prosecution has failed to prove the charges against the accused beyond reasonable doubt.

(14) It is submitted by him that prosecution has failed to establish the place of occurrence. Incident might have been taken place at some other place. Accused have falsely been implicated by the prosecution. In order to substantiate his argument. It is submitted that no blood was found at the place of occurrence by the investigating officer. P.W. 3 Ramkali has sustained self inflicted injuries. It is further argued that there was no motive for commission of the offence. Motive as alleged has not been proved. Accused are the son of the brother of the husband of Ramkali. They have no grudge against the deceased. They were ploughing field of Ramkali. There was no reason as to why Prabhu ploughed the field. It is further argued that no specific role has been assigned to any accused rather a general role has been assigned to all the accused except Munshi. P.W.1 Prakash is real brother of deceased whose evidence could not be relied upon. Evidence of P.W.3 Ramkali could not also be relied upon as her presence at the scene of occurrence is doubtful.

(15) Per contra, learned AGA submits that the first information report was lodged promptly. There was no reason to falsely implicate the accused rather there was a definite motive to commit the crime by the accused as earlier they were ploughing the field of Ramkali and enjoying fruit but when Ramkali did not get anything out of her field from the accused then she got it ploughed through the deceased Prabhu. Accused got annoyed resulting in the commission of crime. It is further submitted that the evidence of injured P.W. 3 Ramkali as well as P.W.1 Prakash is fully reliable evidence. P.W. 1 Prakash cannot be disbelieved only on the ground of being a relative and interested witness rather he is a natural witness who was present at the scene of occurrence. It is further submitted by learned AGA that presence of P.W.3 Ramkali at the place of occurrence is also established as she got injuries in the incident and was medically examined at 09.40 PM on the same day. Even, if the blood stained earth was not recovered by the investigating officer or he did not find any blood at the place of occurrence it does not mean that the place of occurrence was different as it could be a case of defective investigation only.

(16) Occurrence took place on 19.10.1995 at 6.00PM while the first information report was lodged on the same day at 07.15PM. According to the prosecution version, injuries were inflicted by ballam as well as lathi. Before proceeding further we would like to deal with the medico legal aspect of the matter. Specific case of causing injuries by ballam and lathi has been taken by the prosecution. According to the postmortem report, which was duly proved by P.W.4 Dr. A.K. Srivastava, two stabbed wound, one incised wound and one lacerated wound were found on the body of the deceased Prabhu. According to Dr. Srivastava injuries no.1, 2 and 3 could have been caused by ballam while injury no.4 could be caused by hard and blunt object like lathi. Injuries no.1, 2 and 3 are sufficient in the ordinary course to cause death.

(17) P.W. 9 Dr. Gupta has medico legally examined the injuries of Ramkali and found lacerated wound on her head. According to Dr. Gupta, this injury was caused by hard and blunt object like lathi. X-ray was also advised but no fracture was found. Dr. Gupta opined that the injuries was simple in nature. Hence, it is fully established that the injuries which were found on the

body of the deceased as well as injured Ramkali could have been caused by the weapons like ballam and lathi as alleged by the prosecution.

(18) P.W. 1 Prakash is brother of deceased Prabhu who along with deceased and Rajandra was sitting at the door of his house while accused came and assaulted Ramkali. When she cried then Prabhu, Rajendra, Chhannoo proceeded towards her to protect her from the assault. Since Prabhu was first to reach then accused Munshi hit him by ballam while Rampal and Sri Krishana caused injuries by lathi. According to P.W.1 Prakash, after the incident he took the deceased in injured condition to Pihani Hospital who succumbed to his injuries on the way. Dead body was left by him in the hospital. He got the report written by one Ramchand Gupta and tendered the same at the police station. P.W. 3 Ramkali is the injured who has also supported the version of P.W.1 Prakash and stated that after the incident Prakash along with Prabhu took her to P.H.C. Pihani. Prabhu succumbed to the injury on the way, thereafter, written report was written scribe of the report was a hotel owner report was submitted at the police station from where she was sent for medico legal examination. This statement further find support from the statement of P.W.7 H.P. Jagdish Prasad Dwivedi who prepared the chick FIR and made an entry of the same in the G.D. Distance of the police station from the place of occurrence is about 1 and Â½ furlong. It was a prompt FIR just after the incident first information report was lodged at the police station.

(19) It has been held by the Apex Court in the case of in **Kishan Singh through LRs v. Gurpal Singh and others** reported in **(2010) 8 SCC 775** the Supreme Court held that "*Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained.*"

(20) It has been held by the Hon'ble the Apex court in the case of ***Nanhe Vs. State of Uttar Pradesh reported in 1973 (3) SCC 317*** has held that a prompt F.I.R. eliminates the chances of cooking up of a false story.

(21) In this case, FIR was lodged promptly without any undue delay. There was no occasion for the complainant for any consultation or deliberation prior to the lodging of FIR.

(22) Learned counsel for the accused-appellants submitted that P.W.1 Prakash is a real brother of the deceased while P.W.3 Ramkali is also an interested witness. Hence their evidence could not be held reliable.

(23) In a recent judgment in the case of ***Nagappan Vs. State (by Inspector of Police, Tamil Nadu) reported in (2014) 3 SCC (Cri) 660*** Hon'ble the Apex Court in paragraph no. 10 has observed as under :-

"10. As regards the first contention about the admissibility of the evidence of PW 1 and PW 3 being closely related to each other and the deceased, first of all, there is no bar in

considering the evidence of relatives. It is true that in the case on hand, other witnesses turned hostile and have not supported the case of the prosecution. The prosecution heavily relied on the evidence of PW 1, PW 3 and PW 10. The trial court and the High Court, in view of their relationship, closely analysed their statements and ultimately found that their evidence is clear, cogent and without considerable contradiction as claimed by their counsel. This Court, in a series of decisions, has held that where the evidence of "interested witnesses" is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they were interested witnesses. In other words, relationship is not a factor to affect the credibility of a witness. " (emphasis added)

(24) We have to scrutinize the evidence on record to find out as to whether evidence of P.W.1 Prakash and P.W.3 Ramkali is wholly reliable, trustworthy or not?

(25) Specific motive has been alleged by prosecution. Admittedly Chetai and Sukhai were son of one Bahadur. P.W.3 Ramkali is the wife of Sukhai. It is also admitted that Sukhai was physically disabled person who was suffering from disease of leprosy. According to the prosecution agricultural land of Sukhai and Chetai was divided on family partition basis. 4 and 5 years prior to the incident Sukhai stopped cultivating the field due to his illness. Hence, field was given on 'batai' to the sons of Chetai. Accused are sons of Chetai. Subsequently, Ramkali did not get the fruits of her land then prior to 2-4 days before the date incident, she gave her share to Prabhu on 'batai' and one day prior to the incident Prabhu and Ramkali have also ploughed the filed by tractor, so accused were very much annoyed. This fact further finds support from the statement of P.W.3 Ramkali who has stated that she gave her land to Prabhu for ploughing due to which accused persons got annoyed. It was a motive due to which accused have committed crime.

(26) In the case of **Darbara Singh Vs. State of Punjab (2012) 10 SCC 476**; Hon'ble the Apex Court has observed in paragraph no.15 and 16 as under:-

"15. So far as the issue of motive is concerned, it is a settled legal proposition that motive has great significance, *but where direct evidence is available, which is worth relying upon, motive loses its significance.* In the instant case, firstly, there is nothing on record to reveal the identity of the person who was convicted for rape, there is nothing on record to determine the identity of this girl or her relationship to the co-accused Kashmir Singh. More so, the conviction took place 20 years prior to the incident. No independent witness has been examined to prove the factum that the Appellant was not on talking terms with Kashmir Singh. *In a case where there is direct evidence of witnesses which can be relied upon, the absence of motive cannot be a ground to reject the case. Under no circumstances, can motive take the place of the direct evidence available as proof, and in a case like this, proof of motive is not relevant at all.*

16. *Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witness is not at all relevant. In such a fact-situation, the mere absence of a strong motive to commit the crime, cannot be of any assistance to the accused. ……."*

(Underlined by us)

(27) Although the motive is alleged by the prosecution which is also established even otherwise also it is a case of direct evidence where even motive is not proved an incident is proved by the direct evidence then accused could be held guilty.

(28) P.W.3 Ramkali is an injured witness who has specifically stated that at the time of occurrence, she was present outside her house when accused Munshi armed with ballam and Sri Krishana, Surendra and Rampal armed with lathi came and started abusing her. Surendra inflicted a lathi blow on her head. When she cry then Prabhu along with Prakash, Rajendra, Sitaram, Chhannoo came and then Rampal gave a lathi blow on the head of Prabhu, Munshi inflicted injuries by Ballam, Sri Krishana also inflicted injuries by lathi. P.W. 3 Ramkali was standing outside of her house at the time of occurrence while deceased and Prakash etc. were sitting at the door of the house. As soon as Surendra inflicted lathi blow, all of them came Single blow was given to P.W. 3 Ramkali by Surendra which finds support from the statement of P.W.9 Dr. Gupta and the medical examination report wherein only one lacerated wound was found on the head of Ramkali. Although, the said injury was found simple in nature. P.W.3 Ramkali has further stated that stabbed wound were caused to deceased Prabhu by Munshi by ballam. P.W.1 Prakash is also an eye witness who was present at the spot. P.W.1 Prakash has stated that Surendra did not give lathi blow to Prabhu. Munshi inflicted the injuries by Ballam.

(29) In the cross examination it has specifically been stated that all the accused have caused injuries to Prabhu by their respective weapons.

(30) P.W. 1 Prakash has given categorical statement that as soon as Prabhu reached near the house of Ramkali all the accused started attacking by their respected weapons. Prabhu felled down on the ground. This statement further found support from the statement of P.W.3 Ramkali her statement finds support from the medico legal examination. She was an injured witness whose presence at the place of occurrence is fully established. In fact, she is the lady who was attacked by Surendra by lathi then the whole prosecution story comes out. Genesis of the incident begins from the point when Ramkali was attacked on head by Surendra when she cried then Prabhu went to the spot who was attacked by the accused.

(31) At this stage, we may also analyze the argument as advanced by learned counsel for the appellant that the place of occurrence as alleged by the prosecution is not established. According to P.W.1 Prakash place of occurrence is outside the house of Ramkali. P.W.3 Ramkali has also stated that she was standing outside of her house. Prakash and other were sitting on the house of door. When accused came and started abusing her. On her residence Surendra gave a lathi blow on her head. It is also admitted that blood oozed out from the injuries and also fallen on the earth. P.W.5 Ram Samujh Misra investigating officer has stated that he has prepared the site plane on the pointing out of complainant. In the site plane, place of occurrence is shown by letter ''B' which is in front of house of Sukhai while complainant along with deceased and Rajendra was sitting at point ''A' which was in front of the house of the deceased. Distance of the house of

deceased from point ''A' is about three steps. Investigating officer P.W.5 S.I. Ram Samujh Misra stated that he did not find any blood at the place of occurrence.

(32) ***Ram Avtar Rai and Ors. Vs. State of Uttar Pradesh (1985)2 Supreme Court Cases 61***; it has been held in para 10 of the judgment:

"10. We agree with the High Court that the occurrence had taken place about 15 paces away from the house of the deceased and PW.1. It is true that blood-stained earth has not been recovered from the scene of occurrence by the investigating officer though as stated earlier the deceased had sustained as many as 5 lacerated injuries besides a number of contusions and abrasions. From the failure of the investigating officer to recover blood-stained earth from the scene of occurrence it is not possible to infer that the occurrence had not taken place in front of the house of the deceased and PW 1."

(33) Even if the investigating officer has not recovered or found the blood at the place of occurrence, it cannot be doubted that the place of occurrence has been changed by the prosecution. Consistent statement is given by P.W.1 Prakash and P.W.3 Ramkali regarding place of occurrence. P.W.3 Ramkali was also an injured witness whose statement cannot be discarded on any count. She is in the center point of the occurrence wherein deceased Prabhu was asked by her to plough her field on ''batai he agreed to it. Thereafter, since accused were earlier plouging the field on ''batai' they got annoyed consequently, they commit the crime. We, in no manner, believe that either P.W.1 Prakash and P.W 3 Ramkali were not present at the place of occurrence. Their statement are totally reliable.

(34) First information report was lodged promptly without any undue delay wherein accused-appellants were named in the report. Ocular statement of P.W.1 Prakash and P.W. 3 Ramkali finds support from the medico legal report as well as postmortem report. We do not find any contradiction or infirmity in the prosecution case. Accordingly, we are of the view that prosecution has successfully proved the charges against the accused-appellants and the appeal is liable to be dismissed.

(35) The appeal is **dismissed**. Judgment and order dated 27.3.1998 passed by learned trial court is confirmed. Accused Munshi is in jail. Appellants Rampal, Sri Krishna and Surendra are on bail. Their bail is cancelled and sureties are discharged. They should surrender before the trial court immediately to serve out the sentence as imposed by the learned trial court and confirmed by this court.

(36) Office is directed to communicate this order forthwith to the court concerned and to send back the lower court record to ensure compliance.

(2016) 9 ILRA 786
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.

Second Appeal No.- 266 Of 1986

Nankau **...Appellant**
Versus
Samiullah & Ors. **...Respondents**

Counsels for the Appellant:
Shri R.K. Nigam, Shri R.U. Pandey

CounselS for the Respondents:
Shri Fareed Ahmad, Shri Abhinandan Kumar Pandey, Shri B.K. Saxena, Shri Brijesh Kumar Yadav, Shri I.D. Shukla, Shri S.K. Mehrotra

Held –

i. 1. Representation & Context

2. The High Court heard arguments from counsel representing the appellant (seller) and respondents (purchasers). Respondent No. 2/1 remained unrepresented.

i. 2. Nature of Appeal & Case History

3. This Second Appeal under **Section 100 C.P.C.** challenges the First Appellate Court's judgment (dated January 22, 1986) which had reversed the Trial Court's decree (dated August 29, 1984). The Trial Court had dismissed the plaintiff's suit for specific performance, whereas the First Appellate Court allowed it.

i. 3. Factual Matrix

4. On January 24, 1979, an agreement for sale was entered into where the appellant agreed to sell part of Plot Nos. 1280 and 1281 in Village Manauli, District Sultanpur, to Respondent Nos. 1 and 2 for an advance consideration of ₹2,000. The sale deed was to be executed within two years after revenue record corrections.

i. 4. Plaint Claims

5. The plaintiff (Respondent No. 1) asserted readiness and willingness to perform his part of the contract. He issued legal notices on August 25, 1981, and October 23, 1981. Plot No. 1281 was excluded from the suit as revenue corrections remained pending for it.

i. 5. Defendant's Written Statement

6. The appellant/defendant denied executing the agreement, alleging fraud and undue influence. Being an illiterate *Halwaha* (ploughman) employed by the plaintiff, he claimed his thumb impression was obtained fraudulently. He also pleaded that the suit abated due to ongoing consolidation operations under the **U.P. Consolidation of Holdings (U.P.C.H.) Act** without prior permission under **Section 5(1)(c)(ii)**.

i. 6. Issues Framed by Trial Court

7. The Trial Court framed seven issues covering: entitlement to specific performance (Issue 1), refund of earnest money (Issue 2), limitation (Issue 3), abatement under Section 5(2) U.P.C.H. Act (Issue 4), valuation/court fees (Issue 5), general relief (Issue 6), and execution of the agreement (Issue 7).

i. 7. Findings of the Trial Court

8. The Trial Court decided limitation, abatement, valuation, and execution of the agreement in favor of the plaintiff. However, on Issues 1 & 2, it held that because the sale involved a **part of a holding** during consolidation without permission under **Section 5(1)(c)(ii)**, the contract was inexecutable. It ordered a refund of ₹2,000 with 6% interest instead of specific performance.

i. 8–9. First Appellate Court's Findings

9. The First Appellate Court re-evaluated the evidence (P.W.-1, P.W.-2, and hand-writing expert P.W.-3) and confirmed that the agreement was genuinely executed without fraud, rejecting the defendant's cross-objections.

i. 10–12. Reversal by First Appellate Court

10. The First Appellate Court noted that Plot No. 1280 was recorded as a 'chak out' land in Form C.H.-2. It held that obtaining permission was feasible and reversed the Trial Court's refusal to grant specific performance, decreeing the suit in full without granting detailed reasons for setting aside the statutory bar.

i. 13–15. Appellant's Arguments in Second Appeal

11. The appellant argued that:
12. Permission under Section 5(1)(c)(ii) U.P.C.H. Act was mandatory at the time and its absence rendered the agreement inexecutable.
13. The First Appellate Court gave no valid reasoning for reversing the Trial Court's findings.
14. The transaction was also hit by the bar on fragmentation under **Section 168-A of the U.P.Z.A. & L.R. Act**.

i. 16–18. Respondent's Arguments in Second Appeal

15. The respondent argued that:
16. Being 'chak out' land, no consolidation permission was necessary.
17. Section 5(1)(c)(ii) was omitted by **U.P. Act No. 30 of 1991** during the pendency of the appeal, and the Court must apply the law as it stands today.

i. 19–20. Interim Order & Substantial Questions of Law

18. The High Court noted the interim stay granted against executing the sale deed and evaluated five substantial questions of law covering: Section 16(c) readiness and willingness, free will/undue influence over an illiterate worker, performance impossibility, and land unidentifiability.

i. 21–23. High Court's Analysis on Concurrent Findings of Execution

19. The High Court affirmed the lower courts' concurrent findings of fact that the agreement to sell was genuinely executed and that allegations of fraud were not proven beyond reasonable doubt.

i. 24–26. Analysis on the Statutory Bar under Section 5(1)(c)(ii) U.P.C.H. Act

20. The Court examined Section 5(1)(c)(ii), noting that during consolidation, a tenure-holder could not transfer *a part of a holding* without prior written permission from the Settlement Officer (Consolidation).

i. 27–31. Temporal Applicability of Law (Retrospective vs. Prospective)

21. Addressing the respondent's claim regarding the 1991 statutory amendment, the High Court held that substantive rights and legal enforceability must be evaluated based on the **law as it existed on the date the suit was instituted**, relying on precedent (*Dayawati*, *Carona Ltd.*, and *Raj Kumar*).

i. 32–33. Distinguishing Respondent's Case Laws

22. The High Court reviewed the precedents cited by the respondent (*Ambika Prasad*, *United Bank of India*, *Sudhir G. Angur*, etc.) and concluded they did not rescue the respondent on the question of substantive enforceability at the time of filing.

i. 34–36. Reversal Procedure & Duty of First Appellate Court

23. The High Court held that the First Appellate Court committed a serious procedural error by reversing the Trial Court's well-reasoned findings without specifically setting them aside or providing cogent counter-reasons (*Sri Jasmel Singh*, *M/s. Jeevan Ram Ram Lakhan*).

i. 37–40. Effect of 'Chak Out' Status & Partial Transfers

24. The Court clarified that 'chak out' land inside a notification area remains subject to Section 5(1)(c)(ii) restrictions. Furthermore, full-bench rulings (*Smt. Rajeshwari*, *Smt. Asharfunisa Begum*) confirm that while selling an *entire* holding was permissible, selling a **part of a holding** strictly required prior permission.

i. 41–44. Adjudication on Undue Influence & Final Judgment

25. The Court noted that the First Appellate Court failed to consider the imbalance of power between an illiterate *Halwaha* and his employer.
26. **Held:** The First Appellate Court's judgment was unsustainable. The High Court **allowed the Second Appeal**, set aside the First Appellate Court's decree, and **restored the Trial Court's decree** directing a refund of ₹2,000 with 6% simple interest.

a.

List of Case Laws Cited:

Ambika Prasad v. D.D.C. & others, 1987 R.D. 403.
United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. & others, (2000) 7 SCC 357.
Sudhir G. Angur & others v. M. Sanjeev & others, (2006) 1 SCC 141.
Km. Prema Devi and others v. Raja Ram, 2014 (32) LCD 2179.
Raj Kumar & others v. Ashok Kumar Chaurasia & others, 2016 (34) LCD 62.
Dayawati and another v. Inderjit and others, AIR 1966 SC 1423.
Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559.

Raj Kumar v. Director of Education and others, (2016) 6 SCC 541.
Smt. Bhagwati v. Deputy Director of Consolidation and others, 1978 RD 206.
Ram Saran v. The Ist Addl. District Judge, Rampur and others, 1980 AWC 22.
Sri Jasmel Singh v. Sri Rajendra Prasad Saxena and others, 2012 (30) LCD 1184.
Smt. Sawarni v. Smt. Inder Kaur and others, AIR 1996 SC 2823.
J.B. Sharma v. State of Madhya Pradesh and another, AIR 1988 SC 703.
S.V.R. Mudaliar v. Mrs. Rajabu F. Buhari, AIR 1995 SC 1607.
M/s. Jeevan Ram Ram Lakhan v. State of U.P., 2014 (32) LCD 1290.
Chandrabhan v. Jagdesh Prasad Chauhan, 2014 (32) LCD 1957.
Smt. Rajeshwari v. D.D.C. Lucknow Camp Mirzapur & others, 1971 RD 100 (Full Bench).
Smt. Asharfunisa Begum v. Deputy Director of Consolidation Camp at Hardoi and others, 1970 RD 532 (Full Bench).

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard Mr. R.U. Pandey, learned counsel for the appellant as well as Mr. I.D. Shukla, learned counsel for the respondent 1/1 and Mr. Abhinandan Kumar Pandey, learned counsel for the respondent no. 2/2. No one has put in appearance on behalf of respondent no. 2/1.

2. This second appeal has been filed under Section 100 C.P.C. by the appellant/defendant against the judgment and decree dated 22.1.1986 passed by the Special/Additional District Judge, Sultanpur, allowing the Civil Appeal No.148/84 filed by the respondent no.1 against the judgment and decree dated 29.8.1984 passed by the Munsif (North), Sultanpur by means of which the Suit No.427 of 1981 filed by the respondent no.1 for specific performance of contract was dismissed.

3. As per the facts in brief, allegedly an agreement for sale dated 24.1.1979 was entered between the appellant (first party) and the respondent nos. 1 and 2 (second party) for executing a sale deed in respect of part of land bearing Plot Nos.1280 and 1281 situated in Village Manauli, Pargana Musafir Khana, District Sultanpur and a sum of Rs. 2000/- was paid by the plaintiff/respondent no.1 (purchaser) to the appellant (seller) and the sale deed was to be executed within two years after necessary correction is got made in the revenue records. The respondent no.2/Smt. Shivkala was also impleaded as one of the defendant along with the appellant in the suit filed by the respondent no.1.

4. As per the case of respondents in the plaint the appellant wanted to execute a sale deed of half his share in Plot No. 1280, however he failed to execute the sale deed despite necessary notices given to him on 25.8.1981 and 23.10.1981, with the result a suit for specific performance was filed by the respondent/plaintiff. It was also pleaded that the respondent/plaintiff was always willing to perform his part of contract. It was alleged in the plaint that correction in the revenue papers regarding Plot No.1281 has not been made hence the plot No. 1281 was not included in the suit.

5. The suit was contested by the appellant/defendant by filing written statement. He had denied to have executed the agreement for sale. It was pleaded that the plaintiff had obtained his thumb impression by practicing fraud and he had no knowledge of the same. He used to work as

Halwaha with the plaintiff and taking advantage of appellant/defendant's illiteracy and by misusing his influence the respondent no.1 by playing fraud had allegedly got the said agreement for sale registered, hence the same is not binding on him. It was also pleaded that the suit is liable to abate due to the fact that the notification under Section 4 of U.P.C.H. Act has taken place in the village where the land in dispute exists and no permission under Section 5(1)©(ii) of U.P.C.H. Act, which was operative at that time, was obtained.

6. On the pleadings of the parties, the trial court had framed seven issues in the suit, translation of which is reproduced below:-

"1. Whether the plaintiff is entitled to get the sale deed executed of disputed Araji (property) to defendant no. 2 on the basis of the agreement mentioned at the end of the plaint.

2. Whether the plaintiff is entitled to get Rs.2000/- from defendant no. 2, as alleged in the plaint.

3. Whether the suit is time barred?

4. Whether the plaint is liable to be abated under Section 5(2) of Uttar Pradesh Consolidation Act.

5. Whether the suit has been under valued and less court fee has been paid?

6. Whether the plaintiff is entitled to get any relief.

7. Whether the plaintiff and defendant no.2 had entered into an agreement for sale of the land in dispute on 24.1.1979, as alleged in the plaint."

7. The learned trial court in its findings has decided the issue no. 3, which relates to the plea of suit being barred by time in negative. The issue no.4 relating to abatement of the suit under Section 5(2), U.P.C.H. Act, has also been decided in negative. Issue no.5, relating to valuation and payment of court fee, was also decided in the negative. Issue no.7 relates to execution of agreement for sale dated 24.1.1979 which has been decided in the affirmative. Issue no.1 relates to the fact whether the plaintiff was entitled to get the sale deed executed in his favour and Issue no.2 relates to the fact as to whether the plaintiff is entitled to receive back Rs.2000/- from the appellant/defendant and Issue no.6 relates to the relief.

8. The learned trial court found on issue nos. 1 and 2 that since the part of holdings is sought to be sold in the absence of any permission under Section 5(1)©(ii), U.P.C.H. Act, which was necessary, the execution for sale deed is not enforceable and held that respondent/plaintiff is entitled to get back Rs.2000/- within one month, failing which simple interest at the rate of 6% shall be payable.

9. The first appellate court while considering the appeal filed by the respondent no.1, had framed certain points for consideration, such as; whether the appellant/defendant has executed the agreement for sale dated 24.1.1979 and whether the plaintiff is entitled to get the sale deed executed from the present appellant. In the cross-objection, the appellant/respondents had taken the plea that finding on Issue no.7 which relates to the execution of agreement for sale is not correct.

10. The learned first appellate court in its findings has come to the conclusion that the plaintiff has examined himself as P.W.-1 and Mr. Arjun Prasad as P.W.-2, who is a marginal witness of the agreement for sale and Mr. M. Makkar, Hand writing and fingerprint expert as P.W. - 3. Since there was no inconsistency in the statements of P.W. 1 and P.W.2 and they have stated that agreement for sale dated 24.1.1979 was executed by the appellant/Nankau with full understanding, the plea of appellant/respondent about the fraud in execution of the document is not sustainable. It was also held that the appellant has not been able to establish beyond reasonable doubt the commission of fraud by the respondent no. 1. It has also recorded that another marginal witness, Sukhram who is said to be the *Samdhi* of appellant/Nankau was not examined by the appellant in the case. The first appellate court came to the conclusion that the trial court has rightly held that Nankau had executed the agreement for sale on 24.1.1979 in favour of plaintiffs, namely; Sami Ullah and Smt. Sheokala, respondent nos. 1 and 2, respectively. The cross objection filed by the appellant/respondent was accordingly rejected.

11. There is no doubt that the allegations of fraud are like any other criminal offence whether made in civil or criminal proceedings. Which must be established beyond reasonable doubt. The suspicion alone cannot take the place of proof. The appellant has failed to prove commission of fraud in the execution of agreement for sale dated 24.1.1979 and the trial court as well as the first appellate court have rightly come to the conclusion that the alleged agreement dated 24.1.1979 was executed between the present appellant and respondent nos. 1 and 2. In the alleged agreement for sale, it is mentioned that the appellant/Nankau would execute the sale deed within two years and in this regard will take all necessary steps. The learned trial court has come to the conclusion that the land in question is situated in the village where consolidation operations were going on and a notification under Section 4 of U.P.C.H. Act was in force.

12. The learned trial court after coming to the conclusion that the permission under Section 5 (1) © (ii) of U.P.C.H. Act for execution of the sale deed was necessary, held that since no such permission was obtained, therefore, the sale deed was inexecutable. The learned trial court, therefore, partly allowed the suit and allowed the plaintiff a sum of Rs. 2000/- which was paid by him to the appellant at the time of entering into the agreement for sale and directed the appellant to pay the same within one month, failing which the interest at the rate of 6% (simple interest) shall be chargeable.

13. The first appellate court considering the evidence on record has recorded in its findings that Paper No.15-C in appeal is the document relating to Form C.H.-2. This document shows that plot no. 1280 is ‘chak out’ land. It is not in dispute that the appellant/Nankau is owner of the plot in suit. He had agreed to take all steps for executing the sale deed in pursuance of the agreement for

sale. There was no difficulty for him to obtain permission from the Settlement Officer of Consolidation, which in the present case, could have been easily obtained because the land at Plot No. 1280 was a 'chak out' land.

14. The first appellate court, however, did not agree with the contention of the respondent no.1 (appellant before the appellate court) that no permission from the Settlement Officer of Consolidation was needed. The first appellate court reversed the findings of the trial court on this issue and did not agree with the findings of the trial court that the respondent cannot get the sale deed executed in pursuance of the agreement for sale.

15. It has been contended by learned counsel for the appellant that finding of the first appellate court is not sustainable in the eye of law. The permission under Section 5 (1) (c)(ii) of U.P.C.H. Act was fully applicable in the present case and in the absence of such permission, the sale deed for the land in question could not be executed.

16. It is also contended that the first appellate court while reversing the findings in this regard has not recorded its reasons and in the absence of the same the said finding is not sustainable in the eye of law. It is also submitted that notification under Section 4 of U.P.C.H. Act was issued with respect to the village where the land in question was situated and the land in question was under consolidation proceedings at the time of agreement for sale. Section 5(1)(c) (ii) of U.P. C.H. Act clearly stipulates permission from the Settlement Officer of Consolidation in case a tenure holder transfers any part of his holdings by way of sale. It is submitted that Section 5(1)(c)(ii) of U.P.C.H. Act, at the relevant time, was in vogue and has been subsequently deleted by the amendment vide U.P. Act No.30 of 1991 (w.e.f. 19.02.1991).

17. Learned counsel for the appellant has also submitted that the suit was barred by Section 168-A of U.P.Z.A.& L.R Act, which prohibits transfer by sale, gift or exchange any fragment situated in consolidated area.

18. Learned counsel for the respondent no.1, on the other hand, vehemently argued that since the land in question was recorded as 'chak out' in the consolidation proceedings, no permission under Section 5(1) (c)(ii) of U.P. C.H. Act was required. It is also submitted that in any case the provision under Section 5(1) (c) (ii) of U.P.C.H. Act has been omitted during pendency of the second appeal and the Court shall take into consideration the necessary development in law during continuation of the proceedings initiated since filing of the suit by the respondent/plaintiff, as such, it shall be presumed that no such permission was required.

19. It is also submitted that once no permission from the Settlement Officer of Consolidation was required for execution of the sale deed of the land in question, the learned first appellate court has rightly allowed the suit for specific performance of contract filed by the respondent/plaintiff and has rightly directed the present appellant to execute the sale deed in favour of the respondent no.1, failing which the sale deed shall be executed by the Court. It is further submitted that the change in law shall be applied and since at present no permission from

Settlement Officer of Consolidation is required with respect to the sale of land in question, as such there is no legal impediment in the execution of the sale deed for the land in question in favour of the respondent/plaintiff.

20. In support of his submissions, learned counsel for the respondent 1/1 has relied on the following judgments.

1. Ambika Prasad Vs. D.D.C. & others; 1987 R.D. 403**.**

2. United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. & others; (2000) 7 Supreme Court Cases 357**.**

3.Sudhir G. Angur & others Vs. M. Sanjeev & others;(2006) 1 Supreme Court Cases 141**.**

4.Km. Prema Devi and others Vs. Raja Ram; 2014 (32) LCD 2179**.**

5.Raj Kumar & others Vs. Ashok Kumar Chaurasia & others; 2016 (34) LCD 62**.**

21. I have considered the submissions made by the parties' counsel and gone through the records.

22. While admitting the second appeal the Court, as an interim measure, has provided that till further orders the appellant shall not be required to execute the sale deed.

23. At the time of hearing the appeal following substantial questions of law have been framed for consideration:

"(a). Whether the suit for specific performance of contract filed by respondent No.1 could be decided without complying with the provisions of section 16 (c) and without proving that the plaintiff is still ready and willing to perform his part of the contract?

(b) Whether the suit for specific performance of contract could be decreed by the first appellate court without giving any finding as to plaintiff's the readiness and willing to perform his part of the contract on the part of the plaintiff?

(c) Whether the learned first appellate court could decree the suit for specific performance of contract without giving any finding that the agreement to sell was executed by the free will of the appellant when the respondent No.1 was in a position to dominate the will of appellant and the fact taken undue advantage of his position?

(d) Whether the learned first appellate court not committed illegality in decreeing the suit for specific performance of contract without giving any finding about the possibility of performance when on the fact it was not capable of being performed.

(e)Whether the suit for specific performance of contract could be decreed for a portion of plot which is not ascertainable nor identifiable?"

24. As per the findings recorded by the trial court and affirmed by the first appellate Court, a suit for specific performance was filed by the respondent no.1/plaintiff within the period of limitation. Both the Courts below have also come to the conclusion that the alleged agreement for sale dated 24.1.1979 was entered into between the appellant being the seller and respondent nos.1 and 2 as purchasers. The Courts below appreciating the evidence on record have categorically recorded in their findings that the plea of fraud could not be established by the appellant and there is sufficient evidence to come to the conclusion that the said sale agreement for sale was executed between the parties and got registered before the Sub Registrar.

25. I do not find any infirmity or illegality in the findings recorded by both the Courts below in this regard.

26. It is not in dispute that the land in question was under consolidation proceedings as notification under Section 4 of U.P.C.H. Act was issued for the village concerned and the land in question was under the consolidation proceedings at the time of execution of agreement for sale dated 24.1.1979 and till decision by the impugned judgment and decree, no notification under Section 52, U.P.C.H. Act for de-notification of the village or under Section 6(1), U.P.C.H. Act was issued.

27. As per the agreement for sale dated 24.1.1979, a portion of Plot No. 1280 was agreed to be sold, hence it was a sale of a portion of a consolidated plot. At the time of execution of the agreement for sale as well as at the time of filing of the suit, Section 5 (1) (c) (ii) of U.P.C.H. Act, was fully operational. Section 5(1) (c)(ii) of U.P.C.H. Act for convenience is reproduced below:

5. Effect of Declarations- Upon the publication of the notification under Section 4 in the Official Gazette, the consequences, as hereinafter set forth, shall, subject to the provisions of this Act, from the date specified thereunder till the publication of notification under Section 52 or sub-section (1) of Section 6, as the case may be, ensue in the area to which the declaration relates, namely:

(a)……

(b)……

(c) notwithstanding anything contained in the U.P.Zamindari Abolition and Land Reforms Act, 1950, no tenure-holder, except with the permission in writing of the Settlement Officer, Consolidation, previously obtained shall-

(i)……..
(ii) transfer by way of sale, gift or exchange any part of his holding in the consolidation area:

Provided that a tenure-holder may continue to use his holding, or any part thereof, for any purpose for which it was in use prior to the date specified in the notification issued under Section 4."

28. A bare reading of the aforesaid Section clearly indicates that no tenure-holder except with the permission in writing of the Settlement Officer, Consolidation, previously obtained, shall transfer by way of sale, gift or exchange any part of his holding in the consolidation area. The term 'consolidation area' has been defined in Section 3 (11-A) of U.P.C.H. Act and it means the 'area' in respect of which a notification under Section 4 of U.P.C.H. Act has been issued. The provision of Section 5, U.P.C.H. Act, as mentioned above, requires the permission in writing of the Settlement Officer, Consolidation when a tenure-holder transfers any part of his holding by way of sale and sub-section (2) of Section 5 © of the Act permits the sale of any part of his holding by a tenure-holder;meaning thereby that for execution of a sale deed of the land in question permission of the Settlement Officer, Consolidation was necessary and without previously obtaining the said permission the sale deed was inexecutable.

29. So far as the contention of learned counsel for the respondents that since Section 5(1)©(ii) of U.P.C.H. Act, has been deleted during pendency of the instant appeal and as such the Court has to apply the change in law and since no permission from Settlement Officer of Consolidation at present is required as such the finding recorded by the first appellate Court does not require any interference and the present appeal is liable to be dismissed is concerned, I am of the considered view that the legal position, as existing at the time of filing of the suit is required to be taken into consideration to find out as to whether any permission under Section 5(1)©(ii) of U.P.C.H. Act, was required for the purpose of execution of sale deed of the land in question or not.

30. In this regard, my view is supported by the following catena of decisions.

31. In the case of ***Dayawati and another Vs. Inderjit and others***, the Apex Court has held that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. The relevant paragraph 10, on reproduction reads as under:

"10.Now as a general proposition, it may be admitted that ordinarily a court of appeal cannot take into account a new law, brought into existence after the judgment appealed

from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke, whose maxim-a new law ought to be prospective,not retrospective in its operation-is oft-quoted, courts have looked with disfavour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective'. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance. The distinction between laws affecting procedure and those affecting vested rights does not matter when the court is invited by law to take away from a successful plaintiff, what he has obtained under judgment. See Quilter v. Mapleson (1882) 9 QBD 672 and Stovin v. Fairbrass,(1919) SS LJKB 1004, which are instances of new laws being applied. In the former the vested rights of the landlord to recover possession and in the latter the vested right of the statutory tenant to remain in possession were taken away after judgment.See also Maxwell Interpretation of Statutes (11th Edn.) pp. 211 and 213, and K.C. Mukerjee v.Mst. Ramaraton Kuer 65 Ind App 47 (AIR 1936 PC 49) where no saving in respect of pending suits was implied when s. 26(N) and (0) of the Bihar Tenancy Act (as amended by Bihar Tenancy Amendment Act, 1934) were clearly applicable' to all cases without exception."

In the case of ***Carona Ltd. Vs. Parvathy Swaminathan & Sons***[2], in paragraph 42, the Court has come to the conclusion that the basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit. Para 42 of the judgment on reproduction reads as under:

*"***42.** In our judgment, the law is fairly settled. The basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit. Thus, if the plaintiff has no cause of action on the date of the filing of the suit, ordinarily, he will not be allowed to take advantage of the cause of the action arising subsequent to the filing of the suit. Conversely, no relief will normally be denied to the plaintiff by reason of any subsequent event it at the date of the institution of the suit, he has a substantive right to claim such relief."

32. In the case of ***Raj Kumar Vs. Director of Education and others***[3], the Apex Court has held that the rights and liabilities of the parties to the suit must be considered in accordance with the law as on the date of institution of the suit. Paragraph 53 of the judgment on reproduction reads as under:

"**53.** Furthermore, the decision in the case of Kathuria Public School (supra) does not come to the aid of the respondents for one more reason. Undisputedly, the notice of retrenchment was served on the appellant on 07.01.2003 and he was retrenched from service on 25.07.2003. The decision in the case of Kathuria Public School (supra), striking down Section 8(2) of the DSE Act was rendered almost exactly two years later, i.e. on 22.07.2005. Surely, the respondents could not have foreseen that the requirement of prior approval of the order of

termination passed against the appellant from Director would be struck down later and hence decided to not comply with it. Section 8(2) of the DSE Act was very much a valid provision of the statute as on the date of the retrenchment of the appellant, and there is absolutely no reason why it should not have been complied with. The rights and liabilities of the parties to the suit must be considered in accordance with the law as on the date of the institution of the suit. This is a fairly well settled principle of law. In the case of Dayawati v. Inderjit[12], a three judge bench of this Court held as under: (AIR p.1426, para 10)."

"10. Now as a general proposition, it may be admitted that ordinarily a court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit."

33. On the other hand, the judgments cited by the learned counsel for the respondents in this regard do not support the case of the respondents.

34. In this regard, in the case of ***Ambika Prasad Vs. D.D.C. & others***[4], this Court while considering the question as to whether the sale deed executed by the Court itself is void as no permission to make transfer in favour of the petitioner was obtained by him from the Settlement Officer of Consolidation under Section 5(1) (c) (ii) of U.P.C.H. Act, the Court came to the conclusion that the restrictions imposed by Section 5(1)©(ii) of U.P.C.H. Act, relates to transfers made by the tenure-holder voluntarily and it cannot be construed to relate to transfer made by the Court in pursuance of a decree passed in a suit for specific performance of a contract on the refusal of the judgment-debtor/tenure holder to execute the sale deed in pursuance of the decree passed against him. The said provision cannot be construed to cast a duty upon the Court to apply for and seek permission of the Settlement Officer of Consolidation under Section 5(1) © (ii) of U.P.C.H. Act to execute the sale deed. The relevant paragraphs of the judgment on reproduction read as under:

"The first question which crops up for consideration in this writ petition is whether the sale deed dated October 14, 1977 executed by Additional Munsif, Bahraich, is void as no permission to make transfer in favour of the petitioner was obtained by him from the Settlement Officer, Consolidation under Section 5(1)©(ii) of the Act or not. It was urged by the learned counsel Dr. L.P.Misra that no distinction can be drawn between the transfers made by private parties and the transfers made by Court in execution of decree for specific performance of contract passed in favour of the vendee on behalf of the defendant -judgment debtors. It was urged that upon publication of notification under sub-section (2) of Section 4 the consequence provided in the Act shall follow where the tenure holder without the permission of the Settlement Officer, Consolidation previously obtained makes transfer by way of sale, gift or exchange, of his holding or any part thereof in the consolidation area. It was urged that if a transfer is made in contravention of the provisions of Section 5(1) © (ii) of the Act, the same shall not be valid or recognized notwithstanding anything contained in any other law for the time being enforced to the contrary as provided in sub-section (2) of Section 45-A of the Act. There should be no distinction made

between transfer made by a tenure holder on his own accord and a sale deed executed by court in execution of a decree for specific performance of contract or in execution of a money decree. Learned counsel, thus, contended that since in the present case the Additional Munsif had admittedly not obtained prior permission for executing the sale deed in favour of the petitioner in respect of the land in dispute as was required under Section 5(1)© (ii) and, as such, the sale deed is not valid and the petitioner cannot be said to have acquired Bhumidhari rights on its basis. At the first flash the argument appears to be attractive, but on careful scrutiny I find no merit in it.

The restrictions imposed by Section 5(1)© (ii), in my opinion, relate to transfers made by the tenure holder voluntarily and it cannot be construed to relate to transfer made by court in pursuance of a decree passed in a suit for specific performance of contract on the refusal of the judgment-debtor/tenure holder to execute sale deed in pursuance of the decree passed against him. The said provision cannot be construed to cast a duty upon the court to apply for and seek permission of the Settlement Officer, Consolidation under Section 5(1) © (ii) of the Act to execute sale deed and there appears to be no such restriction in the matter relating to compulsory sales in execution of the decree of the Court passed in favour of decree holder.

Similar question cropped up for consideration in Smt. Bhagwati V. Deputy Director of Consolidation and others (1) wherin K.P. J. held:

"If the tenure holder refuses to execute sale deed in pursuance of an agreement to sell and the Civil Court is called upon to execute necessary sale deed in favour of the decree holder, it would be too much to expect that the Civil Court should seek permission of the Settlement Officer of Consolidation for executing the necessary sale deed in favour of the decree holder. If the contentions raised on behalf of the petitioner are accepted, there are chances that the decree passed by the Civil Court would become ineffective if the Settlement Officer of Consolidation refused to grant permission. The provisions of Section 5(2) of the Act do not apply to suits for specific performance of a contract to sell as is evident from several decisions of this Court. If the bar contained in Section 5© (ii) is imposed upon the Civil Court, the net result would be that an unwilling tenure holder can get an opportunity to thwart the civil court decree in an undesirable manner."

I respectfully agree with the view expressed above and in my opinion the bar contained in Section 5© (ii) of the Act is only applicable to voluntary transfer made by tenure holder and it cannot be stretched to sale deeds executed by Civil Court against the will of the tenure holder in execution of a decree for specific performance of contract in favour of decree holder. If the Civil Court executes a sale deed against the will of the tenure holder judgment debtor, it would not at all be necessary for the Civil Court to seek permission of the Settlement Officer, Consolidation under Section 5(1) © (ii) of the Act. Similar view was expressed by S.D. Agarwal, J. in Ram Saran V. The Ist Addl. District Judge, Rampur and others wherein the vendee had purchased land in execution of a decree for sale of the land belonging to a Scheduled Caste. It was urged by the judgment-debtor that since the land could not be purchased by the auction purchaser in view of the provisions contained in the mandatory provisions of Section 157-A of the

U.P.Zamindari Abolition and Land Reforms Act, and, as such, the auction purchaser would not get any right in the land purchased in the auction sale in execution of Civil Court decree. This contention was repelled and it was held:-

"Section 157-A of the Act in terms only prohibits a Bhumidhar who is of Scheduled Caste or Scheduled Tribe from transferring by way of sale, gift or mortgage or lease any land to a person not belonging to the Scheduled Caste or Scheduled Tribe except with the previous approval of the Collector. It applied to voluntary sales. This prohibition has been made so far as the Bhumidhar is one who either belongs to the Scheduled Caste or Scheduled tribe. The prohibition is against such a Bhumidhar. It is only when a Scheduled Caste or Scheduled Tribe Bhumidhar wants to sell or transfer any land then only the previous approval of the Collector is required and not in other cases. In the instant case, the petitioner who is admittedly the Bhumidhar and belongs to a Scheduled Caste is not transferring the land to any person and as such this provision does not apply to the present case at all. In the instant case the Court would be executing a sale deed in execution of a decree passed against the Scheduled Tribe Bhumidhar. In my opinion, therefore, the prohibition contained in Section 157-A of the Act does not prohibit in any manner the attachment and sale of the property belonging to the Scheduled Caste."

35. In the case of ***United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. And others***[5], the observations made in paragraphs 20, 24 and 25, have been relied. The Court in that case has come to the conclusion that it is the duty of a Court whether it is trying original proceedings or hearing an appeal to take notice of the change in law affecting pending actions and to give effect to the same.

"20. Now, it is well settled that it is the duty of a Court, whether it is trying original proceedings or hearing an appeal, to take notice of the change in law affecting pending actions and to give effect to the same. (See G.P.Singh, Interpretation of Statutes, 7th Ed.p.406). If, while a suit is pending, a law like the 1993 Act that the Civil Court shall not decide the suit, is passed, the Civil Court is bound to take judicial notice of the statute and hold that the suit – even after its remand – cannot be disposed of by it."

"24. The above result is also reached by the application of the principle of purposive construction.

25. In regard to purposive interpretation, Justice Frankfurter observed as follows:

"Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose ("Some Reflections on the Reading of Statutes) 47 Columbia LR 527 at 538) (1947)"

36. There is no dispute to the aforesaid legal proposition. The Court has to take into consideration the change in law which has occurred during pendency of the original proceedings or hearing an appeal, however where the change in law has taken place which goes to the very root of the matter and determines the rights of the parties, the Court has to take into consideration the legal position as existing at the time of filing of suit.

37. In the case of ***Sudhir G.Angur and others Vs. M. Sanjeev and others*;** (Supra), reliance has been placed in paragraph 11 wherein the Apex Court has observed that all procedural laws are retrospective unless the legislature expressly states to the contrary. Paragraph 11 of the judgment is reproduced below:

"11. In our view, Mr. G.L. Sanghi is also right in submitting that it is the law on the date of trial of the suit which is to be applied. In support of this submission, Mr. Sanghi relied upon the judgment in Shiv Bhagwan Moti Ram Saraoji V. Onkarmal Ishar Dass; AIR 1952 Bom 365, wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repealed. It could not be denied that now the Court has jurisdiction to entertain this suit."

38. There is no dispute to the aforesaid legal proposition, however, in the present case, at the time of institution of the suit as well as at the time of hearing, Section 5(1)©(ii) of U.P.C.H. Act was fully operational and the trial court was right in taking into consideration the said provision while deciding the suit.

39. So far as the judgments of this Court in the case of ***Km. Prema Devi and others Vs. Raja Ram*** (Supra) and ***Raj Kumar & others Vs. Ashok Kumar Chaurasia & others*** (Supra) are concerned, the court was considering the affect of removal of bar created under Section 23 of Hindu Succession Act and had come to the conclusion that after the amendment in Hindu Succession Act, a female heir can also seek partition, although the bar of Section 23 was very much there when the suit was filed, however during pendency of the appeal Section 23, Hindu Succession Act was omitted, as such the benefit of amending Act should be available to the appellants.

40. In view of the above, the judgments relied by the counsel for the respondents are of no help to him.

41. As such, as discussed above, I am of the considered view that permission under Section 5 (1)©(ii) of U.P.C.H. Act was required to be obtained for execution of the sale deed of the land in

dispute and in absence of such permission the sale deed was inexecutable. The learned trial court has rightly come to the conclusion that since the sale deed of the land in question was inexecutable, as such the respondent is entitled to get back the amount of Rs. 2000/- which he had paid at the time of entering into the agreement for sale and has rightly directed the appellant to pay the amount of Rs.2000/-, failing which simple interest at the rate of 6% shall be payable by him to the respondent/plaintiff.

42. It is to be noted that the learned first appellate court while reversing the findings recorded by the trial court in this regard has although come to the conclusion that the contention of respondent/plaintiff that no permission from the Settlement Officer of Consolidation needed, is not acceptable, however has not given any reason to reverse the findings of the trial court in this regard.

43. It is needless to observe that in case the appellate court comes to the conclusion that the findings recorded by the trial court are perverse or are not acceptable in the eye of law and need to be reversed, it is required to first set aside the findings recorded by the trial court and thereafter reverse the same by giving reasons.

44. This Court in the case of ***Sri Jasmel Singh Vs. Sri Rajendra Prasad Saxena and others***[6]**,** has held that the decree passed by the trial court could not be reversed in the appeal on the basis of single evidence without setting aside the findings recorded by the trial court on material on record and substantiated by weighty reasons. The relevant paragraphs 8, 9 and 12, on reproduction read as under:

"8. The Supreme Court in Smt. Sawarni V. Smt. Inder Kaur and others; AIR 1996 SC 2823 held that where the conclusion of the trial court was based on material on record and substantiated by weighty reasons and where the appellate court did not set aside the findings of the trial court the lower appellate court could not reverse the decree of the trial court merely on the basis of mutation entry in favour of the defendant. It follows from the judgment that on the basis of single evidence the lower appellate court could not have reversed the findings of the trial court.

9. In J.B. Sharma V. State of Madhya Pradesh and another, AIR 1988 SC 703, it was held that where the appellate court while recording the finding acted on an assumption not supported by any evidence and further failed to consider the entire document on the basis of which the finding was recorded, the High Court was justified in setting aside the finding of the lower appellate court. On the basis of this case it can be said that since there was assumption by the lower appellate court the reversal of finding in this second appeal is justified.

12. Again in S.V.R. Mudaliar V. Mrs. Rajabu F. Buhari, AIR 1995 SC 1607, it was laid down that appellate court has to bear in mind reasons ascribed by the trial court for its finding and the same should be considered before setting aside the judgment."

45. Again in the case of ***M/s. Jeevan Ram Ram Lakhan Vs. State of U.P***[7], the Court emphasized the requirement of reasons needed to be recorded by the appellate court while reversing the findings recorded by the trial court. Paragraph 29 of the judgment on reproduction reads as under:

"**29**. The finding recorded by the trial court is based on reasons derived from th evidence on record and its correct interpretation. The appellate court committed error in reversing the finding without considering all the reasons given by the learned Civil Judge. His finding of fact is the result of superficial and wrong approach. The appellate court was bound to examine the entire relevant evidence on record and then to draw interference on its basis. He committed error in procedure by reversing the finding without considering the entire evidence and all the reasons given by the trial court. The trial court's conclusions were based on material on record and substantiated with reasons."

46. In the present case, the first appellate court has reversed the finding without setting aside the finding recorded by the trial court and has reversed the finding on issue no. 1 without assigning any reason which is not sustainable in the eye of law hence liable to be set aside and is hereby set aside.

47. So far as the contention of learned counsel for the respondents that during the consolidation proceedings in the village where the land in question is situated, the land in question was taken as 'chak out' and no permission was required is concerned, I am of the view that the notification under Section 4 of U.P.C.H. Act is issued with respect to the initiation of the consolidation proceedings in consolidated area which is defined under Section 3 of U.P.C.H. Act and it means the area in respect of which a notification has been issued. In case during consolidation proceedings any part of any land or any plot is declared as 'chak out' which is situated in that area, it does not mean that it is not part of the consolidation proceedings and no permission under Section 5(1)©(ii) of U.P.C.H. Act is required. Even for the area which has been declared as 'chak out' the permission for sale of any part of such area was required under Section 5(1)©(ii) of U.P.C.H. Act, as was applicable at the time of filing of the suit by the plaintiff. Hence, the contention raised in this regard has no force.

48. In the case of ***Chandrabhan Vs. Jagdesh Prasad Chauhan***[8], Hon Prafulla C. Pant,J. as his Lordship then was had occasion to consider the import of Section 5(1)©(ii) of U.P.C.H. Act and while considering the same his Lordship came to the conclusion that the bar to transfer a land during consolidation operations was contained in sub-clause (ii) of Clause © of sub-section (1) of Section 5 of U.P. Consolidation of Holdings Act, 1953. The said provision was repealed and omitted vide U.P. Land Laws (Amendment) Act, 1991 (U.P. Act 30 of 1991) and after its omission, the permission of consolidation authorities was not required before transfer of land. The relevant paras 9 and 10, are reproduced hereunder:

"9. Lastly, it is argued on behalf of the appellant that no permission of consolidation authorities was obtained prior to the execution of the sale deed, as such the learned Courts below have erred in law by dismissing the suit and appeal. Learned Counsel failed to show me the provisions of law in U.P. Consolidation of Holdings Act , 1953 by which the permission of the consolidation authorities was necessary after the year 1991 before transfer of the land.

10. In fact, the bar to transfer a land during consolidation operations was contained in sub-clause (ii) of Clause © of sub-section (1) of Section 5 of the U.P. Consolidation of Holdings Act, 1953. However, said provision was repealed and omitted vide U.P. Land Laws (Amendment) Act, 1991 (U.P. Act 30 of 1991). Therefore, there is no substance in the argument advanced on behalf of the appellant that the permission of the consolidation authorities was required before transfer of land, as the impugned documents are of the year 1995 and 1996."

49. A Full Bench of this Court in the case of ***Smt. Rajeshwari Vs. D.D.C. Lucknow Camp Mirzapur & others***[9], was required to consider the question as to whether the sale deed in that case infringe the provisions of Section 5©(ii) of the Consolidation of Holdings Act? The Full Bench has answered the question in the following manner, which on reproduction reads as under:

"The sale deeds were executed after the statement of proposals had been confirmed and chaks had been allotted. The vendor sold the entire chak to the vendee. The facts of these cases are similar to the facts of Smt. Asharfunisa Begum V. Deputy Director of Consolidation; 1970 RD 532, Smt. Asharfunisa Begum's case is a recent Full Bench decision. The Full Bench had held that Section 5©(ii) requires the permission of the Settlement Officer, Consolidation in the case of sale of a part of a holding and not in the case of sale of the entire holding. We are in full agreement with the opinion of the Full Bench. Accordingly we answer the question referred to us in the negative."

50. In the case *of* ***Smt. Asharfunisa Begum Vs. Dy. Director of Consolidation Camp at Hardoi and others***[10], the Full Bench has held as under: (relevant paragraph 9 is reproduced).

*"**9**. Accordingly if the whole holding is transferred that will not disturb the progress of the consolidation proceedings. The scheme of U.P. Consolidation of Holdings Act is to treat a person as a Bhumidhar tenure-holder or Sirdar tenure-holder and not to have separate holdings under the same tenure. This is apparent in the instant case from the documents filed in which all plots of land held by the deceased Bushir Mohammad as Bhumidhar are grouped together and corresponding chak or chaks were allotted together in lieu of that land and similarly all plots of land held as Sirdar was grouped together for allotting a chak or chaks in lieu thereof as constituting one holding. We are accordingly of the view that it will be only part of a holding under one tenure, if transferred by a tenure holder during consolidation operations, that would create complications and the object of speedy consolidation would be thwarted, but if the whole holding is transferred that position will not arise. The Legislature must be presumed not to have intended to place more restrictions than were necessary or to have intended to make an invalid provision hit by Article 13 read with Article 19 (f) of the Constitution. We are accordingly of the opinion that with the meaning of 'holding' as clarified above, sub-clause (ii) of Clause © of sub-section (1) of Section 5 restricts only the transfer of any part only of the holding of a tenure holder and not the whole holding and to our view the Division Bench case referred to above was correctly decided on the basis of a similar interpretation placed on sub-clause (ii) of Clause © of sub-section (I) of Section 5 of the Act."*

51. In the present case, it is the admitted case of the parties that as per the agreement for sale dated 24.1.1979, a portion of Plot No. 1280 was required to be sold to the respondent/plaintiff and for

that appellant was to execute a sale deed within two years from the date of agreement for sale after completing legal necessities, as such the requirement of permission from Settlement Officer, Consolidation under Section 5(1)©(ii) of U.P.C.H.Act, which was fully attracted. However, in the absence of the same, the sale deed as per the terms of the agreement for sale was not executable.

52. So far as the contention of learned counsel for the appellant that the execution for sale deed was barred under Section 168-A of U.P.Z.A.&L.R. Act is concerned, it is to be observed that the import of Section 168-A of U.P.Z.A.&L.R. relates to transfer of fragment of a land in a consolidated area, it bars fragmentation of land, however in the present case since the village where the land in question situated was under consolidation operations and at the time of passing of the impugned judgment and decree the de-notification under Section 52, U.P.C.H. Act was not done hence Section 168-A, U.P.Z.A.&L.R. Act would not be attracted.

53. The question as to whether the respondent/plaintiff had complied the provisions of Section 16-C, Specific Performance Act and whether the respondent/plaintiff has proved his readiness and willing to perform his part of contract is concerned, since the appellant/defendant had not contested the said issue before the trial court and the first appellate court and has not made any categorical denial in this regard, as such the courts below were right in presuming the readiness and willingness of the respondent/plaintiff on the basis of statements of the witnesses and the evidence on record.

54. So far as the question as to whether the first appellate court decreed the suit for specific performance of contract without giving any findings that the agreement for sale was executed by the freewill of the appellant when the respondent no.1 was in a position to dominate the will of the appellant and he had taken undue advantage of his position is concerned, it is to be noted that as per the given facts, the appellant/respondent was working as *Halwaha* with respondent no.1/plaintiff and the appellant/respondent was illiterate and taking advantage of the dominating position respondent/plaintiff could have got the alleged agreement for sale executed in his favour, however the learned trial court has not taken due diligence in appreciating the evidence in this regard while writing its finding on this issue. There was possibility that the respondent/plaintiff could have taken undue advantage of his position being in dominating position. The learned first appellate court has committed an illegality in decreeing the suit for specific performance of contract without giving any finding in this regard.

55. In view of above, I am of the considered opinion that the impugned judgment and order dated 22.1.1986 passed by the Special/Additional Judge in Civil Appeal No.148 of 1984, is not sustainable in the eye of law.

56. The second appeal is allowed.

57. The judgment and decree dated 22.1.1986 passed by the Special/Additional District Judge, Sultanpur, is hereby set aside and the judgment and decree dated 29.8.1984 passed by the Munsif (North) Sultanpur in Suit No.427 of 1981, is upheld. The plaintiff/respondent shall be entitled to get an amount of Rs. 2000/- along with the interest, as directed by the trial Court.

(2016) 9 ILRA 805
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal Defective No.- 292 Of 2016
&
Connected With Other Cases

State Of U.P. & Ors. **...Appellants**
Versus
Somdeo Sharma & Anr. **...Respondents**

Counsel for Appellants:
Shri Chandra Shekhar Singh

Held –

Paragraphs 1–8 (Applications for Condonation of Delay):
The High Court examined eight defective First Appeals filed by the State (Nos. 292, 293, 294, 295, 296, 297, 299, and 300 of 2016).
The appeals involved massive delays ranging from roughly 4 years to over 7 years beyond the prescribed limitation period.
In each case, the State's supporting affidavits blamed a former official (*Jiledar* Mr. Banni Singh) and explained actions taken only after show-cause notices were issued in late September or October 2015.
The court observed that the affidavits completely failed to explain the massive delay for the multi-year periods leading up to September/October 2015.

Paragraphs 9–10 (Legal Framework on Limitation):
Citing Supreme Court precedent, the court emphasized that limitation laws are rooted in public policy to protect successful litigants who have acquired rights under a judgment.
Citing further Apex Court precedent, the court reiterated that limitation laws bind the government equally, and routine departmental administrative delay/red tape does not constitute a "sufficient cause" for condoning delay.

Paragraph 11 (Rejection of Delay Applications):
The court held that the appellants miserably failed to provide cogent or acceptable reasons for the substantial delays and rejected all condonation of delay applications.

Paragraphs 12–19 (Order on Costs & Waste of Public Exchequer):
The court detailed the underlying Land Acquisition Reference orders from District Bulandshahar, noting that land was acquired for canal/waterway projects under the Madhya Ganga Canal Scheme.
It noted that the State exchequer was burdened with significant, wasteful court fee expenses alone across the 8 appeals (totaling over ₹1.5 lakh in court fees).

Paragraphs 20–21 (Frivolous and Negligent Litigation):
The court noted that the lower court judgments relied on previous related reference judgments where earlier First Appeals filed by the State had already been dismissed and compensation paid.
Appellants failed to dispute these facts or produce the relied-upon judgments when asked.
The court concluded that State officers acted negligently, irresponsibly, and filed ex-facie frivolous appeals knowing full well they had no case and that the delay was unexplainable.

Paragraphs 22–23 (Personal Liability of Erring Officers):
Relying on Supreme Court precedent, the court emphasized that imposing costs directly on the State/PSU fails to deter officers because money comes from government coffers.
To deter irrational and vexatious litigation, costs must be personally recovered from the specific officers who authorized the filing of such frivolous appeals.

Paragraphs 24–26 (Final Directions and Costs):
All 8 defective appeals were dismissed with an exemplary cost of ₹50,000 per appeal, totaling **₹4,00,000**.
The U.P. State Government was directed to identify the responsible officers within 6 weeks, recover the ₹4,00,000 cost from them within a further 6 weeks, and deposit the amount with the Legal Services Authority, High Court, Allahabad.
Directed a compliance report to be submitted to the Registrar General and instructed a copy of the order to be served on the Chief Secretary, Government of U.P.

Citation Listed in the Judgment:

Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, JT 2012 (4) SC 55
Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr., JT 2012 (2) SC 483
Punjab State Power Corporation Ltd. v. Atma Singh Grewal, (2014) 13 SCC 666
Rameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

Heard Sri Chandra Shekhar Singh, learned Additional Chief Standing Counsel for the applicants/appellants.

ORDER ON DELAY CONDONATION APPLICATIONS

1. FIRST APPEAL DEFECTIVE No. - 292 of 2016

Delay Condonation Application No.278616 of 2016

(i) This appeal has been filed beyond limitation by 4 years and 48 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.384 of 1990 the Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 28.03.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.09 of 2012 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 29.10.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 29.10.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 30.10.2015. The affidavit does not at all explain the delay till 30.10.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

2. FIRST APPEAL DEFECTIVE No. - 293 of 2016

Delay Condonation Application No.278631 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 85 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.386 of 1991 the Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 2.03.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.07 of 2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 19.9.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 19.9.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 19.09.2015. The affidavit does not at all explain the delay till 19.09.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

3. FIRST APPEAL DEFECTIVE No. - 294 of 2016

Delay Condonation Application No.278650 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 123 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.74 of 1989 the Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 23.01.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.01/2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 19.9.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 19.9.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 19.09.2015. The affidavit does not at all explain the delay till 19.09.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

4. FIRST APPEAL DEFECTIVE No. - 295 of 2016

Delay Condonation Application No.278665 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 35 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.369 of 1990 the S.C.S.T./Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 21.04.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.26 of 2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 29.10.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 29.10.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 30.10.2015. The affidavit does not at all explain the delay till 30.10.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

5. FIRST APPEAL DEFECTIVE No. - 296 of 2016

Delay Condonation Application No.278665 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 123 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.75 of 1989 the Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 23.01.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.03 of 2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 19.9.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 19.9.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 19.09.2015. The affidavit does not at all explain the delay till 19.09.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

6. FIRST APPEAL DEFECTIVE No. - 297 of 2016

Delay Condonation Application No.278690 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 37 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.171 of 1991 the Special Judge S.C.S.T./Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 18.04.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.26 of 2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 19.09.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 19.09.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 19.09.2015. The affidavit does not at all explain the delay till 19.09.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

7. FIRST APPEAL DEFECTIVE No. - 299 of 2016

Delay Condonation Application No.279374 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 122 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.76 of 1989 the Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 23.01.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for filing the appeals. During the Execution proceedings having No.02 of 2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 19.9.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 19.9.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 19.09.2015. The affidavit does not at all explain the delay till 19.09.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

8. FIRST APPEAL DEFECTIVE No. - 300 of 2016

Delay Condonation Application No.279381 of 2016

(i). This appeal has been filed beyond limitation by 7 years and 85 days alongwith delay condonation application and affidavit.

(ii). In paragraph 2 of the affidavit accompanying the delay condonation application it is stated as under:

"That, in the reference No.385 of 1991 the Addl. District Judge, Court No.2 Bulandshahar has finally allowed the reference vide order dated 2.03.2009. It is not clear from the available records of the department that as to why the then Jiledar Court Case, Madhya Ganga Canal Construction Division-10, Bulandshahar Mr. Banni Singh, has not take appropriate steps for

filing the appeals. During the Execution proceedings having No.06 of 2009 when it transpired that no appeal has been preferred by the Jiledar as such an explanation was sought from him on 19.9.2015. For kind perusal of this Hon'ble Court a copy of show cause dated 19.9.2015 issued to the then Jiledar is being filed herewith and marked as Annexure No.1 to this affidavit."

(iii). Subsequent paragraphs of this affidavit attempts to explain delay after 19.09.2015. The affidavit does not at all explain the delay till 19.09.2015. Thus the delay has not been explained and consequently delay can not be condoned. Therefore, the delay condonation application deserves to be rejected.

9. In **Maniben Devraj Shah versus Municipal Corporation of Brihan Mumbai JT 2012 (4) SC 55**, the Apex Court has held that the law of limitation is based on public policy. It ensures that litigants approach the Court without unreasonable delay. At the same time Courts are empowered to condone delay if sufficient cause is shown. Though a liberal and justice oriented approach is to be adopted, it also to be kept in mind that successful litigant has acquired rights on the basis of the judgment under challenge and has spent time pursuing the litigation.

10. In **Office of the Chief Post Master General & Ors.v.Living Media India Ltd. & Anr. JT 2012(2) SC 483**, the Apex Court has held as follows:

"The law of limitation undoubtedly binds everybody including the Government.

It is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the prices. The Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

11. From the facts as aforenoted, it is absolutely clear that the appellants have miserably failed to give any acceptable and cogent reasons sufficient to condone the aforenoted long delay in filing these appeals. Under the circumstances delay in filing these appeals are not condonable. Consequently all the delay condonation applications are rejected.

ORDER FOR COSTS

12. FIRST APPEAL DEFECTIVE No. - 292 of 2016

(i). The impugned judgment dated 7.4.2012 has been passed by the Court of Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.139 of 1988 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894 dated 14.8.1986 published on 31.1.1987 relating to village Shikarpur, Tehsil and District Bulandshahar. The land was acquired for construction of Lakhawati Branch under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.27,858/-.

13. **FIRST APPEAL DEFECTIVE No. - 293 of 2016**

(i). The impugned judgment dated 2.3.2009 has been passed by the Court of Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.386 of 1991 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, published on 14.9.1988 relating to Village Raniwal, Pargana Pahasu, Tehsil Khurja and District Bulandshahar. The land was acquired for construction of Hazaratpur Minor under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.19758/-.

14. **FIRST APPEAL DEFECTIVE No. - 294 of 2016**

(i). The impugned judgment dated 23.1.2009 has been passed by the Court of Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.76 of 1989 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, published on 31.8.1985 relating to Village Bhaipur, Pargana Pahasu, Tehsil Khurja and District Bulandshahar. The land was acquired for construction of Lakhawati Branch Canal and Minor under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.7195/-.

15. **FIRST APPEAL DEFECTIVE No. - 295 of 2016**

(i). The impugned judgment dated 21.4.2009 has been passed by the Court of S.C.S.T. Act/Additional District Judge, Bulandshahar in Land Acquisition Reference No.369 of 1990 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, dated 14.2.1986, published on 20.9.1986 relating to Village Aswar, District Bulandshahar. The land was acquired for construction of Partapur Rajwahe under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.13083/-.

16. **FIRST APPEAL DEFECTIVE No. - 296 of 2016**

(i). The impugned judgment dated 23.1.2009 has been passed by the Court of Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.76 of 1989 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, published on 31.8.1985 relating to Village Bhaipur, Pargana Pahasu, Tehsil Khurja and District Bulandshahar. The land was acquired for construction of Lakhawati Branch Canal and Minor under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.33445/-.

17. **FIRST APPEAL DEFECTIVE No. - 297 of 2016**

(i). The impugned judgment dated 18.4.2009 has been passed by the Court of Special Judge S.C.S.T. Act/Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.171 of 1991 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, dated 5.1.1985 published on 29.6.1985 relating to Village Mustafabad Dadua, District Bulandshahar. The land was acquired for construction of Hazaratpur Minor under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.34233/-.

18. **FIRST APPEAL DEFECTIVE No. - 299 of 2016**

(i). The impugned judgment dated 23.1.2009 has been passed by the Court of Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.76 of 1989 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, published on 31.8.1985 relating to Village Bhaipur, Pargana Pahasu, Tehsil Khurja and District Bulandshahar. The land was acquired for construction of Lakhawati Branch Canal and Minor under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.4533/-.

19. **FIRST APPEAL DEFECTIVE No. - 300 of 2016**

(i). The impugned judgment dated 2.3.2009 has been passed by the Court of Additional District Judge (Court No.2), Bulandshahar in Land Acquisition Reference No.386 of 1991 which relates to determination of market value of the land of the claimant acquired by Notification under Section 4(1) of the Land Acquisition Act,1894, published on 14.9.1988 relating to Village Raniwal, Pargana Pahasu, Tehsil Khurja and District Bulandshahar. The land was acquired for construction of Hazaratpur Minor under the Madhya Ganga Canal Scheme. By the impugned judgment the market value of the acquired land has been determined @ of Rs.200/- per sq. yard based on the judgment in other Land Acquisition References.

(ii). The State exchequer has been burdened with huge wasteful expenditure in filing this appeal. Merely the Court fees component in filing this appeal is Rs.20358/-.

20. It has also been observed in the impugned judgments that against the judgments given in other L.A.Rs. relating to certain lands of Villages in question or the adjoining villages, the First Appeals filed by the present appellants were dismissed by the High Court and the claimants/tenure holders have also been paid compensation accordingly. Neither these findings of fact recorded in detail in the impugned judgments have been disputed by the appellants nor the relied upon judgments have been disputed. The appellants are well aware of the judgments passed in different Land Acquisition References and the first appeals which have been relied in the impugned judgments but they have not produced those judgments before this Court despite being asked. Appellants have neither pleaded nor disclosed during the arguments, despite being asked repeatedly, as to whether they have challenged the relied upon judgments. From the facts as briefly noted above it appears that these appeals have been filed by the Officers negligently and without any sense of responsibility towards the State.

21. Thus, in view of the aforesaid, the appellants knew well at all the relevant point of time that neither the delay is condonable in the absence of any proper explanation for delay nor they have any case in view of the facts noted in the preceeding paragraph and yet these first appeals have been preferred for the reasons best known to the concerned Officers of the State Government, resulting in wastage of public money in filing these first appeals which are ex facie frivolous.

22. In the case of **Punjab State Power Corporation Ltd. Vs. Atma Singh Grewal, (2014) 13 SCC 666** (para 14), Hon'ble Supreme Court observed as under:

"14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi v. Nirmala Devi (2011) 8 SCC 249]. However, the moot question is as to whether imposition of costs alone will prove deterrent? We do not think so. ***We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals****. We clarify that such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for."*

(Emphasis supplied by me)

23. The law laid down by Hon'ble Supreme Court for imposition of cost and recovery thereof from the officers who took decision to file frivolous appeals, clearly attracts in the present set of facts.

24. In view of the aforesaid, all the delay condonation applications are rejected and consequently **all the appeals also stand dismissed with cost of Rs.50,000/- in respect of each appeals.** Thus total cost imposed comes to Rs.4,00,000/- which shall be recovered by the State Government from the Officers who took decision to file these frivolous appeals and that too without offering any proper explanation for long delay of several years, knowing well that the appeals are frivolous and uncalled for on the pleadings and the affidavits filed in support of delay condonation applications.

25. The state Government shall identify and fix the liability of the Officers for recovery of cost from them within six weeks from today and shall recover the cost from them within a further period of six weeks. The cost recovered shall be deposited within a week thereafter with the Legal Cell Authority, High Court, Allahabad. Thereafter, within a week a compliance report shall be sent by the State Government to the Registrar General of this Court who shall keep the report on record of these appeals and place it before this Court.

26. Let a copy of this order be sent by the Registrar General of this Court to the Chief Secretary, Government of U.P. for appropriate action and compliance.

(2016) 9 ILRA 816
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 532 Of 1996
&
Criminal Appeal No.- 516 Of 1996

Rakesh & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
Shri Alok Kapoor

Counsel for Respondent:
Govt. Advocate

Held –
Background & Trial Court Order
Appellate Arguments & Core Issues
Paras 8–11 (Arguments Heard): The High Court considered arguments from Defense Counsel Sri Alok Kapoor (arguing "no evidence" and a perverse trial verdict) and the A.G.A. (arguing the trial court findings were sound).
Para 12 (Key Issues Framed):
Is the delay in lodging the FIR fatal to the prosecution?
Did prosecution witnesses fail to support the case?
Were the essential ingredients of Sections 304B, 498A IPC and 3/4 D.P. Act fulfilled?

i. Court Analysis & Findings

1. Delay in FIR (Fatal to Prosecution)
The occurrence took place on April 18, 1994, but the FIR was lodged on April 22, 1994 (a 4-day delay).
Although delay alone isn't always fatal (*Amar Singh*, *Tara Singh* principles), the informant's testimony directly contradicted his FIR narrative. In court, PW-1 admitted that the accused **never** threatened him, bound his mouth, or illegally detained him.
Due to these contradictions and embellishments, the 3-day delay remained unexplained and proved fatal to the prosecution's credibility.

2. Hostile & Contradictory Witnesses
PW-1 (father) and PW-2 were declared hostile.
Referring to precedents (*Prithi v. State of Haryana*, *Koli Lakhmanbhai Chanabhai v. State of Gujarat*), the court noted that testimony of a hostile witness remains admissible if corroborated.

However, PW-3 (mother) and PW-4 (uncle) completely contradicted themselves during cross-examination, admitting there were **no dowry demands or torture**.
PW-1 and PW-4 admitted the deceased died of Cholera and the last rites were performed in the presence of family members. Without an inquest or post-mortem report, there was no evidence of unnatural death.
3. Failure to Satisfy Statutory Ingredients (Dowry Death)
Citing *Prem Kanwar v. State of Rajasthan*, the court reiterated the essential prerequisites for Section 304B IPC & Section 113B Evidence Act:
Death caused by burns, bodily injury, or unnatural circumstances.
Death occurred within 7 years of marriage.
Deceased was subjected to cruelty/harassment for dowry **soon before her death** (proximity test).
Court Finding: The prosecution failed to prove an unnatural death, failed to establish dowry demands, and failed to demonstrate cruelty "soon before death."

ii. Final Verdict

Paras 14–18 (Acquittal): Finding major contradictions and a shaky prosecution case, the High Court **allowed the appeal**, set aside the trial court conviction dated November 30, 1996, and **acquitted** all appellants (Rakesh, Heera Lal, Rajaipal, Smt. Siya Dulari, and Smt. Mina Devi). Bail bonds were cancelled and sureties discharged.

List of Case Law Cited:
Amar Singh v. Balwinder Singh and others, (2003) Cr.L.J. 1282 (SC)
Tara Singh and others v. State of Punjab, AIR 1991 SC 63
Prithi v. State of Haryana, (2010) 8 SCC 536
Koli Lakhmanbhai Chanabhai v. State of Gujarat, (1999) 8 SCC 624
Prem Kanwar v. State of Rajasthan, (2009) 1 JT 197
Pawan Kumar and others v. State of Haryana, (1998) 3 SCC 309 *(referred within the extract of Prem Kanwar)*

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

1. Challenge in these appeals is to the judgment and order dated 30.11.1996 passed by Special Judge, Unnao, in Sessions Trial No. 875 of 1994 (State vs. Rakesh and others), arising out of Case Crime No. 108 of 1994, under Sections 498A, 304B, 342, 201 I.P.C. and Section ¾ of the D.P. Act, Police Station Asiwah, District Unnao, whereby the accused persons were found guilty and sentenced to 3 years rigorous imprisonment and Rs. 2000/- as find under Section ¾ D.P. Act, 1 year rigorous imprisonment under Section 498A and 10 years rigorous imprisonment under Section 304 B I.P.C with default stipulation.

2. The prosecution story as unfolded as per statement of the prosecution witnesses and the first information report is that the informant Prabhu Dayal has lodged the first information report on 22.04.1994 stating that his daughter Guddy was married 11 months ago to Rakesh, the accused. Guddy has come to her paternal house five times after her marriage. He has given sufficient dowry in the marriage but the accused persons were not satisfied with the dowry and they used to assault the deceased and used to torture her and demanded a T.V. and a cycle as additional Dowry. The deceased narrated the whole incident to her parents, her sister, uncle (Foofa) Ram Asray and Shiv Balak. The informant talked to the accused persons in the matter and promise to give a T.V. and

cycle after obtaining loan from somewhere. On 18.04.1994 one Radhey Lal informed him that the deceased was suffering from Cholera. When the informant went to the matrimonial house of the deceased, he saw one eyeball of the deceased was missing. She was bleeding. He suspected that the deceased was killed by the accused due to non fulfillment of dowry. The informant was going to the Police Station Rasoolabad to give information in the matter. Suddenly, Heera Lal, Siya Dulari, Rakesh his brother and sister-in-law took him into a room. Heera Lal pointed a country made pistol at him and threatened him not to go to lodge the report. He was compelled to sign on some blank papers. The dead body of the deceased was taken by the accused persons on some unknown place. On 19.04.1994, at 04:00 A.M., the hands and mouth of the informant were tied and he was left outside the village. Since then the informant was feared and tainted about the death of his daughter. He was perturbed. On 22.04.1994, he went with his brother-in-law to the police station and lodged the report.

3. On the basis of this first information report, PW-6 Constable 117 C.P. Abdual Gaffar scribed the chik report which proved by this witness as Exhibit Ka-4. Further the witness scribed the copy of the G.D. which was proved by him as Exhibit Ka-5.

4. Investigation was entrusted in the matter to Pw-5 C.O. Lallan Ray. He copied the chik and G.D. in the case diary. Further, he recorded the statement of Vasudeo on 22.04.1994. He recorded the statement of informant Prabhu Dayal on the same day. He recorded the statements of Mishri Lal and Rajeshwari. Further he inspected the spot, prepared the site plan which was proved by this witness as Exhibit Ka-2. On 10.05.1994, he tried to trace the accused but they could not be traced. Since the accused Heeral Lal and Rakesh had surrendered on 16.05.1994 before the C.J.M., Unnao. Thereafter, the accused Siya Dulari and Mina Devi were apprehended and their statements were recorded. Further on 01.08.1994, the statements of the accused Heera Lal and Rakesh were recorded in jail. On 06.08.1994, the statement of the accused Brijpal was recorded in the court of C.J.M. On 29.04.1994, the statement of Mishri Lal was recorded. Since the dead body of the deceased was flown in the river by the accused, hence the body could not be recovered. The investigation was ended into a charge sheet which was proved by this witness as Exhibit Ka-3.

5. The prosecution proceeded to examine 6 witnesses in support of its case. PW-1 is Prabhu Dayal, the informant who proved the first information report as Exhibit Ka-1. PW-2 is Ram Asray. PW-3 is Rajeshwari, the mother of the deceased. PW-4 is Mishri Lal, uncle of the deceased. The statement of PW-5, C.O. Lallan Ray and PW-6 constable Abdul Gaffar has earlier been discussed.

6. After close of the prosecution evidence, the statement of the accused persons were recorded under Section 313 Cr.P.C. who denied the occurrence. However, the marriage 11 months prior to the incident was admitted but all the accused have stated that the deceased died the natural death due to Cholera.

7. The accused persons examined Rama Shankar Pal, DW-1 who is said to have treated the deceased prior to her death.

8. After perusal of all the evidence available on record and hearing the counsel for the parties, the learned trial court has passed the impugned judgment as specified in para one of the judgment.

9. I have heard Sri Alok Kapoor, counsel for the appellants, learned A.G.A. and perused the material available on record.

10. Counsel for the appellants while castigating the judgment in appeal has submitted that this is a case of no evidence. There is neither any circumstantial nor any documentary evidence to support the prosecution case. The judgment of the trial court is perverse, illegal and not based on the evidence on record, hence the appeal is liable to be allowed.

11. Per contra learned A.G.A. has submitted that the findings of the learned lower court are based on the evidence on record which needs no interference.

12. The following points were raised before the court during the course of arguments :-

* The first information report is delayed which is fatal for the prosecution case.

* The prosecution witnesses have not supported the prosecution version.

* The ingredients of Section 304B, 498A I.P.C. and Section ¾ D.P. Act have not been fulfilled.

*** The first information report is delayed which is fatal for the prosecution case :-**

Counsel for the appellants has vehemently submitted that as per the first information report Exhibit Ka-1 and the chik report Exhibit Ka-4, the occurrence is said to have taken place on 18.04.1994, whereas the report was lodged on 22.04.1994 at 07:15 A.M. the police station being 10 Kms. Away from the place of occurrence. There is inordinate delay in lodging the first information report which remained unexplained and the prosecution led its oral evidence.

Per contra, learned A.G.A. has submitted that a perusal of the first information report makes it clear that the informant has specifically stated that after the occurrence when he went to the matrimonial house of the deceased, he was forcibly taken in a room by the accused persons. Heera Lal pointed a country made pistol at him. He was illegally detained in the room and was forced to sign blank papers. He was set free on 19.04.1994 at 04:00 A.M. but could only lodged the report on 22.04.1994 since he was feared and was grief stricken.

No doubt the first information report is not a substantive piece of evidence. It is only a corroborative piece of evidence. In the backdrop the statement of the informant has to be seen. There is not a whisper in the statement of PW-1 Prabhu Dayal that he was illegally detained by the accused persons in their house or he was compelled to sign blank papers or he was grief

stricken due to which he could not lodge the first information report earlier. To the contrary he has stated that "मुलजिमान ने मुझे अपने घर पर कोई धमकी नहीं दी थी। ना तो मुलजिमान ने मेरा मुंह बंधा था और ना गांव के कनारे छोड़ा था। मैं देवेंद्र कुमार से रिपोर्ट नहीं लखी थी दस्तखत उन्होंने कराया था।"

In 2003 Cr.L.J. 1282, Amar Singh Vs. Balwinder Singh and others*, the Hon'ble Apex Court has laid down in regard to the delay in lodging of F.I.R. that many circumstances have to be seen. There is no hard and fast rule that any delay in lodging the F.I.R. would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the F.I.R. which may cast doubt about the veracity of the prosecution case and for this, a host of circumstances like the condition of the informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of hospital and the police station, etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging the F.I.R.*

The Hon'ble Apex Court in ***Tara Singh and others Vs. State of Punjab, AIR 1991 Supreme Court 63****, has held that "the delay in giving the F.I.R. by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin, who have witnessed the occurrence cannot be expected to go mechanically with all promptitude in giving report to the police. At times being grief-stricken because of the calamity, it may not immediately occur to them that they should give a report. After all, it is but natural, in these circumstances for them, to take sometime to go to the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons, the courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate the grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the F.I.R. also will have to be scrutinized carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the F.I.R. and later substantiated by the evidence, merely on the ground of delay. These are all matters of appreciation and much depends on the facts and circumstances of each case.*

Thus, the evidence on record and even the statement of the informant does not support the prosecution version. Thus, the inordinate delay of more than three days in lodging the first information report is fatal for the prosecution case. There being chance of embellishment and false implication.

***<u>The prosecution witnesses has not supported most of the prosecution version</u>**

:-

The father of the victim namely Prabhu Dayal PW-1 has been declared to be hostile by the prosecution. PW-2 is Ram Asray who was also declared hostile. Since he did not support the prosecution version. PW-3 is Rajeshwary, the mother of the victim has stated in chief that the

husband, brother-in-law (Jeth), sister-in-law (Jethani), mother-in-law and father-in-law of the deceased tortured and assaulted the deceased due to non fulfilled demand of dowry. She has further stated that they demanded a T.V. and a cycle as additional dowry which could not be fulfilled. Whenever the deceased came to her house, she narrated these facts to her mother. This witness was given in the hands of the defence for cross-examination in which she has stated that nobody has demanded dowry from the deceased. Even her son-in-law did not demand T.V. or cycle. Her daughter also never told her that she was tortured or dowry was demanded from her and things went well during the marriage ceremony and even thereafter. PW-4 is Mishri Lal who is the uncle of the deceased who has stated that the deceased came five times to her paternal house. Whenever, the deceased used to go to the house of this witness, she narrated him that her husband beats her and all the accused threatened her and demanded a cycle and T.V. as additional dowry.

In cross-examination, contradicting the previous statement, this witness has stated that after marriage, he went to the house of the deceased but there was no demand of dowry. Even the deceased did not make any such complain to him. In its wisdom, the prosecution moved an application and got PW-1, the informant and PW-2 Ram Asray declared hostile.

As far as the evidence of hostile witnesses is concerned the law on this point has been laid down by Hon'ble Apex Court in ***Prithi vs. State of Haryana, reported in 2010 (8) SCC 536,*** in which it has been laid down as under:-

"Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross- examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary."

In ***Koli Lakhmanbhai Chanabhai vs. State of Gujarat reported in (1999) 8 SCC 624***, in which it has been laid down that it is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

Keeping in view the aforesaid law, even then, the evidence adduced by the prosecution is not trust-worthy not only the hostile witnesses even the mother of the victim namely PW-3 Rajeshwari and PW-4 Mishri Lal have changed their statements in every breath.

As per the first information report Exhibit Ka-1, the informant was informed that his daughter died due to Cholera. Since, cremation was done, hence no post-mortem report, inquest report or statement of the doctor is on record. As far as this part of the evidence is concerned PW-1 Parbhu Dayal has stated that he was told that the deceased died due to Cholera. Her body was flown in the Ganges.

In cross-examination, he has admitted clearly in so many words that his daughter died due to Cholera and all the family members were present at the time of performation of the last rites.

PW-2 Ram Asray has said nothing except that the dead body was flown away in the river. PW-3 Rajeshwari stating the cause of death in her examination-in-chief has stated that one of her eye bolls was missing. Her eye was bleeding. Besides this averment in her statement, there is nothing to even suggest that the deceased died an unnatural death. Even PW-4 Mishri Lal has stated that he was informed that the deceased died due to Cholera.

DW-1 Dr. Rama Shankar Pal was produced as a defence witness who is said to have treated the deceased but in the absence of relevant record, I do not find it proper to place any reliance on the statement of DW-1.

Thus, the evidence on record has not supported the prosecution version and the case does not stand proved.

***The ingredients of Section 304B, 498A I.P.C. and Section ¾ D.P. Act have not been fulfilled :-**

It has been submitted on behalf of the appellants that the ingredients of Section 498A, 304B I.P.C. and Section Â¾ D.P. Act have not been fulfilled, hence the conviction by learned trial court is bad in the eyes of law.

Before I proceed to evaluate the evidence on record led by the prosecution in support of charges framed against the accused, it is necessary to examine the law relating to 'dowry death'. The Hon'ble Supreme Court has highlighted all the aspects of law relating to 'dowry demand' and 'dowry death' in recent case of ***Prem Kanwar vs. State of Rajasthan, 2009(1) JT 197,*** para 6 to 12 of the reports areas under:-

"6. In order to attract Section 304B I.P.C., the following ingredients are to be satisfied:

(i). The death of a woman must have been caused by burns or bodily injury or otherwise that under normal circumstances;

(ii). Such death must have been occurred within 7 years of the marriage;

(iii). Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(iv). Such cruelty or harassment must be in connection with the demand of dowry.

Section 304B and Section 498A I.P.C. Reads as follows:-

"304B. Dowry death.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harÂ-assment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.—For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonÂ-ment for a term which shall not be less than seven years but which may extend to imprisonment for life."

"498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punÂ-ished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, "cruelty" means—

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

7. The term "dowry" has been defined in Section 2 of the Dowry Prohibition Act, 1961 (in short 'Dowry Act') as under:-

"Section 2. Definition of 'dowry'- In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly."

(a) by one party to a marriage to the other party of the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mehr in the case of person whom the Muslim Personal Law (Shariat) applies.

Explanation I- For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments,

clothes or other articles, shall not be deemed to be dowry within the meaning of this Section unless they are made as consideration of the marriage of the said parties.

Explanation II- The expression 'valuable security' has the same meaning in Section 30 of the Indian Penal Code (45 of 1861)."

8. Explanation to Section 304B refers to dowry" as having the same meaning as in Section 2 of the Act', the question "what is the periphery of the dowry as defined therein? The argument is, there has to be an agreement at the time of the marriage in view of the words "agreed to be given" occurring herein, and in the absence of any such evidence it would not constitute to be dowry. It is noticeable, as this definition by amendment includes not only the period before and at the marriage but also the period subsequent to the marriage. This position was highlighted in ***Pawan Kumar and others vs. State of Haryana, 1998 (3) SCC 309.***

9. The offence alleged against the accused is under Section 304B I.P.C. Which makes "demand of dowry" itself punishable. Demand neither conceives no would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved; hardly any offenders would come under the clutches of law. When Section 304B refers to "demand of dowry", it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. The argument that there is no demand of dowry, in the present case, has no force. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence that could be either direct on indirect. It is significant that Section 4 of the Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The work "agreement" referred to in Section 2 has to be inferred on the facts and circumstances of each case. The interpretation that the accused seek, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provision of the Act including Section 3, which refers to giving or taking dowry and Section 4 which deals with a penalty for demanding dowry; under the Act and the I.P.C. His makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry.

10. Section 113B of the Evidence Act is also relevant for the case at hand. Both Sections 304B I.P.C. And Section 113B of the Evidence Act were inserted as noted earlier by the dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113B reads as follows:-

"113B: Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry, the Court shall presume that such persons has caused the dowry death.

Explanation- For the purposes of this Section' dowry death ' shall has the same meaning as in Section 304B of the Indian Penal Code (45 of 1976).

11. The necessity for insertion of the two provisions has been amply analyzed by the Law Commission of India in its 21st Report dated 10th August, 1988 on 'Dowry Deaths and Law Reform'. Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related death, legislature through it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113B in the Evidence Act has been inserted. As per the definition of 'Dowry death; in Section 304B I.P.C. And the wording in the presumptive Section 113 B of the Evidence Act, one of the essential ingredients, amongst other, in both the provisions in that the concerned woman must have been "soon before her death" subjected to cruelty or harassment for or in connection with the demand of dowry".Presumption under Section 113B is a presumption of law. On proof of the essentials mentioned there in, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

(1) The question before the Court must be whether the accused committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B I.P.C.

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

12. A conjoint of Section 113B of the Evidence Act and Section 304B I.P.C. shows that there must be material to show that soon before the death, the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113B if the Evidence Act and Section 304B I.P.C are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be let by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would be constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304B I.P.C. and Section 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Section 114B Illustration (a)

of the Evidence Act is relevant. It is lays down that Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of a period which can come within the term 'soon before' is let to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not be disturb mental equilibrium of the woman concerned, it would be of no consequence."

13. In the aforesaid backdrop, perusal of the evidence available on record makes it crystal clear that neither there is evidence of unnatural death of the deceased nor there is any evidence of demand of additional dowry, nor there is any evidence of cruelty for demand of dowry "soon before her death".

14. Thus, on what has been said and discussed above, I find that the evidence of the witnesses have major contradictions and the prosecution story is shaky, unreliable, not worthy of credence. Thus, the prosecution has miserably failed to prove the case against the appellants and the appeal is liable to be allowed.

15. Accordingly the appeal is allowed.

16. The impugned judgment of conviction and sentence dated order dated 30.11.1996 passed by Special Judge, Unnao, in Sessions Trial No. 875 of 1994 (state vs. Rakesh and others), arising out of Case Crime No. 108 of 1994, under Sections 498A, 304B, 342, 201 I.P.C. and Section ¾ of the D.P. Act, Police Station Asiwah, District Unnao is hereby set aside.

17. The appellants of both the appeals namely Rakesh, Heera Lal, Rajaipal, Smt. Siya Dulari and Smt. Mina Devi are on bail. Their bail bonds are cancelled and the sureties are discharged. However, the appellants are directed to comply with the provision of Section 437-A Cr.P.C.

18. Let the copy of this judgment be sent to the trial court concerned for compliance.

(2016) 9 ILRA 827
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 631 Of 1997

Ganga Singh & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
Shri B.P. Srivastava, Shri Vikas Shukla

Counsel for Respondent:
Govt. Advocate

Held –
Paragraph 1: The appeal challenges the judgment dated 15.10.1997 by the 3rd Additional Sessions Judge, Hardoi (ST No. 273 of 1994, arising from Crime No. 22 of 1993, PS Tandiyawan). Accused Ganga Singh, Jai Singh, and Arvind Singh were convicted under Section 394 IPC and sentenced to life imprisonment (noted as 7 years' rigorous imprisonment), with an additional 7 years under Section 397 IPC. Co-accused Darshan Singh was acquitted.
Paragraph 2: On the night of 24/25.01.1993 at around 12:30 AM, miscreants committed robbery at Chinta's house in Mardan Nagar. They caused injuries to Chinta, Baijnath, and Ram Prasad using deadly weapons. Chinta lodged the FIR at PS Tandiyawan on 25.01.1993 at 1:30 PM.
Paragraph 3: The FIR detailed that armed miscreants scaled the wall and looted the house. Witnesses recognized co-villagers Ganga Singh, Jai Singh, and Arvind Singh using torches and lathis. Ganga Singh fired at the witnesses while fleeing with looted items, injuring Chinta, Baij Nath, and Ram Prasad. Case Crime No. 22 of 1993 was registered, and the investigation commenced.
Paragraph 4: Medical examination of Chinta revealed superficial pellet abrasions on both legs, caused by a firearm; injuries were simple.
Paragraph 5: Medical examination of Baijnath showed 19 gunshot entry wounds on his left thigh and leg, caused by a firearm; injuries were simple.
Paragraph 6: Medical examination of Ram Prasad showed a lacerated wound near the right eye, caused by a hard, blunt object; injury was simple.
Paragraph 7: Following investigation, the Investigating Officer (IO) submitted the charge sheet against the accused.
Paragraph 8: Prosecution examined PW-1 Chinta (injured informant), PW-2 Ram Prasad (injured eye-witness), PW-3 Special Magistrate S.K. Nagar (proved Test Identification Parade report as Ext. Ka-2), and PW-4 Ram Yagya Singh (proved chik report Ext. Ka-3 and GD Ext. Ka-4).
Paragraph 9: PW-5 Ajeet Pratap Singh conducted later investigation (proved TIP report Ext. Ka-8). PW-6 Sub-Inspector Prem Pal Shukla (initial IO) detailed site inspection, recovery of empty cartridges, and arrests. PW-7 Girish Chand Yadav concluded the investigation and submitted the charge sheet (Ext. Ka-11). Accused

denied charges under Section 313 Cr.P.C., alleging false implication, and examined DW-1 Sushil Kumar to prove enmity.

Paragraph 10: The Trial Court convicted and sentenced the appellants as stated in Para 1.

Paragraph 11: The High Court heard arguments from the defense counsel, the learned AGA for the State, and perused the trial court records.

Paragraph 12: Defense counsel argued that the trial court erred in convicting the appellants based on inadmissible and unreliable evidence, requesting the appeal be allowed.

Paragraph 13: The AGA contended that the conviction was well-founded on evidence, lacked illegality, and the appeal should be dismissed.

Paragraph 14–15: Defense reiterated that the conviction relied on unreliable evidence, while the State argued the judgment was supported by clinching evidence.

Paragraph 16: Accused Arvind Singh died during the pendency of the appeal; hence, the appeal abated against him and survived only for Ganga Singh and Jai Singh.

Paragraph 17: Defense raised three main points:

Delayed FIR renders the prosecution story doubtful.

Failure of the Trial Court to assess evidence correctly.

Witnesses were interested and inimical.

Delay in FIR: Defense argued a 13-hour delay for a 14 km distance indicates deliberation, citing *Thulia Kali v. State of Tamil Nadu*. The AGA countered that traveling 14 km with three injured cold-weather victims justified the time taken, citing *Jitendra Kumar v. State of Haryana* and *Yakub Ismail Bhai Patel v. State of Gujarat*. The High Court agreed with the State that the delay was satisfactorily explained given January weather and circumstances.

Assessment of Evidence: Defense argued there was no recovery of looted property, no detailed list of stolen items, and unmasked co-villagers committing robbery was unnatural (citing *Sujit Biswas v. State of Assam* and *Shrishti Narain Jha v. Bindeshwar Jha*). The High Court noted major contradictions: the IO denied being shown any torch light (contradicting PW-1), and no stolen property list was ever provided, making the identification and sequence of events highly doubtful.

Interested Witnesses: Defense claimed PW-1 and PW-2 were related and inimical. The Court reviewed legal precedents (*Dalip Singh*, *Masalti*, *Guli Chand*, *Israr*, *Galivenkataiah*, *Sucha Singh*, *Ravi*, *S. Rayappa*) establishing that relationship alone does not invalidate testimony, but requires cautious scrutiny.

Paragraph 18: The High Court held that while the injuries confirmed PW-1's and PW-2's presence, major inconsistencies, non-recovery of property, doubtful light sources, and contradictions with the IO made the prosecution case improbable.

Paragraph 19: The Court concluded that the conviction was not supported by sound and reliable evidence, giving the benefit of doubt to the appellants.

Paragraph 20: The appeal was allowed. The conviction of Ganga Singh and Jai Singh was set aside; bail bonds were canceled, and compliance with Section 437-A Cr.P.C. was ordered.

Paragraph 21: Ordered a copy of the judgment to be sent to the Trial Court.

List of Citations:

Thulia Kali vs. State of Tamil Nadu, AIR 1973 SC 501
Jitendra Kumar vs. State of Haryana, (2012) 6 SCC 204
Yakub Ismail Bhai Patel vs. State of Gujarat, (2004) 12 SCC 229
Sujit Biswas vs. State of Assam, 2013 (82) ACC 467
Shrishti Narain Jha vs. Bindeshwar Jha and others, AIR 2010 SC 465
Dalip Singh and others vs. State of Punjab, AIR 1953 SC 364

Masalti and others vs. State of U.P., AIR 1965 SC 202
Guli Chand and others vs. State of Rajasthan, 1974 (3) SCC 698
Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614 *(referenced within Guli Chand)*
Israr vs. State of U.P., 2005 (51) ACC 113
Galivenkataiah vs. State of A.P., 2008 (60) ACC 370
Sucha Singh and another vs. State of Punjab, (2003) 7 SCC 643
Ravi vs. State of U.P., 2004 (11) SCC 266
State of Andhra Pradesh vs. S. Rayappa and others, 2006 (1) AAR 259 (SC)

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

1. Challenge in this appeal is to the judgment and order dated 15.10.1997 passed by Third Additional Sessions Judge, Hardoi in ST No. 273 of 1994 (State Vs. Arvind Singh and others) arising out of Crime No. 22 of 1993 under Sections 394, 397 IPC, Police Station Tandiyawan, Hardoi whereby the accused persons were found guilty and sentenced. Accused Ganga Singh, Jai Singh and Arvind Singh were sentenced for life imprisonment of seven years' rigorous imprisonment under Section 394 IPC. Accused Ganga Singh, Jai Singh and Arvind Singh were further sentenced to undergo rigorous imprisonment for seven years. By the impugned order accused Darshan Singh was not found guilty and was acquitted.

2. Filtering out unnecessary details the prosecution story in brief is that during the intervening night of 24/25 of January, 1993 at about 12:30 AM in the house of complainant Chinta situated in village Mardan Nagar, Police Station Tandiyawan, District Hardoi, the miscreants committed robbery. While doing dacoity they have voluntarily caused hurt to Chinta, Baijnath and Ram Prasad. At the time of committing dacoity/robbery the accused persons were armed with deadly weapons. Report of the occurrence was lodged by Chinta at Police Station Tandiyawan on 25.01.1993 at about 13:30 P.M.

3. In the report the informant mentioned that in the mid night the accused persons entered in his house by scaling the wall and began to loot and assault all the inhabitants. The nephew of informant namely Ram Prasad ran out of the house raising alarm at which the grand son of the informant Baij Nath, his son-in-law Rakesh armed with Lathis and torches rushed and recognized Ganga Singh, Jai Singh and Arvind Singh on spot. One of their companion could not be identified. Accused ran away with the looted property. When they were chased Ganga Singh opened fire at the approaching witnesses. The informant, his cousin Baij Nath and his nephew were injured. Utensils, clothes, ornaments and cash were taken away by the accused. On the basis of this report a case under Sections 394, 397 IPC at Case Crime No. 22 of 1993 was registered at the Police Station Tandiyawan, District Hardoi against the accused persons. Entries were made in the GD vide report No.14 at 13:30 P.M. on 25.01.1993. Investigating Officer visited the spot of occurrence and recorded the statements of witnesses. The injured were medically examined.

4. Injured *Chinta* received the following injuries:-

1. Superficial abrasions 0.2 cm x 0.2 cm thirteen in number scattered in the front of left leg, 25 cm from the knee joint. No pellets are palpable.

2. Superficial abrasion 0.2 cm x 0.2 cm on the right leg, lateral side, 12 cm below the knee joint two in number, Scattered area is 6.5 cm above from the first two abrasions.

Injury was simple in nature and caused by fire-arm.

5. On the body of injured *Baijnath* there were following injuries:-

1. Gunshot wound entry of 0.2 cm x 0.2 cm scattered in the front part of lower part of left thigh and indulges upper part of leg, 21 cm below from the knee joint and 12 cm above the knee joint, 19 in number, some pellets are palpable and advised for X-ray for confirmation.

Injuries were simple in nature caused by fire-arm.

6. Injured *Ram Prasad* sustained the following injuries :-

1. Lacerated wound 0.5 cm x 0.2 cm x skin deep on the outer part of right eye obliquely from upward to downward, margins irregular, colour red.

His injuries were simple in nature caused by hard blunt object.

7. Investigation was entrusted to the Investigating Officer who submitted the charge sheet against the accused persons.

8. The prosecution examined PW-1 Chinta who is also an injured witness. He proved the report as Ext. Ka-1. PW-2 is Ram Prasad. He is also an eye-witness being an injured witness. PW-3 is Special Magistrate S.K. Nagar, who conducted the Test Identification Parade. He proved the Test Identification report as Ext. Ka-2. PW-4 is Ram Yagya Singh who prepared the chik report which was proved as Ext. Ka-3 and copy of the GD as Ext. Ka-4.

9. PW-5 is Ajeet Pratap Singh who conducted the later part of the investigation. On 30.09.1993 the result of Test Identification Parade was received. The test identification report was proved by this witness as Ext. Ka-8. PW-6 is Sub Inspector, Prem Pal Shukla, who conducted the investigation. The case was registered in his presence on 25.01.1993. He copied the chik report and GD in the Case Diary. Thereafter, he recorded the statements of Baij Nath, Ram Prasad, Ganga Dei, Imali and Rakesh Kumar and inspected the place of occurrence. He further prepared the site plan which was proved by him as Ext. Ka-9. He collected the empty cartridges from the place of occurrence, prepared the recovery memo which was proved by this witness as Ext. Ka-10 On 27.01.1993 accused Jai Singh and Arvind Singh were arrested and their statements were recorded.

On 31.01.1993 after apprehending accused Ganga Singh, his statement was recorded. Name of accused Darshan Singh came into investigation during the statement of accused Ganga Singh. After this, this witness was transferred and investigation was entrusted to Sub-Inspector Girish Chand Yadav, PW-7 who concluded the investigation and submitted a charge sheet which was proved by him as Ext. Ka-11. After the aforesaid witnesses were examined by the prosecution, the Trial Court proceeded to record the statements of accused persons under Section 313 Cr.P.C. The accused stated that they had been falsely implicated. The accused further proceeded to examine DW-1 Sushil Kumar as defence witness, tried to prove the enmity of informant with the accused.

10. After hearing the arguments of the learned counsel for the parties and going through the record as well as evidence, the learned Trial Court proceeded to convict the accused appellants as narrated in para -1 of the judgment.

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

12. The learned counsel for the appellants has submitted that the learned Trial Court has erred in convicting and sentencing the appellants by impugned judgment and order, hence the same is liable to be set aside and the appeal deserves to be allowed.

13. On the contrary, the learned AGA has submitted that the impugned judgment and order convicting and sentencing the accused appellants is based on evidence available on record and does not suffer from any illegality or irregularity. He further submitted that the appeal has no merit and is liable to be dismissed.

14. Learned counsel for the appellant has submitted that conviction of the appellants is bad in the eyes of law as the conviction is based on inadmissible and unreliable evidence.

15. Per contra, learned AGA appearing for the State has submitted that the learned Trial Court has based its judgment on clinching evidence and the appeal is liable to be dismissed.

16. During the pendency of appeal, accused Arvind Singh died, hence appeal as regards Arvind Singh stands abated and it survives only on behalf of accused Ganga Singh and Jai Singh.

17. The following points were raised by the learned counsel for appellants during the course of arguments:-

- First information report is delayed. Hence the whole prosecution story is doubtful.
- The Trial Court failed to assess the evidence in its correct perspective.
- All the witnesses are interested witness, hence too much weightless cannot be attached to their evidence.

• **First information report is delayed. Hence the whole prosecution story is doubtful**

Perusal of the chik report Ext. Ka-3 shows that the occurrence took place in the intervening night of 24/25 January, 1993 at about mid night. Report of the occurrence was lodged on 25.01.1993 at 01:30 PM. The distance of police station from the place of occurrence being 14 kilometers. Learned counsel for appellant had submitted that the surviving appellants are related to each other. They are residents of the same village. If occurrence would have been correct, the FIR would have been prompt. In its support the learned counsel for appellant has placed reliance on **AIR 1973 SC 501, Thulia Kali Vs. State of Tamilnadu** in which the Apex Court has laid down as under:-

"FIR in a criminal case is extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial stage. The importance of first information report can hardly be over-estimated from the stand point of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained."

Per contra, the learned AGA has submitted that lodging of the first information report depends upon many factors. In this case, there are three injured persons. The incident took place in the mid night. The police station was 14 kilometers from the place of occurrence. Hence, lodging of the incident after 12 hours cannot be said to be fatal for prosecution. In the first information report Ext. Ka-1 the informant has specified that he and his grandson sustained fire-arm injury and his nephew received Lathi injuries. Thereafter, the report was lodged.

The informant was produced as PW-1 who has categorically stated that after the incident in the morning, arrangements for conveyance were made, after which he went to the police station. Thus, this witness has tried to explain the reason for the time taken by him in reaching the police station with the injured persons. Here, reference may be made to the pronouncement of Hon'ble Apex Court in the case of **Jitendra Kumar Vs. State of Haryana reported in (2012) 6 SCC 204** wherein Hon'ble Apex court has observed as under:

"The Court has also to consider the fact that the main purpose of the F.I.R. is to satisfy the police officer as to commission of a cognizable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the F.I.R. The

F.I.R. itself is not the proof of a crime, but a piece of evidence which could be used for corroborating the case of the prosecution."

Learned AGA has submitted that it is well settled principle of law of criminal jurisprudence that mere delay in lodging the first information report may not prove fatal in all cases. Delay in lodging the first information report cannot be a ground by itself for throwing away the entire prosecution case. The Court has to seek an explanation for delay and check the truthfulness of version put forward. If the Court is satisfied, then, the case of the prosecution cannot collapse on this ground alone.

In the case of **Yakub Ismail Bhai Patel Vs. State of Gujrat (2004) 12 SCC 229** and in a large number of other cases, it has been held that the Court has to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.

In the case in hand, the occurrence took place in the intervening night of 24/25th of January, 1993. Obviously the Court take note of the facts that nights in January are extremely cold and foggy. Besides, in the morning after covering a distance of 14 kilometers reaching police station with three injured persons at 1:30 PM cannot be termed to be delay in lodging the first information report. Thus, the argument advanced on behalf of the appellants that the report is delayed has no locus standi.

The Trial Court failed to assess the evidence in its correct perspective.

The learned counsel for accused appellants has further submitted that the learned Trial Court did not assess the evidence adduced by the prosecution correctly. The Trial Court failed to consider the fact that there was no recovery of looted articles. The evidence is silent as to the weapons being carried by the accused. Further, he has stated that prosecution case as set forth is highly improbable and indigestible because there is no reason why the accused appellants belonging to the same village and being known to the informant would enter the house of informant and would rob the articles without muffling their faces. In this regard, he has placed reliance on **2013 (82) ACC 467 Sujit Biswas Vs. State of Assam.**

The prosecution witnesses have depicted that accused and the complainant were known to each other previously but the accused appellants had not muffled their faces. It has further come in evidence that the accused were recognized in the light of torches. He has further stated that when the Investigating Officer visited the spot, he was shown the torches, but admittedly the memo regarding the inspection of torches is not on record. Reliance has been placed on **AIR 2010 SC 465 : Shrishti Narain Jha Vs. Bindeshwar Jha and others**, wherein it has been held that after his long standing enmity between accused and informant there is the possibility of false implication which could not be ruled out. Though the Investigating Officer during investigation did not find any

lantern or sign of any lantern. And it has been further held that it looks very unnatural that the accused would come to commit dacoity in the neighbourhood taking with them young boys.

Reverting back to the evidence adduced on behalf of the prosecution it has been submitted that PW-1 Chinta has stated in his cross-examination that when he reached the Police Station he met the Munshi (Clerk) there. I am reproducing the words stated by him before the Court – "मुंशी जी ने मुझसे कहा था यदि कसी पर शक सुवह हो तो बताओ।"

Further, this witness has stated that Baij Nath was holding a three cell torch and the cells were not changed for the four months although it was being used daily. In this regard, PW-6 Prem Pal has specifically stated that the informant and his family members did not show this witness any torch. Even Baij Nath did not show him any torch.

Learned AGA appearing for the State has submitted that for the sake of argument even if source of light is done minus from the prosecution case it has to be noted that since the accused and informant belong to the same village and the accused were very close to the informant and injured witnesses, it was not difficult for the accused to recognize and identify the accused persons by their voice, way of walking, standing etc. I think this argument is not very tenable in this particular case because if no light was present at the time of occurrence, then, a question would be raised as to how the accused could aim to fire at the informant and his family members without light. To aim a fire-arm also light would been needed as this is not a case of blank firing. PW-2 Ram Prasad was also given in the hands of defence for cross-examination, who stated that miscreants ran away with looted property. When the accused fled away, then, he raised hue and cry at which his uncle and other witnesses came. He has specified that miscreants had not covered their faces. He has tried to improve the prosecution story by saying that the miscreants had torches with which they were locating the articles. He could not state as to what valuables were taken by the miscreants at the time of occurrence.

In the first information report there is an averment that utensils, clothes, jewelery and cash were taken away by the accused but there were no details of the goods carried away by the accused. I do not loose the sight of the fact that this would not be mandatory at the time of lodging of the First Information Report but later on, a list of articles carried away by the miscreants could have been provided to the Investigating Officer which was not done by the informant. In the examination in chief of PW-1 namely Chinta there is not a whisper as to what articles were carried away by the accused. In cross-examination he has stated that his jewelery, cash, utensils and clothes were taken away by the accused which costed 10-15 thousands of rupees but there were many injured people, hence he could not submit the list with the first information report. But why this could not be done later, has not at all been explained by the prosecution and besides general allegations there are no specifications about the goods alleged to have been taken away by the accused persons. The informant namely Chinta who claims to be present at the time of occurrence has stated that at the time of occurrence, he was lying in his house. He reached the place of occurrence on the shrieks of his son. As soon as he reached the door of his house, the dacoits were coming out of his house. Suddenly, his cousin lit a torch at which the miscreants fired at the

informant. He has further stated that the dacoits had fired at him from inside the house without opening the door. As I have said earlier the availability of torch is doubtful in as much as this witness PW-1 has stated that he showed the torch to the Investigating Officer, whereas the Investigating Officer has denied this fact. Thus, the prosecution story as stated by both the injured witnesses PW-1 Chinta and PW-2 does not corroborate the statements of each other and is improbable due to which benefit of doubt should definitely be given to the accused appellants.

All the witnesses are interested witness, hence much weight cannot be attached to their evidence.

Learned counsel for the appellants has submitted that PW-1 Chinta and PW-2, Ram Prasad are interested witnesses, who are inimical to the accused, hence conviction cannot be based on the testimony of these two witnesses.

As per the first information report Ram Prasad injured, PW-2, is nephew of Chinta, the informant (injured), PW-1.

Learned counsel for State has vehemently controverted this argument stating that related witnesses would be the last persons to screen the real offender and to implicate the innocent falsely. He has further stated that the accused persons are not foreigners for them.

In the case of **Dalip Singh and others Vs. State of Punjab (AIR 1953 SC 364)**, it has been laid down as under by the Hon'ble Apex Court:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

Observations of the Hon'ble Apex Court in **Masalti and others Vs. State of U.P., AIR 1965 SC 202**, are worth mentioning:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence

should be appreciated. Judicial approach has to be cautions in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

The above decision has been followed in **Guli Chand and others Vs. State of Rajasthan 1974 (3) SCC 698**, in which **Vadivelu Thevar vs. State of Madras AIR 1975 SC 614** was also relied upon. The following observations were made by the Hon'ble Apex Court in **Israr Vs. State of U.P. (2205 (51) ACC 113)** in para-12 of the judgment are also important:-

"…….Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."

The above position has been highlighted again the case of **Galivenkataiah vs. State of A.P. 2008 (60) ACC 370**, in which reference has been made to some other cases also. In this context, I may refer to the case of **Sucha Singh and another vs. State of Punjab (2003) 7 SCC 643** wherein Their Lordships of the Hon'ble Apex Court observed as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

They further observed:-

"…….Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."

In the case of **Ravi vs. State of U.P. 2004 (11) SCC 266**, the following observations have been made by the Apex Court :

"It is well settled in a catena of cases that the evidence of eye witnesses cannot be rejected merely because they are related. The relatives will not exonerate real culprits and falsely implicate others."

The Hon'ble Supreme Court in the case of **State of Andhra Pradesh vs. S. Rayappa and others, 2006 (1) AAR 259 (SC)** dealing the evidence of related/interested witnesses has observed as under:

"…….By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

In para – 8 Their Lordships have further observed:

"……*The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously…."*

18. I would not be hesitant in relying upon the testimony of Chinta, PW-1 and PW-2 Ram Prasad because at least their injuries indicate to some extent their presence on the scene of occurrence but inconsistencies and contradictions in the statements of both the witnesses and the statement of Investigating Officer coupled with documentary evidence on record makes the whole prosecution story doubtful and improbable.

19. Thus, on the basis what has been stated above, I conclude that conviction order of the Trial Court is not based on sound and reliable evidence. The appellants are entitled to the benefit of doubt.

20. The appeal is allowed as far as the appellants are concerned. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged. However, the provisions of Section 437-A Cr.P.C. shall be complied with.

21. Let a copy of this judgment be sent to the Trial Court concerned.

(2016) 9 ILRA 838
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 914 Of 1982

Sadhu **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for the Appellant:
Shri Arun Sinha

Counsel for the Respondent:
G.A., Shri Anurag Singh

Held –

Para 1: The appeal challenged the judgment dated 12.11.1982 of the 5th Additional Sessions Judge, Lucknow, convicting Sadhu @ Ram Chandra under Section 302 IPC and sentencing him to life imprisonment.

Paras 2–3: The prosecution alleged that the deceased, Smt. Kundala @ Shanti, was the widow of the appellant's brother. The appellant and his brother allegedly wanted her property transferred to them and had also borrowed ₹3,000 from her. When she demanded repayment and refused to transfer the property, the appellant allegedly threatened her. On 26.05.1981, while she was eating outside her house with her daughters Sohana (PW-1) and Mohana (PW-2), the appellant and three armed companions arrived. The appellant and one companion fired at her, causing her death on the spot. The FIR was lodged the next morning, followed by investigation, inquest, recoveries, and submission of the charge-sheet.

Paras 4–7: The post-mortem revealed multiple firearm injuries, including entry and exit wounds. Two wads were recovered from the left lung. The doctor opined that the injuries were sufficient to cause death and could have been caused by gunfire, possibly by two shots. The medical evidence broadly supported the prosecution version.

Paras 8–10: The appellant was committed to the Sessions Court and charged under Section 302 IPC. He pleaded not guilty. The prosecution examined seven witnesses.

Paras 11–15: PW-1 Sohana and PW-2 Mohana were the principal eyewitnesses and also testified regarding motive. The remaining witnesses proved the inquest, recoveries, FIR, investigation, transportation of the body, and post-mortem report.

Paras 16–17: The appellant denied the prosecution case and pleaded false implication due to a property dispute. He also raised a plea of alibi, claiming that he was staying at his father-in-law's house in Unnao. He examined two defence witnesses.

Paras 18–20: The Trial Court convicted the appellant under Section 302 IPC. Aggrieved, he preferred the present appeal. The High Court heard both sides and examined the record.

Para 21 – Issues for Determination: The High Court considered three principal issues:
Whether the appellant had any motive to commit the murder;
Whether the prosecution witnesses were unreliable because they were interested/related witnesses; and
What consequence followed from the appellant having been declared a juvenile on the date of the offence.

Issue I – Motive
The Court held that the prosecution had established a specific motive from the beginning. The appellant allegedly wanted the deceased's property and had also failed to repay ₹3,000 borrowed from her. Both eyewitnesses supported this version. The Court observed that although motive assumes lesser importance where reliable direct eyewitness evidence exists, proof of motive nevertheless strengthens the prosecution case.

Issue II – Reliability of Related and Child Witnesses
The Court held that minor discrepancies or normal variations do not justify rejection of otherwise credible testimony. PW-1 and PW-2 were natural witnesses because they were the deceased's minor daughters and were present with her at their home at the time of the occurrence.
The Court further held that a relative is not automatically an "interested witness." The evidence of a close relative must be scrutinised carefully, but it cannot be discarded merely because of the relationship with the deceased.
Regarding the child witnesses, the Court noted that the Trial Court had tested their competence before recording their evidence. Their statements remained consistent despite extensive cross-examination and were supported by the medical evidence. Accordingly, the Court found their testimony trustworthy and held that the prosecution had proved the appellant's guilt beyond reasonable doubt.

Issue III – Juvenility of the Appellant
The appellant had been declared a juvenile on the date of the offence. The Court held that although his conviction could be maintained, his sentence had to be governed by the Juvenile Justice (Care and Protection of Children) Act, 2000.
The Court referred to Sections 15, 16, 20 and 64 of the 2000 Act and observed that a juvenile could not be sentenced to imprisonment for life. The benefit of juvenility could also be extended in pending proceedings, including appeals, even where the accused had subsequently attained adulthood.

The Court noted the practical difficulty that the appellant was then about 53 years old and could neither appropriately be sent to a special home as a child nor imprisoned pursuant to a sentence prohibited by the Juvenile Justice Act. The Court also observed that the State Government should frame appropriate rules or make suitable arrangements for persons who were juveniles at the time of the offence but had attained majority by the time their cases were finally decided.

Paras 22–26: The Court reiterated the legal difficulty regarding the placement of persons who were juveniles at the time of the offence but had become adults by the time of final adjudication. It noted the absence of any identified special or shelter home for such persons and referred to an earlier direction suggesting that the State Government formulate specific rules.

Para 27: The Court held that the conviction of Sadhu was well-founded and required no interference.

Para 28: The conviction was maintained, but the sentence of life imprisonment was quashed because the appellant was a juvenile in conflict with law on the date of the offence and was entitled to the benefit of the Juvenile Justice Act, 2000.

Para 29: The appeal was partly allowed.

Para 30: The conviction of Sadhu under Section 302 IPC was upheld, but the sentence imposed by the Trial Court was set aside.

Para 31: The case record was directed to be placed before the concerned Juvenile Justice Board for passing an appropriate order regarding sentence/disposition in accordance with law.

Final Outcome
Conviction under Section 302 IPC: Upheld.
Life imprisonment: Set aside.
Appeal: Partly allowed.
Matter: Sent to the concerned Juvenile Justice Board for appropriate orders.

Case Laws Cited in the Judgment:

1. State of U.P. v. Naresh, (2011) 4 SCC 324.
2. State of A.P. v. S. Rayappa and Others, (2006) 4 SCC 512.
3. Panchi v. State of U.P., (1998) 7 SCC 177.
4. Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341.
5. Satish @ Dhanna v. State of Madhya Pradesh and Others, (2009) 14 SCC 187.
6. Pratap Singh v. State of Jharkhand and Another, Criminal Appeal No. 210 of 2005, decided on 02.02.2005.
7. Salil Bali v. Union of India and Another, (2013) 7 SCC 705.
8. Shiv Govind @ Surat & Others v. State, Criminal Appeal No. 529 of 1982.

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

1. This appeal has been preferred against the judgment and order dated 12.11.1982, passed by 5th Additional Sessions Judge, Lucknow, in S.T. No. 343 of 1981, under Section 302 I.P.C., P.S. Malihabad, District Lucknow, whereby the accused Sadhu @ Ram Chandra was found guilty and convicted under Section 302 and sentenced to imprisonment for life.

2. Prosecution case in brief is that One Changa, accused Sadhu and Pyare Lal Gosai husband of the deceased Smt. Kundala @ Shanti were the brothers that Pyare Lal had died about two and half years or three years before the incident which took place on 26.05.1981 that Pyare Lal has left behind him his wife the deceased and four daughters out of whom Km. Sohana is PW-1 and Smt. Mohana the complainant is PW-2, that after the death of Pyarey Lal, said Changa and accused Sadhu in order to grab the properties of Pyare Lal used to press the deceased to transfer it in their favour, that the deceased was not agreeable to proposal of the accused Sadhu and his brother Changa and in this respect an altercation used to take place between them that besides it Changa and accused Sadhu in order to purchase a pumping set has taken cash loan of Rs. 3000/- from the deceased Kundala, that the deceased had settle the marriage of the complainant Mohana PW-2 with the younger brother of the husband of the eldest daughter Smt. Kamla (not examined) in village Mohamaci, P.S. Shandila and thus prior to the incident the deceased Kundala demanded back the said loan amount from Changa and accused Sadhu, that both of them denied to pay the said amount and threatened to kill Smt. Kundala, that Changa and accused Sadhu had told to people of village also that they would kill Smt. Kundala if she would remain in the village and thereafter both of them has disappeared from the village.

3. It is further alleged that in the evening of the day of incident when the sun had not set Smt. Kundala along with her two daughters Km. Sohana PW-1 and Smt. Mohana PW-2 was sitting on the gate of her house and was taking food. The accused Sadhu accompanied with three other persons armed with guns came there and said to Km. Sohana PW-1 and Smt. Mohana PW-2 to get away, that the moment Smt. Mohana and Km. Sohana slightly moved away, the accused Sadhu fired his gun at Smt Kundala who after receiving the gun shot rolled down on the ground and then one of the companion of accused Sadhu also fired at Smt. Kundala. That Smt. Kundala died on the spot due to gun shot injuries received by her, that both the sisters Smt. Mohana and Km. Sohana began to raise alarm and on their hue and cry many people of village collected on the spot. That when the witnesses reached on the spot accused Sadhu and his companion ran away from the side of the door of the house of Gaya (not examined). That in the light of setting sun Smt. Mohana and Km. Sohana saw the accused and recognised Sadhu by name and other culprits were seen and recognized by their faces, that thereafter Smt. Mohana requested to three or four persons to lodge the report of the incident at police station, but as it had become dark and due to fear also none of them became ready to go to the police station at that time, that then in the morning of 22.05.1981 after leaving dead body under the custody of constables who has arrived on the spot Smt. Mohana accompanied with Chunni the village Chowkidar went to P.S. Malihabad, Lucknow which was at a distance of 10 miles from the spot and lodged oral report there at 08:15 A.M. Sri Kamta Prasad PW-4, was posted as Head Moharrir at P.S. Malihabad, who on the dictation of Smt. Mohana scribed the report and prepared the chik first information report Exhibit Ka-1, according to law and then he registered the case in the General Diary on report no. 14 at 08:15 A.M. dated 27.05.1981. Its copy is Exhibit Ka-11. Sri Srawan Singh S.I. PW-5 was then posted as Station Incharge of P.S. Malihabad. He received the investigation of the case on the same day i.e. 20.05.1981 and immediately went to the spot. S.I. B.K. Rai PW-3, S.I. S.P. Tripathi and S.I. K.S. Misra (both not examined) has accompanied the I.O. to the spot. On the spot S.I. B.K. Rai PW-3, on the instruction of the I.O. held inquest on the dead body and nominated the panches and obtained their opinion

regarding the injuries present on the dead body of Smt. Kundala and then he prepared Panchayatnama Exhibit Ka-2 of the dead body according to rule. He further wrote letter Exhibit Ka-3 and Exhibit Ka-4 addressed to Chief Medical Officer, Lucknow for the post-mortem examination of the dead body and taking into possession of the dhoti material Exhibit -4 from the dead body. He then prepared diagram of the dead body, chalan of dead body, sample seal marked as Exhibit Ka-5, Ka-6 and Ka-7 respectively. He took in his possession the 8 glass bangles Exhibit Ka-5/1 to 5/8 and ornaments, two earnings Exhibit 6/1 and 6/2 and 1 nose nail Exhibit -7 from the dead body vide memo Exhibit Ka-8. He then took in his possession the blood stained earth and plain earth Exhibit 8 and Exhibit -9 and sealed them in two different dibbas and the spot and marked it as Exhibit Ka-9 before the witnesses. He also took in his possession one tikli of card board and one tikli of plastic of the wads and one was marked as Exhibit -10, Exhibit -11 and Exhibit -12 respectively, found on the spot and prepared its memo Exhibit Ka-10 and sealed them on the spot before the witnesses. Thereafter the sealed dead body of Smt Kundala was handed over to constable Umesh Chandra Tewari C.P. No. 2394 PW-6 at 12:10 P.M. on 27.05.1981 on the spot for getting the post-mortem examination of the dead body done, on the spot. The I.O. recorded the statements of the complainant Smt. Mohana, Km. Sohana and of the witnesses of Panchayatnama. The I.O. then inspected the place of occurrence and prepared its sit plan Exhibit Ka-12. Thereafter the I.O. came to know that accused Sadhu had surrendered in the court of Sri Raj Singh, Judicial Magistrate, Lucknow on 30.05.1981 and was sent to district jail, Lucknow. He then on 13.06.1981 went to jail and recorded his statement and on 15.07.1981 after concluding the investigation of the case, he submitted charge sheet Exhibit Ka-13 against accused Sadhu. PW-7 Dr. Ram Niwas was then posted as Medical Officer, Infection Disease Hospital, Lucknow. He conducted the autopsy of the dead body of Smt Kundala on 29.05.1981 at 05:30 P.M., and prepared post-mortem report Exhibit Ka-1, its carbon copy is also on record. The dead body of Smt. Kundala was brought in sealed condition by Umesh Chandra Tewari C.P. No. 2394 PW-6 in the mortuary and he has identified the dead body at the time of post-mortem examination:

Physical conditions: Deceased aged about 40 years. Well built body. Both eyes lids half opened. Eye ball opaque and protruded rigor mortise passed off. Abdomen distorted. Post-mortem blisters present. Post-mortem staining on back and buttocks skin peeling of at few places. Greenish discolouration of the abdomen veins at few places are prominent. Hairs could not be pulled out easily from the scalp. Tough prodruding.

4. The following ante-mortem injuries were found on the person of the deceased:

i. Firearm injury would oval shape 6 cm. X 4 cm. X chest cavity deep, on left side upper back in posterior axillary line just below and behind the left axilla and 10 cm. below from the top of the left shoulder. Blackening and tattooing present around the wound. Direction from left to right side.

ii. Fire arm entrance would two in number 2 cm. apart on left upper back outer side situated 2 cm. back to the injury no. 1 Each would in 1 cm. X ¾ cm. X Muscle deep. No shots found from the would. Direction from left to right side.

iii. Fire arm entrance would 1 cm. X ¾ cm. X. muscles deep on left upper and outer chest situated 6 cm. below the injury no. 1. No shot recovered from the wound. Direction from left to right side.

iv. Fire arm exit would two in number each 1 cm. X ¾ cm. on right upper chest front and outer side situated 5 cm. below the right axilla, 2 cm. apart from each other.

5. On opening these woulds, communicate with the injury no. 1. The entrance would have 1 cerated and inverted margin abraded colers. Ringh present. The exit woulds have lacerated and inverted margins shots could not be traced out despite of internsive search. Two was taken out from the left lungs sent to Senior Superintendent of Police, Lucknow.

6. The doctor took out two wads Exhibit-2 and Exhibit 3 from the left lungs of the deceased and sealed them in the envelope and sent it to Sr. Superintendent of Police, Lucknow. He also took out the dhoti Exhibit -4 from the dead body of the deceased Smt. Kundala and sealed it and handed over to Constable Umesh Chandra Tewari, PW-6.

7. In the opinion of the doctor the injuries aforesaid were sufficient for the death of the deceased Smt. Kundala and they would have also possibly been caused by gun. He has further opined that the death of Smt. Kundala could have been caused on 26.09.1981 at the time of the setting sun and possibility of its being caused by two fires also could not be ruled out. In cross-examination, the doctor has stated that semi digested food was found in the stomach of the deceased. In reply to the defence question he has stated that he has not mentioned the presence of blackening and tattooing in the injuries no. 2 and 3 and has only mentioned about it in the injury no. 1. According to him since the injuries 2 and 3 were at a distance of 2 cm. from injury no. 1, hence it can safely be presumed about the presence of blackening and tattooing in injuries nos. 2 and 3 also. He has denied the suggestion given by the learned counsel for the accused that he did not mention the presence of blackening and tattooing in the injuries 2 and 3 because they were not present there at all. The doctor has further stated in his cross-examination that injury no. 1 could have been caused within four feet distance. He has further stated that there could ba a variation of 12 hours either way in the time of death as narrated by him. According to him the food takes 6 hours for its complete digestion, and if a person dies at the time when he was taking food then undigested food would be found. He has further stated that injury no. 5 contustion on the area of 12 cm. X 12 cm. On the left outer chest 22 cm. Above from the hip joining, could be caused by blunt object. He has further stated when asked by the court that the said injury could be caused even by fall on the hard substance. He has denied the defence question that injury no. 5 could have disappeared within three days. He has further stated that colour of contusion would keeps on changing for one week and then change begins after 6 hours from the time when it is caused. He has denied specific defence suggestion that the injuries aforesaid could have been caused by more than two fire arm shots.

8. Accused Sadhu was committed to court of session to stand his trial under Section 302 I.P.C. By Sri S. Chandra, Judicial Magistrate, Lucknow vide his order dated 19.08.1981.

9. The charge under Section 302 I.P.C. For committing the murder of Smt. Kundala @ Shanti by intentionally causing gun shot injuries to her on 26.05.1981 before sun set in village was framed against the accused Sadhu. The charge was read over and explained to the accused who pleased not guilty and claimed to be tried.

10. The prosecution in order to prove its case examined Km. Sohana PW-1, Smt. Mohana PW-2, Sri Virendra Kumar PW-3, Sri Kamla Prasad, H.C. PW-4, Sri Shrawan Singh PW-5, Sri Umesh Chandra Tewari Constable PW-6 and Dr. Ram Niwas PW-7.

11. Out of these prosecution witnesses, PW-1 Km. Sohana and PW-2 Smt. Mohana are the material witnesses whose testimony is the product of their direct sensory perception. Both of them have stated about the incident. They have stated about the motive also, of the crime committed by the accused Sadhu. PW-3 Sri Virendra Kumar is Sub-Inspector and was posted at P.S. Malihabad, Lucknow when the incident had taken place. He had accompanied with the I.O. Of the case on the place of incident and there on the instruction of the I.O. He held inquest on the dead body and had prepared inquest report, wrote two letters to the Chief Medical Officer, Lucknow for conducting the post-mortem examination of dead body and also to take in his possession the dhoti worn by the deceased. He has further prepared diagram of the dead body, chalan of dead body, sample seal and memo of ornaments and glass bangles taken in his possession from the dead body of deceased, memo of blood stained earth and plain earth taken from the spot duly sealed by him. Memo pellets and card board and plastic was recovered on the spot. He has proved the said documents and they have been marked Exhibit Ka-2 to Ka-10 respectively.

12. Kamta Prasad, Head Constable wrote the chik FIR Exhibit Ka-1 and registered the case at the police station on its basis in the general diary on report no. 14 at 08:15 A.M. Dated 27.08.1981. He has proved its copy as Exhibit Ka-11.

13. PW-5 Sri Swaran Singh, S.I. is the I.O. of the case. He has stated about the investigation and has proved the site plan Exhibit Ka-12 and charge sheet as Exhibit Ka-13.

14. PW-6 Umesh Chandra Tewari is the Constable and he was posted Malihabad, Lucknow at the time of incident. He carried the dead body of Smt. Kundala to Mortuary of Medical College, Lucknow for its port-mortem examination and he had identified it before the doctor at the time of post-mortem examination.

15. PW-7 Dr. Ram Niwas has conducted the post-mortem examination of the dead body of Smt. Kundala. He has furnished the medical evidence and has proved the post-mortem examination report Exhibit Ka-14.

16. The accused Sadhu has denied the prosecution case regarding the incident and his participation. He has, however, admitted that he is the uncle of complainant Smt. Mohana. He has pleaded that the husbands of Smt. Mohana and Sohana wanted to take his properties and thus under their influence he has been falsely implicated in the case by the complainant. He has further taken

the plea of his alibi. He has stated that on the date of incident he was staying in the outset of his father in law Sri Badloo at Unnao. According to him after the death of the husband of Smt. Kundala all the properties attending in his name were got transferred in the name of deceased Smt. Kundala at the instance of the accused Sadhu and his brother Changa. He has denied to have taken any cash loan of Rs. 3000/- for the purchasing of any pumping set etc. from the deceased Smt. Kundala. He has stated that Rs. 9000/- of the deceased Smt. Kundala was remained in deposit in the Post Office of Rahimabad Lucknow in her name at the time of incident and there was no necessity of any money to the deceased Smt. Kundala. The said money deposited in the Post Office was withdrawn by Avdhesh and Suresh husband of Smt. Mohana and Smt. Sohana from the Post Office after her death.

17. After close of the prosecution case, the statement of the accused was recorded under Section 313 Cr.P.C. in which he denied the occurrence. He has further stated that he has been falsely implicated in this case and in his defence he has produced DW-1 Badlu and DW-2 Kailash Chandra.

18. The learned trial court after hearing the argument of both the parties and perusing the record convicted the appellant as specified in para 1 of the judgment.

19. Feeling aggrieved, the accused has preferred this present appeal.

20. We have heard Sri Arun Sinha, learned counsel for the appellant, Sri Sharad Dixit, learned A.G.A. and perused the material available on record.

21. During the course of argument the following issued were raised for determination:-

(1) There is no motive for the present appellant to commit the offence.

(2) The witnesses produced by the prosecution are interested witnesses, hence, they cannot be relied upon.

(3) The appellant Sadhu has been declared juvenile on the date of the incident, hence he has to be dealt with according to the provisions of Juvenile Justice (Care & Protection) Act, 2000.

(1) There is no motive for the present appellant to commit the offence:-

It has been contended on behalf of the appellant that there was no motive for the present appellant to commit the offence and in such a case, where the prosecution has not come up with the motive, the prosecution case stands shattered.

Perusal of the first information report goes to show that even in the first information report which was orally lodged by Mohana who was minor at the time of lodging of the

first information report. She has categorically stated that after the death of her father, the accused appellant wanted the deceased to transfer all her immovable property to the accused. Besides, it has also been mentioned that the accused had borrowed Rs. 3000/- from the deceased and the deceased was demanding back her money, due to these two reasons, the accused committed the crime. Although in cases of direct evidence, motive looses its value but in the present case, the prosecution has come up with the specific motive for the accused to commit the crime. PW-2 is the complainant and even the eye witness. She was aged about 12-13 years at the time when her statement been recorded. She categorically stated that her mother did not want to give her husband's property to the accused appellant, besides, the deceased also asked the accused to return back Rs. 3000/- due to which the accused had threatened the deceased and the eye witness namely Sohana who was only 8 years at the time of her statement was recorded has stated that the accused has borrowed Rs. 3000/- from her mother which was demanded back by the deceased besides she has also stated that the accused wanted the deceased to transfer his immovable property in his name for which the deceased was not agreeable. Due to these two reasons, the accused appellant murdered her mother.

Motive is a double edged weapon which on one side proposes the accused to commit the crime and on the other hand it helps in falsely robing the accused in the case. Each persons reacts differently under given circumstances.

Murder can be committed even on very triable issues. A set pattern cannot be laid down as to how and in what manner a person would react and go to what extent to achieve the motive in the commission of the crime under particular circumstances because it is not possible to measure the extent of his feelings, sentiments and reactions as may be, who under frustration or on mere possibility may take the decision to commit the crime. After all, motive is a psychological phenomena to translate the mental deposition of the accused. In the present case, the motive for the accused to kill the deceased has been mentioned in the first information report.

Per contra Sri Sharad Dixit, learned A.G.A. has submitted that although, there is direct evidence in the case but still since the inception of the first information report, the prosecution has come up with the clear case of motive which has been proved, even by both the witnessed. However, proof of motive recedes into the background in cases where the prosecution relies upon eye witness account of the occurrence. This is because if the Court upon a proper appraisal of the deposition of eye witnesses case to the conclusion that the version given by them is credible. Conversely, even if the prosecution succeeds in establishing strong motive for the commission of the offence, the evidence of eye witnesses if found unreliable or unworthy of credit, the existence of motive does not by itself provide the safe basis for convicting the accused. That does not given that proof of motive even in a case which rests on an eye witness account does not lend strength to the prosecution case to fortify the court in its ultimate conclusion and thus proof of motive in such a situation certainly helps prosecution and supports eye witnesses. In the present case, the prosecution while mentioning the motive for the offence in the first information report has also adduced evidence to the effect. The evidence of PW-1 Sohana and PW-2 Mohana is unblemished, consistent and worthy of credit. Both these child witnesses were given in the hands of the defence for cross-examination and extensive fishing cross-examination was done to discreet

their testimony but there is nothing in the cross-examination of these witnesses which would render them to be unreliable witnesses. Thus, there is ample evidence on record to show that the present appellant Sadhu has sufficient motive to commit the offence.

(ii) The witnesses produced by the prosecution are interested witnesses, hence they cannot be relied upon

In ***State of U.P. vs. Naresh, (2011) 4 SCC 324,*** the Hon'ble Apex Court after considering the large number of its earlier judgments held as under:-

"In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

No doubt, PW-1 Sohana and PW-2 Mohana are real sisters and are real daughters of the deceased but who can be the better witness than the minor daughters, who are expected to be present with their mother at their house, where the sun was about to set.

In ***(2006) 4 Supreme Court Cases, 512 (State of A.P. vs. S. Rayappa and others)***, the Hon'ble Apex Court has held as under:-

"*Testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons. On the contrary, invariably the public is reluctant to appear and depose before the court especially in criminal case*

because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are a harassed lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously."

Perusal of the record shows that the testimony of PW-1 Sohana and PW-2 Mohana have been put to a very close cross-examination. Attempt was also made to discreet their testimony as to how the deceased fell down after the incident. But this attempt went in vain.

We fail to appreciate how a rustic, uneducated villager can be cross-examined in this manner to discredit his testimony. It would be too much to expect a photogenic explanation of the occurrence because conception of every person is different and courts are liable to commit mistake by loosing sight of their rural background.

It is well settled that the criminal court should not expect a set reaction from the eye witness on seeing an incident like murder and minor contradictions are likely to occur in the statement of truthful witness. The testimony of eye witness should only be rejected if it is so improbable and so inconceivable from any human being pitted in such a situation.

It has to be kept in mind that both the eye witnesses PW-1 Sohana and PW-2 Mohana are child witnesses.

In ***Panchi vs. State of U.P., (1998) 7 SCC 177,*** the Hon'ble Apex Court has observed as follows:-

"*The evidence of a child witness cannot be rejected. Outrightly evidence must evaluated carefully and with greater circumspection because a child is susceptible to swayed by what other told him and thus a child witness is an easy prey to tutoring."*

In the same context in ***1997 (5) SCC 341, Dattu Ramrao Sakhare vs. State of Maharashtra,*** the Hon'ble Apex Court has held as under:-

"A child witness, if found competend to depose to the facts can reliable one. Such evidence could be the basis of conviction in other words, even in the absence of oath, the evidence of child witness can be considered under Section 118 of the Evidence Act, provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof, would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his / her demeanour must be like any other competent witness and there is no likelihood of being tutored."

We have critically examined the evidence of PW-1 Sohana and PW-2 Mohana but there is nothing on record to turn the evidence of these witnesses as unworthy of credit. Besides, perusal of the record shows that before the statement of the witness was recorded, the trial court in its wisdom put certain questions to both the child witnesses and gave specific findings about both the witnesses that they were capable of understanding the sanctity of oath and were capable of giving their statement before the court. Besides another fact, it is very relevant in this case is that the father of the witnesses PW-1 and PW-2 had already died. The mother of the same witnesses was murdered by the accuses appellant. The informant and her sister had no axe to grind against the accused. There was nothing on behalf of the accused to suggest that any third person had tutored the eye witnesses, hence the statements of the eye witnesses PW-1 Sohana and PW-2 Mohana being consistent, trustworthy and in consonance with the medical evidence.

We conclude that the prosecution has successfully proved the prosecution case beyond all reasonable doubts.

(iii) The appellant Sadhu has been declared juvenile on the date of the incident, hence he has to be dealt with according to the provisions of Juvenile Justice (Care & Protection) Act, 2000 :-

Learned counsel for the appellant has submitted that the appellant has been declared juvenile by the Juvenile Justice Board, Lucknow. It has further been submitted that since as per report of Juvenile Justice Board, Lucknow, the accused appellant Sadhu was juvenile on the date of the occurrence, hence no useful purpose would be served in sending the accused appellant in jail now. It has further been submitted that presently even as per the statement of the accused recorded under Section 313 Cr.P.C., the accused appellant Sadhu has stated his age to be 19 years in the year 1982. Although, the age as stated by the accused is not conclusive and the Juvenile Justice Board has already declared him to be minor on the date of occurrence, is presently about 53 years of age.

He can neither be sent to the children home as presently he is not a minor nor he can be sent to the jail, since at the time of commission of the offence, he was minor. Hence, keeping in view, all the circumstances of the case, the accused appellant Ram Saran be set at liberty. Learned A.G.A. has also not disputed this fact.

How the accused has to be dealt with, is now a matter of consideration before this court.

The order that may be passed regarding juvenile has been specified in Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000 which reads as under:-

"15. Order that may be passed regarding juvenile*- (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit,-*

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e)direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

1[(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.]

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause € or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law: Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the Probation officer."

Section 16 of the Juvenile Justice (Care and Protection of Children) Act, 2000 reads as under:-

"(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death 1[or imprisonment for any term which may extend to imprisonment for life], or committed to prison in default of payment of fine or in default of furnishing security."

Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000 restricts the period of detention of a juvenile for not exceeding three years.

Counsel for the appellants has placed reliance upon ***(2009) 14 Supreme Court Cases 187, (Isatish alias Dhanna vs. State of Madhya Pradesh and others)*** in which it has been laid down that the benefit of the act should be extended to the accused appellant who was a minor on the date of occurrence. It has further been held that at this distant point of time to refer the appellant to the Juvenile Justice Board would not be proper and in the aforesaid case the appellant was ordered to be released.

Thus, there is no doubt that the appellant cannot be compelled to undergo detention otherwise then provided under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Hon'ble Apex Court in Criminal Appeal No. 210 of 2005 (Pratap Singh vs. State of Jharkhand and Anr.), a judgment delivered on 02.02.2005 by the Bench of five Hon'ble Judges in which it has been held as under:-

"26. Special provision in respect of pending cases.- Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Juvenile Court which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that the juvenile has committed the offence."

Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 reads as under:-

"**20. Special provision in respect of pending cases.**—Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence. 1[Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile."

Section 64 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides that where a juvenile is undergoing a sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution. Thus, provision show that even in cases where a mere inquiry is commenced or even where a juvenile has been sentenced a provision of 2000 Act would apply. Therefore, Section 20 of the Act 2000 is to be appreciated in the context of the aforesaid provisions.

Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

Thus, we conclude that although conviction of the appellant has been confirmed but as regards sentence is concerned, he should be dealt with under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000

In (***2013) 7 Supreme Court Cases 705, (Salil Bali vs. Union of India and another),*** the Hon'ble Apex Court has specified its concern about punishment as regards juvenile is concerned. It has been mentioned in the aforesaid judgment as under:-

"One misunderstanding of the law relating to the sentencing of the juveniles, needs to be corrected. The general understanding of a sentence that can be awarded to a juvenile under Section 15(1)(g) of the Juvenile Justice (Care and Protection of Children) Act, 2000, prior to its

amendment in 2006, is that after attaining the age of eighteen years, a juvenile who is found guilty of the heinous offence is allowed to go free. Section 15(1)(g), as it stood before the amendment came into effect from 22.08.2006, reads as follows:

"15. (1)(g) make as order directing the juvenile to be sent to a special home for a period of three years:

- In the case of juvenile, over seventeen years but less than eighteen years of age for a period of not less than two years;

- In case of any other juvenile for the period until he ceases to be a juvenile:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reason to be recorded, reduce the period of stay to such period as it thinks fit."

It was generally perceived that a juvenile was free to go, even if he had committed a heinous crime, when he ceased to be a juvenile. The said understanding needs to be clarified on account of the amendment which came into force with effect from 22.08.2006, as a result whereof Section 15(1)(g) now reads as follows:

"15. (1)(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

The aforesaid amendment now makes it clear that even if a juvenile attains the age of eighteen years within a period of one year he would still have to undergo a sentence of three years, which could spill beyond the period of one year when he attained majority."

We have been informed by the learned A.G.A. That there is no special home for detaining a juvenile in conflict with law after he becomes major. We did not loose sight of the fact that the essence of Juvenile Justice (Care and Protection of Children) Act, 2000 is restorative and not retributive, providing for rehabilitation and reintegration of children in conflict with law into mainstream society, instead of becoming hardened criminal in future. Thus by reason of legal friction, a person, although not a juvenile has to be treated to be one by the Board for the purpose of sentencing, which takes care of a situation that the person although not a juvenile but still would be treated as such under Juvenile Justice (Care and Protection of Children) Act, 2000 for the said limited purpose.

From a plain reading the explanation of Section 20 is that unless pending cases, which would include not only trial but even subsequent proceeding by way of revision or appeal etc, the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2 of the Act.

"11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000."

A question crops up as to how the juvenile in conflict with law who was a juvenile at the time of occurrence but who has subsequently attained the majority and is about 53 years of age shall be dealt with. As informed by learned A.G.A., there is no special home for such people who are convicted but have ceased to be a juvenile.

Perusal of the Juvenile Justice (Care and Protection of Children) Act, 2000 under Section 15(1)(g) the board may if it thinks fit, make an order directing the juvenile be sent to a special home for a period of three years although according to the provisions, the period of stay can also be reduced. Besides other orders which can be passed under Section 15 by the Board. But according to Section 16, the period of detention so ordered shall not exceed in any case three years. However, provision of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 empowers the Board for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

22. The law as it stands today is that the juvenile Justice Board cannot send a juvenile as he was at the time of occurrence who has subsequently attained majority to the special home nor the Board is empowered to send a person who was juvenile at the time of occurrence to jail. The question arises as to where such a person has to be sent.

23. The act has empowered the State Government to make rules under this act for the management of children.

24. Section 37 enables the State Government to recognize, reputed and capable voluntary organization as shelter home.

25. Thus, the State Government to consider to make specific rules as to where such juveniles who have attained majority should be kept in case their conviction is upheld.

26. We inquired from learned A.G.A., whether there were any such shelter homes, where the accused could be kept, but learned A.G.A. could not pointout any such shelter home. In **Criminal Appeal No. 529 of 1982 (Shiv Govind @ Surat & Others vs. State)**, the another Bench of this Court had observed in para 22 that the State Government shouls consider to make specific rules as to where such juveniles who have subsequently attend majority should be kept, in cases their conviction upheld but it appears that nothing was done in the matter.

27. Thus, we conclude that conviction qua the appellant Sadhu is well founded and needs no interference.

28. The conviction of the accused Sadhu is sustained, however, the punishment of life sentence imposed on him is quashed since on the date when the offence was committed, the accused appellant Sadhu was a juvenile in conflict with law, thus, he is entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000.

29. In the aforesaid terms, the appeal is **partly allowed**.

30. The conviction of Sadhu is upheld but sentence awarded by the court below is accordingly set aside.

31. Let the case record be placed before the concerned Juvenile Justice Board for awarding appropriate sentence.

(2016) 9 ILRA 856
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal No.- 1523 Of 2005
&
Criminal Appeal No.- 1388 Of 2005

Sonu @ Shashank Tiwari ...Appellant
Versus
The State Of U.P. ...Respondent

Counsel for Appellant:
Shri R.K. Singh, Shri Jan Laxmi Tiwari, Shri Subodh Kumar Shukla, Shri Yogendra Singh

Counsel for Respondent:
G.A, Shri S.C. Shukla

Held –

Paragraph 1: The High Court notes that both criminal appeals stem from a common judgment and are being heard and decided together.
Paragraph 2: Mentions the appearance of learned counsel representing the appellants (Sri Subodh Chandra Shukla for Sonu @ Shashank Tiwari and Sri R.N. Gupta for Rahul Mishra @ Chulbul Mishra) and the state (Sri Sharad Dixit, Additional Government Advocate).
Paragraph 3: Details the appeal against the trial court's judgment (dated Oct 4, 2005) which convicted Rahul Mishra under Sections 302/34 IPC (life imprisonment) and 394/34 IPC (10 years RI), and Sonu @ Shashank Tiwari under Section 302 IPC (life imprisonment), 394/34 IPC (10 years RI), and 411 IPC (2 years RI), with sentences running concurrently.
Paragraph 4: Summarizes the prosecution case: On Feb 14, 2000, two motorcycle-borne assailants intercepted Suresh Chandra Mishra and complainant Ashok Kumar Tiwari. They looted a suitcase containing ₹4,00,000, shot Suresh Chandra Mishra (who later succumbed to his injuries), and an FIR (Case Crime No. 86/2000) was lodged at P.S. Kotwali Nagar.
Paragraph 5: Outlines the initial investigation steps, including the inquest, postmortem examination revealing death by firearm injury, and the victim's dying statement recorded under Section 161 Cr.P.C.
Paragraph 6: Details the arrest of Rahul Mishra on Feb 16, 2000, leading to the recovery of the motorcycle used in the crime and the looted suitcase (containing bricks) from a well based on his confession.
Paragraph 7: Details the arrest of Sonu Tiwari on Feb 18, 2000, leading to the recovery of a country-made pistol, ₹1,40,000 cash with a "Mishra Automobile" slip, and an additional ₹40,000 at his pointing out.

Paragraph 8: Covers procedural completion: preparation of site plans, witness statements, identification parade (where witnesses identified the accused), and filing of the charge sheet under Sections 302, 394, and 411 IPC.
Paragraph 9: Summarizes the 10 prosecution witnesses presented, highlighting key testimonies from eye-witnesses (P.W. 2, P.W. 5) and the medical doctor (P.W. 7) who confirmed the entry/exit firearm wounds causing death.
Paragraph 10: Details the Section 313 Cr.P.C. statements of the accused, who claimed false implication due to local enmity.
Paragraph 11: Outlines the defense evidence given by D.W. 1 (Asha Ojha), who claimed Sonu was taken from her home without any recovery made on his pointing out.
Paragraph 12: Notes that after evaluating the evidence, the trial court convicted and sentenced both accused.
Paragraph 13: Notes the filing of separate appeals against the trial court's conviction.
Paragraph 14: Notes that the appellants' counsel did not press the appeals on merit but prayed for remission of sentence considering they had been incarcerated since February 2000.
Paragraph 15: Reaffirms the duty of the First Appellate Court to re-appreciate the trial evidence.
Paragraph 16: Re-evaluates P.W. 7's medical evidence confirming death by firearm injury during the robbery.
Paragraph 17: Notes that a co-accused (Edu @ Ateek) was absconding and not tried alongside the appellants.
Paragraph 18: Clarifies the specific roles: Sonu Tiwari was the shooter, while Rahul Mishra drove/followed in a jeep to protect the shooter, sharing common intention under Section 34 IPC.
Paragraph 19: Highlights P.W. 2's eye-witness testimony identifying Sonu Tiwari as the pillion rider who shot the deceased.
Paragraph 20: Highlights P.W. 2's identification of Rahul Mishra driving the supporting jeep.
Paragraph 21: Details P.W. 3's testimony regarding the recovery of the suitcase from the well and cash from Sonu Tiwari.
Paragraph 22: Mentions testimony from recovery witnesses (P.W. 4), the scribe/eyewitness (P.W. 5), and the Investigating Officer (P.W. 6).
Paragraph 23: Notes testimony from Executive Magistrate (P.W. 9) confirming valid identification parade proceedings, along with formal witnesses.
Paragraph 24: Concludes that the prosecution successfully proved the charges beyond reasonable doubt with no material discrepancies, affirming the conviction.
Paragraph 25: Transitions to evaluating the second argument regarding sentence modification/remission.
Paragraph 26: Recalls the life imprisonment sentence imposed under Section 302 IPC.
Paragraph 27: Cites the Supreme Court precedent in *Sangeet and Another Vs. State of Haryana* (2013) regarding statutory guidelines, executive powers, and Section 433-A restrictions for remissions under Section 432 Cr.P.C.
Paragraph 28: Concludes that directions should be issued to forward the appellants' remission proposals to the competent authority.
Paragraph 29: Dismisses the appeals on merit while directing the Jail Superintendent to immediately send remission proposals to the appropriate authority for expeditious consideration according to law.
Paragraph 30: Directs the court office to certify the order to the trial court and transmit lower court records immediately.

List of Case Laws Cited

***Sangeet and Another Vs. State of Haryana*, (2013) 2 SCC 452**

***State of Haryana Vs. Mohinder Singh*, (2000) 3 SCC 394**

(Delivered by Hon'ble Anil Kumar Srivastava-II, J.)

1. Since both the criminal appeals arise out of the common judgment, therefore, the same are being heard and decided together by a common judgment.

2. Heard Sri Subodh Chandra Shukla for the appellant/ Sonu @ Shashank Tiwari in Criminal Appeal no.1523 of 2005 and Sri R.N.Gupta, learned counsel for appellant/ Rahul Mishra @ Chulbul Mishra in Criminal Appeal No.1388 of 2005 and Sri Sharad Dixit, learned Additional Government Advocate.

3. Present Criminal Appeals have been preferred against the judgment and order dated 4.10.2005 passed by learned Additional Session Judge/ Fast Track Court-II , Pratapgarh in S.T. No. 292 of 2000 (Sonu alias Shashank Tiwari Vs. State of U.P.) and (Rahul Mishra alias Chulbul Misra Vs. State of U.P.) arising out of Case Crime no.86 of 2000 under Section 302,394 and 411 IPC , police-station Kotwali Nagar, District Pratapgarh whereby accused Rahul Mishra @ Chulbul Misra was convicted under Section 302 read with section 34 IPC and sentenced for life imprisonment and a fine of Rs.5000/- with default stipulation of further one year imprisonment, section 394 read with Section 34 IP.C. for ten years rigorous imprisonment and a fine of Rs. 5000/- with default stipulation of further six months imprisonment whereas Sonu alias Shashank Tiwari was convicted under Section 302 IPC for life imprisonment and a fine of Rs.20000/- with default stipulation of further two years imprisonment and under section 394 read with section 34 IPC for ten years and a fine of Rs. 10000/- with default stipulation of further one year imprisonment and Section 411 IP.C. for two years rigorous imprisonment and a fine of Rs. 1000/- with default stipulation of further three months imprisonment. All the sentences were directed to run concurrently.

4. According to prosecution case , on 14.2.2000 at about 10.00 a.m., owner of Mishra Automobile, Sri Suresh Chandra Mishra was going on the scooter with Ashok Kumar Tiwari , a pillion rider, to deposit cash in State Bank of India. When they reached just before bridge of Sai river, two persons came with motorcycle and dashed the scooter and warned Suresh Chandra Mishra to give them cash. Complainant Ashok Kumar Tewari ran away and the accused snatched the suitcase containing cash of Rs. 400000/- from Suresh Chandra Misra and another accused person, who was pillion rider of the motorcycle, fired at Suresh Chandra Mishra , who sustained serious injury and he was admitted to Raj Nurshing Home, Allahabad where he succumbed to his injuries. Ashok Kumar Tiwari has lodged an FIR to the said incident at Police station Kotwali Nagar, District Pratapgarh which was registered as Case Crime No. 86 of 2000 under sections 302/394,311 IPC. The investigation was handed over to Station House Officer of P.S. Kotwali District Pratapgarh.

5. The Investigating officer prepared the inquest report. Postmortem of the dead body was conducted by the Doctor on 14.2.2000 at 5.00 p.m. According to doctor, death was caused due to

antimortem fire arm injury. Statement of Suresh Chandra Tiwari was recorded under Section 161 Cr.P.C. by Investigating Officer on 14.2.2000, thereafter he succumbed to his injuries.

6. During investigation, on 16.2.2000 at about 11.30 a.m., investigating officer alongwith police personnel apprehended one Rahul Mishra alias Chulbul Misra. On his pointing out motorcycle bearing no. UP 45/ 5414 used in commission of crime was recovered. He confessed that it is the same motorcycle which was used in the commission of crime and also on his pointing out a black Ataichi (Suitcase) was recovered from the well . He also confessed that it is the same Ataichi which was looted on 14.2.2000 from Suresh Chandra Mishra after firing upon him. Some bricks were also found in the Ataichi.

7. On 18.2.2000 at about 12.20 a.m. Sonu alias Shashank Tiwari was apprehended by the police and on his pointing out one contrymade pistol used in commission of crime and a cash of Rs. 1,40,000/- was recovered in a box wherein a slip was attached on the bundle of rupees mentioning therein 'Misra Automobile Pratapgarh'. Rs. 40000/- was also recovered by the police at the pointing out of Sonu @ Shashank Tiwari .

8. Site plan of the incident was also prepared by Investigating Officer. Statements of witnesses were recorded . Accused/ appellants were also put for identification parade and they were rightly identified by the witnesses. After concluding the investigation, accused were chargesheeted under Sections 302, 394, 411 IPC.

9. In order to prove the case , prosecution has produced as many as ten witnesses, namely, P.W.1 , Shiv Prasad Pandey , P.W.2 Umesh Chandra Pandey, eye witness , P.W.-3 M.R. Premi , S.I., P.W.4 Sub Inspector Hemant Bhushan Singh , witness of recovery , P.W. 5 Ashok Kumar Tiwari, complainant and eye witness, P.W.-6 Pahup Singh, Investigating Officer P.W.-7 Dr. R.P. Singh who conducted the postmortem of the body of deceased Suresh Chandra Mishra on 14.02.2000 and found fire arm wound of entry measuring 1/1"x1/2" of cavity deep on right side of head just behind right ear, margins inverted ,blacking and tattooing and scorching are present. There was fire arm exit wound measuring 1'x1' cavity deep on the forehead left side 1 Â½" above . Lacerated would ¾" x Â½" bone deep on outer surface of close to base of right index finger. According to Doctor, duration of death was about six hours. Death is due to coma as result of fire arm injury to brain. P.W.8 Constable Lakhan Pal, informal witness P.W.9 Ram Dev Gupta, conducted the identification parade. P.W.10 Head Constable Sarvejeet Verma, Head Moharir, who has prepared chik report and mentioned the same in the G.D.

10. Accused/ appellant Sonu @ Shashank Twari has stated in his statement under section 313 CrPC that he was arrested from the house of Mausi Asha Ojha in the night of 16.2.2000. He stated that he was falsely implicated due to enmity of P.W.2 Umesh Chandra Pandey with his Mausia Radhey Shyam whereas Rahul alias Chulbul Misra has denied the charges levelled against him and stated that he has been falsely implicated due to enmity of S.H.O. Police Station Kotwali Nagar, Pratapgarh.

11. In defence, Smt. Asha Ojha has been produced as D.W.1, who has stated that Sonu alias Shashank Tiwari is son of her sister Smt. Sarla Tiwari . On 26.2.2000 marriage of her daughter Km. Anita was fixed and Sonu alias Shashank Tiwari came to her house on 10.2.2000 and was staying there but on 16.2.2000 at about 11.00 p.m. police has taken away Sonu alias Shashank Tiwari from her house. No recovery was made from his possession or on pointing out of Sonu alias Shashank Tewari.

12. After appreciating the evidence on record and going through the material on record , learned trial court found accused persons/appellants guilty and sentenced them in the aforesaid sections.

13. Feeling aggrieved by the impugned judgment , appellants have preferred two separate appeals.

14. At the very outset, learned counsel for the appellants argued that accused were arrested by the police authorities and are in jail since February ,2000 and they have not been granted bail during trial by learned trial court as well as by this Court . Learned counsel for the appellants have not pressed the present appeals on merit rather they have pressed the appeal on the point of sentence only with the prayer of remission of sentence.

15. Being the first appellate court, we are conscious of the duties of the first appellate court to reassess and re appreciate the evidence led by the prosecution before the learned trial court.

16. According to P.W. 7 Dr. R.P. Singh, deceased died due to fire arm injury sustained by him which supports the prosecution version that pillion rider fired at Suresh Chandra Mishra deceased and snatched the bag containing Rs. 4,00,000/-.

17. At this stage, it is relevant to mention that one of the co accused namely Edu alias Ateek son of Vakil Ahmad was absconding and was not put to trial . The trial court has only convicted and sentenced accused appellants Sonu alias Shashank Tiwari and Rahul Misra alias Chulbul Misra in the aforementioned sections.

18. Role assigned to accused Sonu alias Shashank Tiwari is of firing while role of co-accused Rahul Mishra was little different. He was at the jeep when the occurrence took place . After the occurrence he followed motorcycle in order to protect the accused who are driving motorcycle, hence his role was of common intention alongwith main accused Sonu alias Shashank Tiwari.

19. P.W.2 Umesh Chandra has given eye witness account of the incident. He has stated that at the time of incident he was going to his house on bicycle. He saw that the person, who was driving the motorcycle, snatched the bag from Suresh Chandra and pillion rider of motorcycle fired upon Suresh Chandra who fell down. This witness has correctly identified the Sonu alias Shashank Tiwari in identification parade as well as in court.

20. P.W.2 Umesh Chandra Pandey has also identified co accused Rahul Mishra alias Chulbul Misra. He has stated that one Commander Jeep was at the place of occurrence and followed the motorcycle and after the incident only the driver was driving the jeep, who was co-accused Rahul Mishra alias Chulbul Misra, who was known to him from earlier as he used to visit Misra Petrol Pump for taking fuel in the jeep .

21. PW-3 M.R. Premi was a member of the ruling party which has recovered an attachi from a well on the pointing out of the accused Rahul Misra alias Chulbul wherein accused had admitted that this is the same attachin which was robbed on 14.02.2000 after committing the murder of Suresh Chandra Misra. It was further stated by him that attachi was containing an amount of Rs.4,00000/-. Lock was broken open after getting the amount out of the attachi. Bricks were kept in it and it was drowned in the well. PW-3 M.R. Premi has further stated that he was a member of the ruling party which have arrested Sonu alias Shashank Tiwari on 18.02.2000 at 12:30 PM and amount of Rs.1,40,000/- which was robbed were also recovered from the possession of the accused. Recovery memo was prepared on 23.02.2000. Police party has recovered Rs.40,000/- on the pointing out of accused Sonu alias Shashank Tiwari. Recovery memo was prepared.

22. PW-4 S.I. Hemant Bhushan is also a witness of recovery, PW-5 Ashok Tripathi is scribe of the first information report and also eyewitness who has identified accused Rahul and Sonu in the jail. He has further identified Rahul before the trial court. PW-6 Inspector Pahunch Singh is the Investigating Officer of the case who filed the charge sheet against the accused. He is also witness of recovery.

23. PW-9 Ram Dev Gupta is Executive Magistrate who has conducted the identification parade of Rahul and Sonu alias Shashank in the jail wherein it is stated that the witnesses have correctly identified them. PW-9, PW-10 HCP Sarabjit Verma is a formal witness.

24. We have gone through the statement of the above prosecution witnesses wherein we found that the prosecution has successfully proved the charges levelled against the accused appellants. They have been correctly identified by the witnesses in the jail as well as in the trial court. No discrepancy or material contradiction was found by the learned trial court in the evidence of the witnesses. Recovery was also proved by the witnesses. Prosecution has successfully proved the charges against the accused appellants. Learned counsel for the accused appellants have also not pressed the bail on merit.

25. Now we shall take up the second limb of the argument which is on the point of the sentence.

26. Learned trial court has sentenced the accused for imprisonment for life under section 302 IPC coupled with other sentences.

27. Now the second limb of argument comes to our consideration. Before proceeding further in the matter, we would like to mention the pronouncement of Hon'ble the Apex Court in

the case of Sangeet and Another Vs. State of Haryana reported in (2013) 2 SCC 452 and has observed in paragraph no. 61 to 64 and 77.6 to 77.7 as under:-

"61. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Cr.P.C. cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfillment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 of the Cr.P.C. cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this Section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the presiding judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable in as much as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

62. It must be remembered in this context that it was held in State of Haryana V. Mohinder Singh reported in (2000) 3 SCC 394 that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Cr.P.C. does provide this check on the possible misuse of power by the appropriate Government.

Substantive check on arbitrary remissions:

63. For exercising the power of remission to a life convict, the Cr.P.C. places not only a procedural check as mentioned above, but also a substantive check. This check is through Section 433-A of the Cr.P.C. which provides that when the remission of a sentence is granted in a capital offence, the convict must serve at least fourteen years of imprisonment. Of course, the requirement of a minimum of fourteen years incarceration may perhaps be relaxed in exercising power under Article 72 and Article 161 of the Constitution and Section 433 of the Cr.P.C. but, as mentioned above, we are presently not concerned with these provisions and say nothing in this regard, one way or the other.

64. Section 433-A of the Cr.P.C. reads as follows:-

433-A. Restriction on powers of remission or commutation in certain cases.— Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under

Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

77.6 Remission can be granted under Section 432 of the Cr.P.C. in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 of the Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

77.7 Before actually exercising the power of remission under Section 432 of the Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner. "

28. Keeping in view the aforementioned pronouncement, we consider it appropriate that necessary direction may be issued for forwarding the proposal of remission of sentence of the appellants to the competent authority for its consideration.

29. Accordingly, these appeal are hereby **dismissed**. We hope and trust that Jail Superintendent shall immediately send the proposal for remission of sentence of appellants to the appropriate authority, which shall be considered expeditiously by the competent authority in accordance with law.

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.

(2016) 9 ILRA 864
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 1534 Of 2012

Gaya Prasad **...Revisionist**
Versus
State Of U.P. **...Opposite party**

Counsels for the Revisionist:
Shri Ram Autar Verma, Shri Dinesh Chnadra Tripathi

Counsel for the Opposite Party:
G.A.

Held –

Paragraph 1 (Appearance & Identification): The court recorded the presence of Sri Ram Autar Verma (counsel for revisionist Gaya Prasad) and Ms. Anita Srivastava (learned A.G.A. for the State of U.P.).
Paragraph 2 (Revision Details & Case Background): The revisionist challenged the Appellate Court's order (dated 09.02.2012 by Additional District Judge, Room No. 2, Kanpur Nagar in Criminal Appeal No. 96/2011), which had affirmed the Trial Court's conviction order (dated 15.07.2011 by Special Chief Judicial Magistrate, Kanpur Nagar in Criminal Case No. 5229/2006, arising out of Case Crime No. 37/1999, under Sections 420, 467, 468, and 471 I.P.C., P.S. Kotwali, Kanpur Nagar).
Paragraph 3 (Hearing): The High Court formally heard arguments from both counsels and perused the trial and appellate records.
Paragraph 4 (Arguments of Revisionist's Counsel): The revisionist's counsel argued that insufficient documentary evidence existed to convict Gaya Prasad, who only provided photostat copies of alleged orders to his lawyer. He added that the revisionist is an illiterate person unable to grasp legal intricacies, warranting a lenient view by lower courts.
Paragraph 5 (Prosecution Case Details - Fraudulent Land Claim): In a pending revenue proceeding (Case No. 77/88 under Section 229-B of UPZA & LR Act), the accused fraudulently submitted a forged High Court order/judgment (dated 07.10.1996 in Writ Petition No. 3081/1986) to delete the actual owner's name and register his own name. In reality, the revisionist's earlier Writ Petition (No. 3341/1996) had already been dismissed on 12.07.1996, and a review petition was pending when the fake order was procured.
Paragraph 6 (Inquiry & F.I.R.): Pursuant to the High Court's order dated 03.12.1997, an inquiry was conducted by ASP/Zonal Officer Akhileshwar Ram Mishra (P.W.-2). Subsequently, Case Crime No. 37/1999 was registered at P.S. Kotwali under Sections 420, 467, 468, and 471 I.P.C.
Paragraph 7 (Charge-sheet & Severance of Trial): A charge-sheet was submitted against three individuals: Gaya Prasad, Smt. Bittan Devi, and Krishna Kumar Verma. Because Krishna Kumar Verma absconded, his case was separated on 25.01.2007. The Trial Court proceeded only against Gaya Prasad and Smt. Bittan Devi, who both pleaded not guilty.

Paragraph 8 (Prosecution Witnesses & Documentary Evidence): The prosecution examined six witnesses: P.W.-1 Mahendra Kumar Sharma, P.W.-2 Akhileshwar Ram Mishra (informant), P.W.-3 Pradeep Kumar (SDM), P.W.-4 Ashok Kumar, P.W.-5 Babu Ram Pal (Advocate), and P.W.-6 SI Jay Pal Singh (I.O.). Several documentary exhibits were also produced.

Paragraph 9 (Statements under Section 313 Cr.P.C.): Gaya Prasad claimed illiteracy and alleged false implication by his lawyer (P.W.-5 Babu Ram Pal). Smt. Bittan Devi stated she was not a party to the proceedings and hadn't signed anything. No defense evidence was adduced.

Paragraph 10 (Litigation History - Revenue Courts): Gaya Prasad had initially instituted Case No. 25/85 through his mother (Bittan Devi) claiming bhumidhari rights over Plot No. 854/2 (10 Biswa, Naubasta). Decreed initially in his favor on 22.05.1989, the decision was overturned on appeal on 19.12.1989 upon a challenge by Janhit Cooperative Housing Society Ltd. (Exhibits Ka-3 & Ka-4).

Paragraph 11 (Board of Revenue Dismissal): Gaya Prasad's Second Appeal (No. 30/89-90) before the Board of Revenue was dismissed on 30.12.1995, confirming the appellate order against him.

Paragraph 12 (High Court Dismissal & Review): Gaya Prasad then filed Civil Misc. Writ Petition No. 3341/1996 in the Allahabad High Court, which was dismissed on 12.07.1996. His review petition filed on 17.12.1996 remained pending.

Paragraph 13 (Submission of Photostat Orders): A photostat copy of another order in Writ Petition No. 36524/1994 (seeking protection from dispossession) was also placed on record by Gaya Prasad.

Paragraph 14 (Fraudulent Application for Mutation): Despite the dismissal of his writ petition, Gaya Prasad applied on 10.06.1997 for mutation before the Additional City Magistrate (IV), Kanpur Nagar, referencing forged High Court and Supreme Court orders (SLP No. 4100/1997).

Paragraph 15 (Ex-Parte Order Obtained): Relying on photostat copies of forged High Court and Supreme Court judgments, the Magistrate issued an order (Exhibit Ka-8) registering Gaya Prasad's name in revenue records without notifying the actual land owner.

Paragraph 16 (Discovery of Forgery): On 29.09.1997, Janhit Cooperative Housing Society Ltd. inquired about the alleged High Court judgment dated 07.10.1996 in Writ Petition No. 3081/1996. It was revealed that Justice S.P. Srivastava had never passed any such order and the submitted document was completely fake.

Paragraph 17 (Actual Status of Writ Petition No. 3081/1996): Enquiry confirmed that Writ Petition No. 3081/1996 was actually filed by Dr. Kailash Nath Shukla relating to Group-A services and was still pending at the admission stage on 24.11.1997.

Paragraph 18 (High Court Registrar's Order for Investigation): Upon discovering the forgery of its judgment, the Registrar of the High Court directed the Government of U.P. on 03.12.1997 to conduct a C.B.C.I.D. investigation.

Paragraph 19 (Witness Testimony on Forgery): P.W.-1, P.W.-2, P.W.-3, P.W.-4, and P.W.-5 (Advocate Babu Ram Pal) unequivocally testified that the alleged High Court judgment dated 07.10.1996 and Supreme Court judgment dated 06.05.1997 were forged and fabricated.

Paragraph 20 (Thorough Trial Analysis): The High Court noted that the trial court meticulously evaluated both oral and documentary evidence before reaching its conclusion.

Paragraph 21 (Establishment of *Mens Rea* and Beneficiary Status): P.W.-5 (Babu Ram Pal, Advocate) testified that Gaya Prasad personally handed him the forged photocopy orders to submit in court. Furthermore, after obtaining mutation through deceit, Gaya Prasad executed a registered agreement to sell a 236 sq. yd. portion of the disputed land. He also filed objections to delay proceedings when the fraud was exposed, proving his criminal intent (*mens rea*).

Paragraph 22 (Sole Beneficiary Principle): The court re-emphasized that Gaya Prasad was the sole beneficiary of the entire fraudulent process.

Paragraph 23 (Trial Court Findings & Partial Acquittal): The Trial Court, citing Supreme Court precedents, convicted Gaya Prasad under Sections 420, 467, 468, and 471 I.P.C. while giving the benefit of doubt to his mother, co-accused Smt. Bittan Devi, and acquitting her.

Paragraph 24 (Appellate Court Challenge): Gaya Prasad appealed his conviction to the Sessions Court (Criminal Appeal No. 96/2011), primarily repeating the defense of illiteracy.

Paragraph 25 (Appellate Court Findings): The Additional Sessions Judge observed that Gaya Prasad exhausted every legal channel to grab the property and that no third party would forge court orders solely to benefit him.
Paragraph 26 (Registered Agreement to Sell Sealed Conviction): Executing a registered agreement to sell a portion of the fraudulently obtained plot in favor of Smt. Sushila Devi Verma conclusively established his guilt and sealed his fate in revision.
Paragraph 27 (High Court Finding on Legality): After examining the trial court and appellate court judgments, the High Court held that neither order suffered from any illegality, perversity, or impropriety.
Paragraph 28 (Dismissal Decision): The High Court held the criminal revision to be completely devoid of merit and dismissed it.
Paragraph 29 (Dismissal Order): Formally declared: "Dismissed."
Paragraph 30 (Compliance Direction): Directed a copy of the judgment to be sent to the learned Sessions Judge (Civil and Sessions Court), Kanpur Nagar for necessary compliance.

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

1. Case called out. Sri Ram Autar Verma, learned counsel for the revisionist and Ms. Anita Srivastava, learned A.G.A. for the State of U.P. are present.

2. The instant criminal revision has been preferred against the judgement and order dated 09.02.2012 passed by the Additional District Judge, Room No.2, Kanpur Nagar in Criminal Appeal No.96 of 2011 (Gaya Prasad Vs. State of U.P.) relating to Criminal Case No.5229 of 2006 (State Vs. Gaya Prasad and another) in Case Crime No.37/99, under Sections 420, 467, 468, 471 I.P.C., P.S. Kotwali, District Kanpur Nagar, whereby the judgement and order dated 15.07.2011 passed by the Special Chief Judicial Magistrate, Kanpur Nagar in Criminal Case No.5229 of 2006 (State Vs. Gaya Prasad and another) in Case Crime No.37/99, under Sections 420, 467, 468, 471 I.P.C., P.S. Kotwali, District Kanpur Nagar has been affirmed.

3. Heard the arguments of learned counsel for the revisionist and learned A.G.A. for the State of U.P. and perused the record.

4. Learned counsel for the revisionist has argued that there were no sufficient documentary evidence to convict the revisionist Gaya Prasad. Only photostat copy of the alleged orders were submitted by the revisionist to his counsel. Revisionist is an illiterate person who could not understand intricacies of legal proceedings, thus, a lenient view would have been taken by the learned Special Chief Judicial Magistrate, Kanpur Nagar as well as the learned Additional Sessions Judge, Room No.2, Kanpur Nagar while deciding this criminal case.

5. The prosecution case in brief is as follows:

6. One case no.77/88, under Section 229 B of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (Gaya Prasad Vs. K.D.A. and Janhit Cooperative Housing Society Limited) was pending before the court of the learned City Magistrate (IV), Kanpur Nagar in which accused persons by committing forgery have filed fabricated order/judgement with regard to the Civil Misc.

Writ Petition No.3081 of 1986, dated 07.10.1996 of the Hon'ble High Court, Allahabad and thereby deleting the name of real land owner procured the name of accused Gaya Prasad to be registered there whereas accused person Gaya Prasad has preferred a Civil Misc. Writ Petition No.3341 of 1996 before the Hon'ble High Court, Allahabad which was dismissed on date 12.07.1996. A review petition was presented through Sri R.C. Sharma, Advocate and Sri Ram Autar Verma, Advocate against the order/judgement dated 12.07.1996 which was pending before the Hon'ble High Court, Allahabad at the time of preparing/procuring of that relevant fabricated and forged judgement.

7. An enquiry was conducted by the learned Additional Superintendent of Police/Zonal Officer, Sri Akhileshwar Ram Mishra (Prosecution Witness-2) in compliance with the order dated 03.12.1997 of Hon'ble High Court, Allahabad. Thereafter, a case was registered in Crime No.37 of 1999, under Sections 420, 467, 468, 471 I.P.C. against the accused persons in Police Station Kotwali and the investigation was initiated by the Police of Police Station Kotwali, District Kanpur Nagar.

8. A charge-sheet was submitted against the accused persons, namely, Gaya Prasad, Smt. Bittan Devi and Krishna Kumar Verma. Since co-accused Krishna Kumar Verma was absconding, his case was separated by the court concerned by it's order dated 25.01.2007. Hence, it was ordered by the trial court of the learned Special Chief Judicial Magistrate, Kanpur Nagar in it's impugned judgement and order dated 15.07.2011 that this judgement pertains only to the accused persons, namely, Gaya Prasad and Smt. Bittan Devi. Charges were framed against the accused persons Gaya Prasad and Smt. Bittan Devi under Sections 420, 467, 468, 471 I.P.C. to which they pleaded not guilty and claimed to be tried.

9. While adducing oral evidence, the prosecution produced P.W.1, Mahendra Kumar Sharma, P.W.2, Akhileshwar Ram Mishra (informant), P.W.3, Pradeep Kumar, S.D.M., Pratapgarh, P.W.4, Ashok Kumar, P.W.5, Babu Ram Pal and P.W.6, Sub-Inspector, Jay Pal Singh, Investigating Officer of the case. In it's support several documentary evidence were also produced by the prosecution, details of which have been mentioned in the impugned judgement and order dated 15.07.2011 of the learned Special Chief Judicial Magistrate, Kanpur Nagar.

10. Statements of the accused persons Gaya Prasad and Smt. Bittan Devi were recorded under Section 313 Cr.P.C. in which accused person Gaya Prasad stated that he is an illiterate person, he has been falsely implicated by his counsel, Sri Babu Ram Pal, Advocate whereas accused person Smt. Bittan Devi has stated that neither she is a party to the proceedings nor she has put any signatures. She has engaged Sri Babu Ram Pal, Advocate as her counsel. No evidence was adduced in defence.

11. Accused revisionist Gaya Prasad has instituted a case through his mother and natural guardian Smt. Bittan Devi (co-accused) as Case No.25/85, under Section 229 B of the U.P. Zamindari Abolition and Land Reforms Act, 1950 before the court of the learned S.D.O., Kanpur Nagar on date 16.03.1985 claiming the relief that he may be declared bhumidhar with transferable right of the plot no.854/2, ad-measuring 10 Biswa, situated at village Naubasta, Pargana and District Kanpur Nagar and it may also be ordered that his name may be registered as such in the revenue records. This case was contested on behalf of the Janhit Cooperative Housing Society Limited through it's Secretary Sri Mahendra Kumar Sharma, Advocate. The

court of the learned Additional City Magistrate (IV), Kanpur Nagar by it's order dated 22.05.1989 has decided the case no.25/85 in favour of accused person Gaya Prasad.

12. Aggrieved by this order Janhit Cooperative Housing Society Limited through it's Secretary, Sri Mahendra Kumar Sharma, Advocate preferred an appeal before the Additional Commissioner (Administration), Kanpur Division, Kanpur, which was allowed on date 19.12.1989 and the order dated 22.05.1989 was cancelled. Both the above mentioned orders are available on record as Exhibits Ka-3 and Ka-4.

13. Accused person Gaya Prasad preferred Second Appeal No.30/89-90 before the Board of Revenue, Uttar Pradesh, Allahabad which was dismissed on 30.12.1995 and the Board of Revenue, Uttar Pradesh, Allahabad confirmed the earlier order dated 19.12.1989.

14. Against this order of the Board of Revenue, Uttar Pradesh, Allahabad, the accused Gaya Prasad preferred a Civil Misc. Writ Petition No.3341 of 1996 before the Hon'ble High Court, Allahabad which was dismissed by the Hon'ble High Court, Allahabad by it's order dated 12.07.1996.

15. Against this order of Hon'ble High Court, Allahabad accused person Gaya Prasad presented a review petition on date 17.12.1996 before the Hon'ble High Court, Allahabad which was pending as per enquiry dated 24.10.1997 (Exhibit Ka-6).

16. Photostat copy of the order dated 13.11.1996 in Civil Misc. Writ Petition No.36524 of 1994 was also available on the file which was presented by the accused person Gaya Prasad claiming the relief that he may not be dispossessed by the anti- social elements from the plot no.854/2, ad-measuring 10 Biswa.

17. Accused person Gaya Prasad during the pendency of this Civil Misc. Writ Petition No.3081 of 1996 (Gaya Prasad Vs. Board of Revenue and others) and the judgement of Hon'ble High Court, Allahabad dated 07.10.1996 and Special Leave Petition No.4100 of 1997 presented by the Janhit Cooperative Housing Society Limited before the Hon'ble Supreme Court dated 06.05.1997 for cancelling the aforementioned judgement for which obtaining the copy dated 03.06.1997 was available on the file and which was mentioned in the judgement; accused Gaya Prasad presented an application dated 10.06.1997 before the learned Additional City Magistrate (IV), Kanpur Nagar with regard to the plot no.854/2, ad-measuring 10 Biswa for issuing the order of mutation. In Para-4 of application dated 10.06.1997 of accused Gaya Prasad there was mention of order of Hon'ble High Court, Allahabad.

18. Presenting the photostat copies of the judgements of Hon'ble High Court, Allahabad and Hon'ble Supreme Court the learned Additional City Magistrate (IV), Kanpur Nagar without issuing notice to the defendants passed an order regarding registering of the name of accused person Gaya Prasad in revenue records over the disputed plot. This order is Exhibit Ka-8.

19. Affected party i.e. Janhit Cooperative Housing Society Limited made an enquiry by presenting an application dated 29.09.1997 regarding judgement dated 07.10.1996 which was alleged to have been passed in Civil Misc. Writ Petition No.3081 of 1996. On this application dated 29.09.1997 of P.W.1,

Mahendra Kumar Sharma, it was found that in Writ Petition No.3081 of 1996, Hon'ble Mr. Justice S.P. Srivastava of Hon'ble High Court, Allahabad has not passed any order dated 07.10.1996 and the alleged judgement and order dated 07.10.1996 relating to Writ Petition No.3081 of 1996 which was presented by the accused Gaya Prasad before the learned Additional City Magistrate (IV), Kanpur Nagar is a forged document.

20. It is relevant to mention here that during the enquriy, it was found that actually Civil Misc. Writ Petition No.3081 of 1996 was presented by Dr. Kailash Nath Shukla before the Hon'ble High Court, Allahabad which was pending on date 24.11.1997 at the stage of admission and it related to Group-A Services. A copy of the enquiry details dated 24.11.1997 was available on the file.

21. After finding the alleged impugned judgement dated 07.11.1996 relating to Writ Petition No.3081 of 1996 as a forged and fabricated the then Registrar of Hon'ble High Court, Allahabad by his letter dated 03.12.1997 directed the Government of Uttar Pradesh that an enquiry be conducted by C.B.C.I.D.

22. P.W.1, Mahendra Kumar Sharma, P.W.2, Akhileshwar Ram Mishra (informant), P.W.3, Pradeep Kumar, S.D.M., Pratapgarh, P.W.4, Ashok Kumar, P.W.5, Babu Ram Pal, Advocate have deposed that the judgement and order dated 07.10.1996 alleged to have been passed in Civil Misc. Writ Petition No.3081 of 1996 and the alleged judgement passed in Special Leave Petition No.4100 of 1997 dated 06.05.1997 were forged and fabricated documents.

23. The learned Special Chief Judicial Magistrate while conducting the trial has vividly and elaborately discussed the oral as well as documentary evidence available on record.

24. P.W.5, Sri Babu Ram Pal, Advocate was the counsel of accused Gaya Prasad. He has deposed before the trial court that accused Gaya Prasad has handed over him the photocopies of the alleged forged judgement to be presented before the learned Additional City Magistrate (IV), Kanpur Nagar. This fact is also of paramount importance that after the name of accused person Gaya Prasad was registered in the revenue records. Accused Gaya Prasad has executed a registered agreement to sell regarding a portion ad-measuring 236 square yards of disputed plot no.854/2, ad-measuring 10 Biswa. A copy of this registered agreement to sell is available on record. This is also a strong evidence that when Sri Mahendra Kumar Sharma, Advocate, Secretary of Janhit Cooperative Housing Society Limited presented an application dated 04.10.1997 before the court of the learned Additional City Magistrate (IV), Kanpur Nagar mentioning therein that on the basis of forged and fabricated judgement of registering of name of accused person in revenue records (Exhibit Ka-9) and praying therein to postpone the proceedings of the registration. Accused person presented an objection dated 02.12.1997. This proves the culpability and mens rea of the accused person Gaya Prasad.

25. Undoubtedly, accused Gaya Prasad was the sole beneficiary of all these proceedings.

26. Trial court of the learned Special Chief Judicial Magistrate, Kanpur Nagar has cited several rulings of Hon'ble Supreme Court in support of the view taken by it and after considering the rival contention has arrived at the conclusion of conviction of the accused revisionist Gaya Prasad and acquittal of co-accused Smt. Bittan Devi, who was the mother and natural guardian of main accused Gaya Prasad. Resultantly, co-

accused Smt. Bittan Devi was acquitted of the charges under Sections 420, 467, 468, 471 I.P.C. levelled against her after providing her benefit of doubt whereas main accused Gaya Prasad was convicted under Sections 420, 467, 468, 471 I.P.C. and was awarded sentences along with fine.

27. Aggrieved by the judgement dated 15.07.2011 of the learned Special Chief Judicial Magistrate, Kanpur Nagar a criminal appeal was preferred by accused Gaya Prasad before the court of the learned Sessions Judge, Kanpur Nagar ultimately which was decided by the court of the learned Additional Sessions Judge, Court No.2, Kanpur Nagar by it's judgement and order dated 09.02.2012 in criminal appeal no.96 of 2011 (Gaya Prasad Vs. State) relating to criminal case no.5229 of 2006, crime no.37 of 1999, under Sections 420, 467, 468, 471 I.P.C., Police Station Kotwali, District Kanpur Nagar. In this criminal appeal also, the main contention of the counsel before the learned Additional Sessions Judge, Court No.2, Kanpur Nagar, was that accused appellant was an illiterate person, who was even unable to read, write or even to put his signature.

28. Learned Additional Sessions Judge, Court No.2, Kanpur Nagar while adjudicating upon the matter before him has categorically observed that the accused person Gaya Prasad has left no stone unturned to procure the order of mutation in his favour in revenue records relating to the disputed plot no.854/2, ad-measuring 10 Biswa situated at village Naubasta, District Kanpur Nagar and he knocked each and every door possible and available in the legal proceedings and since the accused person Gaya Prasad was the sole beneficiary of the disputed property, then it is out of imagination that any other person will make any endeavour to benefit him by procuring the forged and fabricated documents.

29. The execution of the registered agreement to sell; by the accused person Gaya Prasad, of a portion of the disputed property i.e. plot no.854/2, ad-measuring 10 Biswa, situated at village Naubasta, after getting his name registered as bhumidhar with transferable right by adopting deceitful means; in favour of Smt. Sushila Devi Verma-seals the fate of this criminal revision.

30. I have perused the impugned orders dated 09.02.2012 and 15.07.2011 of the learned Additional District Judge, Room No.2, Kanpur Nagar and the learned Special Chief Judicial Magistrate, Kanpur Nagar respectively. The aforementioned impugned judgements and orders do not suffer from any illegality, perversity or impropriety.

31. Resultantly, this criminal revision is devoid of merit and liable to be dismissed.

32. Dismissed.

33. Let a copy of this Judgement and Order be sent to the learned Sessions Judge (Civil and Sessions Court), Kanpur Nagar for necessary compliance.

(2016) 9 ILRA 871
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE MUKHTAR AHMAD, J.

Criminal Appeal No.- 2659 Of 1982

Inamullah & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsels for the Appellants:
Shri J.N. Chaturvedi, Shri B.P. Gupta, Shri C.M. Jha, Shri Manojkumar Singh, Shri Raghubir Singh, Shri Raghuraj Kishore Mishra A, Shri Tej Pal

Counsel for the Respondent:
D.G.A.

Held –
Para 1 (Introduction & Abatement): This criminal appeal challenges the judgment dated 14.10.1982 by the Additional Sessions Judge, Rampur (Sessions Trial No. 254 of 1981). The four appellants (Inam Ullah, Shafiq @ Gama, Rais, and Mehandi @ Bhatia) were convicted under Section 302/34 IPC (life imprisonment) and Section 324/34 IPC (four months RI), running concurrently. The appeal against Appellant No. 1 (Inam Ullah) abated following his death on 24.10.2008.
Para 2 (Motive & Background): The motive traces back to an unpaid tonga fare owed by Rais Pahelwan to Aziz. Two days prior to the incident, an argument over payment was defused by a neighbor, Nazeer Ahmed.
Para 3 (The Incident & FIR): First informant Iqrar (PW-1) stated that on 02.05.1981, his brother Abrar slapped Shareef @ Dilphar (Rais's brother) during a spat. Shortly after, Rais (armed with a *chhuri*), Shafiq (armed with a country-made pistol), Inam Ullah (armed with a knife), and Mehandi came to threaten them. The altercation escalated at Dak Bunglow Tiraha where Aziz was fatally stabbed. Abrar, Iqrar, and Manjoo were also attacked when attempting to intervene. Iqrar rushed the injured to Police Station Suar, where FIR Crime No. 61 was registered.
Para 4 (Investigation & Second Death): SI H.S. Pawar (PW-10) initiated the investigation, recorded statements, prepared the site plan, collected evidence (blood-stained earth, footwear), and sent Aziz's body for autopsy. On 03.05.1981, Manjoo Khan succumbed to his injuries at District Hospital Rampur. SI Parveen Singh (PW-11) later completed the investigation and submitted the charge sheet.
Para 5 (Prosecution Witnesses): The prosecution examined 14 witnesses: 5 eye-witnesses (PW-1 to PW-5, including injured witnesses PW-1 and PW-2), 4 medical experts (PW-6, PW-9, PW-12, PW-14), 4 police personnel (PW-7, PW-8, PW-10, PW-11, PW-13, PW-14).
Para 6 (Defense & Court Witness): In their Section 313 Cr.P.C. statements, the accused pleaded innocence. Accused Rais claimed bias due to an earlier case; Inam Ullah claimed separation from his sons; Mehandi claimed a identity issue regarding his name. Court Witness CW-1 (an advocate) testified regarding a rejected bail application. No defense witnesses were presented.

Para 7 (Trial Court Decision): The Trial Court found the prosecution proved its case beyond a reasonable doubt, convicting and sentencing the appellants accordingly.
Para 8 (Counsel Appearances): Heard Amicus Curiae Mr. Raghuraj Kishore (for Appellants 2 & 3), Mohd. Irfan Khan (for Appellant 4), and Mr. M.S. Yadav (A.G.A. for the State).
Para 9 (Summary of Casualties): Summarizes the casualties: Aziz died on the spot, Manjoo died during treatment, and PW-1 (Iqrar) and PW-2 (Abrar) sustained non-fatal injuries.
Paras 10–12 (Medical Evidence – Iqrar & Manjoo): Dr. P.S. Thakur (PW-6) proved the injury reports for Iqrar (simple incised wound on thigh) and Manjoo Khan (lacerated head wounds, traumatic swellings, incised hip wound).
Paras 13–14 (Medical Evidence – Abrar): Dr. A.U. Khan (PW-12) proved Abrar's injury report (10 injuries, including head laceration, abrasions, and multiple incised wounds caused by sharp weapons).
Paras 15–17 (Autopsy of Deceased Aziz): Dr. H.B. Bhutt (PW-9) proved Aziz's autopsy report (9 ante-mortem incised wounds). Death was caused by shock and hemorrhage due to lung damage from a chest wound.
Paras 18–20 (Autopsy of Deceased Manjoo): Dr. H.B. Bhutt (PW-9) proved Manjoo's autopsy report (head injuries, skull fracture, brain congestion). Death was due to head trauma caused by a blunt object/butt of a pistol.
Paras 21–23 (Eye-Witness Testimony): Eye-witnesses PW-1 through PW-5 consistently narrated the sequence of events, corroborating the account given in the FIR.
Para 24 (Appellants' Arguments – Contradictions): Appellants argued that the testimonies contained inconsistencies, were "photographic" in nature, and came from interested/inimical witnesses.
Para 25 (Appellants' Arguments – FIR Ante-timed): Appellants argued the FIR was ante-timed because the injury referral slips (*Chitti Majroobi*) lacked the case crime number and specific IPC sections.
Para 26 (State's Submissions): State argued that discrepancies were minor, presence of injured witnesses was indisputable, and the eyewitness accounts were reliable and corroborated.
Para 27 (Court's Finding on FIR): The Court rejected the "ante-timed FIR" argument, noting the quick timeline between the incident (4:15 PM), FIR registration (4:45 PM), and medical examination (5:25 PM). Omission of the crime number on medical referral letters is not fatal to the case.
Para 28 (Court's Finding on Interested Witnesses): The Court held that evidence from related or interested witnesses cannot be discarded automatically. It cited *Jayabalan v. Union Territory* to emphasize that courts must look for consistency rather than taking a pedantic or overly suspicious approach.
Paras 29–30 (Court's Finding on Discrepancies): Minor discrepancies do not shatter the core prosecution story. The Court cited *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* regarding how truthful witnesses may make minor errors due to nervousness or courtroom stress.
Para 31 (Corroboration of Evidence): The Court found the eyewitness accounts clear, consistent, and fully corroborated by the FIR, medical evidence, and investigating officers.
Para 32 (Promptness & Absence of False Implication): Due to the incident occurring in daylight and the FIR being lodged promptly, there was no window for fabrication or falsely implicating the accused while letting the real culprits go.
Paras 33–35 (Conclusion & Order): The High Court dismissed the appeal, affirmed the trial court's conviction/sentence, and ordered the lower court to execute the judgment.

List of Case Laws Cited:-

Jayabalan v. Union Territory [(2010) 1 SCC 199]
Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [AIR 1983 SC 753 / 1983 CAR 301 (SC)]

(Delivered by Hon'ble Mukhtar Ahmad, J.)

1. This criminal appeal has been preferred against the judgment and order dated 14.10.1982 passed by Additional Sessions Judge, Rampur in Sessions Trial No. 254 of 1981, convicting the appellants namely 1-Inam Ullah 2- Shafiq @ Gama 3-Rais and 4- Mehandi @ Bhatia, under Section 302 read with Section 34 of the I.P.C. sentencing each of them to the imprisonment for life. Further convicted under Section 324 read with Section 34 of the I.P.C. sentencing each of them to undergo four months rigorous imprisonment. All these sentences of each appellants are also ordered to run concurrently. Appellant No.1 Inamullah died during pendency of this appeal as such appeal against him has been abated vide order dated 24-10-2008.

2. A synoptical resume of prosecution case is that on wednesday Aziz s/o Majid Pehelwan took the luggage of Rais Pahelwan to patti bazar in his tonga but Rais Pehelwan had not given the fair charges. Two days before the incident Aziz near the State Bank premises in Suar, demanded the fair charges from Rais Pehelwan but Rais Pahelwan abused him by saying that how he dared to demand the money ? and there was some oral altercation between them but one Nazeer Ahmed belonging to the same locality had intervened and resolved the matter.

3. First Information Report of the incident was got lodged by Iqrar PW1 stating that on 2.5.1981 at about 4.15 PM some abuses were exchanged between his brother Abrar and Shareef @ Dilphar brother of Rais Pahelwan in which Abrar had slapped Shareef @ Dilphar. Thereafter Shareef @ Dilphar had gone to his house and Abrar came to the Taal of one Doola Mian and sat on a cot near Aziz. After some time brothers of Sharif @ Dilphar namely Rais Pahelwan armed with chhuri, Shafiq @ Gama having Tamancha (country made pistol) his father Inam Ullah having knife along with one Mehandi @ Bhatia came there and started to abuse his brother.He also reached there. Rais Pahalwan threatened Aziz by saying that they shall also give payment to him. Thereafter altercation took place and all of them went towards Dak Bunglow Tiraha exchanging the abuses. Aziz was started to be assaulted with knife and chhuris. He, his brother Abrar and Manjoo tried to save Aziz but meanwhile fire was opened on Abrar. Rais, Inamullah and Mehndi @Bhatia also assaulted them with knife and chhuris. On hue and cry Ali Jan, Amin PW3 Doola Mian PW4 and Mohammad Yusuf PW5 of the same locality came there and saved them. Aziz succumbed to the injuries on the spot. First informant Iqrar, his brother Abrar and Manjoo sustained serious injuries. Iqrar took Abrar Hussain and Manjoo Khan in a rickshaw to the police station Suar, Rampur where a criminal case bearing case crime no 61 under sections 302, 307/34 I.P.C. was registered against accused persons. Chick F.I.R. was transcribed by Head Muharrir Parshu Ram Sharma (PW-13), who also made entries in G.D. Injured Abrar and Manzoo were sent for medical treatment to Primary Health Care Centre Saur.

4. The investigation was initially taken over by Sub-Inspector H.S. Pawar (PW-10), he went to the Hospital Suar, Rampur and recorded the statements of injured Abrar and Manjoo Khan. He then visited to the place of occurrence and conducted inquest of dead body of Aziz and prepared inquest report (Ex-Ka11) and other relevant papers and sent the dead body to the District Hospital Suar Rampur through Constable Harpal Singh and constable Suresh Chandra (PW-14) for post mortem. He also prepared the site plan (Ex-Ka-12) of the spot and made recovery of plastic shoes (Ex.3) belonging to the deceased Aziz,one empty bag, one pair of black chhapal left by accused

persons and prepared Memo to that effect He also took in his possession the blood stained and simple earth from the spot, duly sealed them in separate containers (Ex.6 and 7) and prepared a Memo (Ex-Ka 13) to that effect. He thereafter recorded the statements of the witnesses. On 3.5.1981 Manjoo Khan also died due to the injuries sustained in District Hospital Rampur during his treatment. The investigating Officer after knowing this fact went to the hospital and conducted inquest of the deceased and sent dead body for post mortem examination through constable Ram Bahadur (PW-8) and Jagdish Saran along with other relevant papers prepared by him. He also recorded the statement of the accused persons in the lock up. Subsequently the investigation was conducted by Parveen Singh (PW-11). He after concluding the investigation submitted the charge sheet against accused persons under Section 302/307 and 324 I.P.C. The Magistrate concerned committed the case for trial to the Court of Sessions where charges of the offenses as stated above were framed against the accused persons. They pleaded not guilty and claimed to be tried.

5. The prosecution with a view to prove his case has examined as many as 14 witnesses namely Iqrar (PW-1) the first informant and brother of injured Abrar Hussain. He is the eye witness to the incident. Abrar Hussain (PW-2) who is injured and eye-witness of the incident. Ameen (PW-3), Doola Miyan (PW-4) and Mohammad Yusuf (PW-5) are also examined as eye witnesses of the incident. Doctor P.S. Thakur (PW-6), had examined Iqrar and Manjoo khan. He proved their injury reports. S.I. K.P. Singh (PW-7) had conducted the inquest of Manjoo Khan. Constable Ram Bahadur (PW-8) had taken the dead body of Manzoo Khan in a sealed position along with other papers for postmortem. Doctor H.B. Bhutt (PW-9) has been examined to prove the post mortem report of the deceased Aziz. Sub Inspector H.S. Pawar (PW-10) is the First Investigating Officer of the case. S.I. Parvin Singh (PW-11), who is the second Investigating Officer. Doctor A.U. Khan (PW-12), had examined injured Abrar Khan. Parsho Ram (PW-13) Head Moharrir had recorded the Chick FIR and made entries in the concerning General Diary. Constable Suresh Chandra (PW-14) has been examined to prove the fact that he had taken the dead body of Aziz in sealed position for post mortem.

6. After concluding the prosecution evidence statement under Section 313 Cr.P.C. of accused persons were recorded in which they pleads their innosense and false implication. Accused Rais Pahelwan stated that he is the prosecution witness in a case No. 305 of 1981 (State Vs. Sabir Baba and Ors) under Sections 323 and 324 I.P.C. Accused Inamullah also stated additionally that he was living separately from his sons Rais, Shafiq and Shareef for the last 12 years with his second wife and his sons were residing with his first wife. He also contended that he had no concern with his sons. Accused Mehandi Bhatia stated additionally that he is permanent resident of Kashi Pur of Suar. His name was not Mehandi Bhatia but his name is Mehadsi Hussain. Mr. Madan Mohan Chobey Advocate (C.W.1) was summoned by the Court and he was examined to prove the fact that second bail on behalf of the accused Mehndi was moved by him in Court of Sessions, Rampur which was rejected. No evidence was adduced by accused persons in their defence.

7. After evaluating the evidence made available on record learned Trial court observed that prosecution had succeeded in proving his case against accused persons beyond reasonable doubts

and held them guilty and awarded the punishment as stated above. Feeling aggrieved with that judgement and order the instant appeal has been preferred.

8. We have heard Mr. Raghuraj Kishore, learned Amicus Curie on behalf of the appellant no.2 and 3 and Mohd. Irfan Khan learned counsel appearing on behalf of the appellant no.4 and Mr. M.S. Yadav learned A.G.A. on behalf of the State.

9. In this matter Aziz died on spot while first informant Iqrar (PW-1), Abrar Hussain (PW-2) and Manjoo sustained injuries. Manjoo, during the treatment also died due to the injuries sustained.

10. Injured Iqrar (PW-1) was medically examined by Dr. P.S. Thakur (PW-6) on 2.5.1981 at 5.25 PM in Primary Health Centre Suar, Rampur and found the following injury on his person:

1. Incised wound on the back of right thigh 15cm x 1/2 cm x 2 cm deep 37 cm above crease of the knee. Fresh blood was coming out.

11. In the opinion of the Doctor the injury was simple and could be caused by some sharp edged weapon like chhuri or knife and was fresh in its duration. The injury could be caused on 2.5.1981 at about 4-15 PM. He also examined Manjoo Khan on the same day at 5.40 PM and found the following injuries on his person.

1. A lacerated wound on the head 1cm x 1/4 cm x 1/4 cm x dept 13 cm above bridge of nose and 15 cm above the left ear.

2. A traumatic swelling 5-1/2 cm x 4 cm on the left side of fore head 5 cm x above the left eye brow.

3. A traumatic swealing 5 cm x 5 cm on left side of head 6 cm above left ear and 8 cm above the left ear brow.

4. A lacerated wound on the back of head 1.5 cm x 1/4 cm x 1/4 cm deep 12 cm above right ear and 15 cm above left ear.

5. An insided wound on the right hip 2.5 cm x 1 cm x 1 cm deep 13 cm below anterior superior iliac spine and 12 cm away from the mid line.

12. In the opinion of the Doctor the injury no.5 could be caused by some sharp edged weapon like Chhuri and knife and injury no.1 to 4 which were kept under observation could be caused with some blunt weapon. All these injuries were fresh and could be caused at about 4.15 PM on 2.5.1981. The Doctor has stated in his cross examination that Manjoo Khan was referred to the District Hospital, Rampur. Nothing could be elicited from the cross examination of the Doctor which would go to shake his credit.

13. Doctor A.U. Khan (PW-12) has proved the injury report (Ex. Ka 23) of the injured Abrar Hussain. The doctor medically examined Abrar Hussain on 2.5.1981 at 6.30 PM in the District Hospital, Rampur and found the following injuries on his person;

1. Lacerated wound 6 cm x 1cm x bone deep over the middle of the back of the skull. Injury was kept under observation and x-ray was advised.

2. Incised wound 5 cmx 2.5 cm x musle deep over the outer part of the right fore-arm on its upper part.

3. Incised wound 3 cm x 1.5 cm depth not proved over the inner part of the right fore arm at its upper part.

4. Liner abrasion 4 cm x 0.25 cm over the front of the upper part of the neck.

5. Liner abrasion 2.5 cm x 0.24 cm x over the front of the left side neck lower part.

6. Incised wound 3.5 cm x 1.5 cm x dept not proved over the outer part of the right side chest 8 cm away from the right nipple.

7. Incised wound 2.5 cm x 1.5 cm dept not proved over the inner part of the right upper arm upper part.

8. Incised wound 2.5 cm x 2 cm x dept not proved over the front of abdanment lower part 10 cm below the umblicus. Injury kept under observation.

9. Incised wound 3 cm x 1.5 cm x muscle deep over the right side hip 12 cm below from anterior.

10. Abrasion 1 cm x 1 cm over the outer part of the right foot in its front.

14. In the opinion of the Doctor, injuries number 1,3, 6, 7 and 8 were kept under observation and X-ray was advised. All other injuries were simple. All the injuries except injury no.1 and 10 could be caused by some sharp edged weapon. Injury no.1 could be caused by some blunt weapon and injury no.10 by friction. The doctor meant by sharp edged weapon as Chhuri and knife. All the injuries were fresh and could be caused at 4.15 PM on 2.5.1981. In his cross examination the Doctor stated that the injury no. 4 and 5 could also be caused by some pointed and sharp edged weapon. Injury no.10 could also be caused by friction of lathi. The statement of doctor was not challenged in his cross examination.

15. Doctor H.B. Bhutt (PW-9) has proved the post mortem examination report (Ex-Ka 9) of deceased Aziz. He conducted autopsy on the dead body of deceased Aziz on 3.5.1981 at 9 AM in

the District Hospital, Rampur. In his opinion the age of the deceased was about 45 years and about half day had passed since the death of Aziz. He found the following ante-mortem injuries on the person of Aziz.

1. Incised wound 3 cm x 1 cm bone -deep on right side of head 7 cm above from the right ear.

2. Incised wound 3 cm x 0.5 cm bone deep on back of left side head 9 cm behind the right ear.

3. Incised wound 5 cm x 1 cm x bone deep on the back of middle of head, 17 cm above the right ear.

4. Incised wound 3 cm x 0.5 cm x chest cavity deep on the left side of chest, 11 cm below the left axilla.

5. Incised wound 2.5 cm x 1 cm abdominal cavity deep on right side of abdomen, 9 cm below the umblicus.

6. Incised wound 3 cm x 0.5 cm x musle deep on outer aspect of right thigh, 2 cm above the right knee.

7. Incised wound 6 cm x 0.5 cm muscle deep on inner aspect of front of left thigh 17 cm x below the greater trouchenter.

8. Incised wound 5 cm x 2 cm skin deep on the back of left fore arm, 11 cm below the left elbow.

9. Incised wound 4 cm x 1 cm musle deep on the back of left thigh upper part 17 cm below the left greater trochenter.

16. On internal examination, the doctor found that left pleura was cut under injury no.4. There was a cut on the left lung under injury no.4. There was a cut on left lung under injury no.4. There was about half pint blood fluid present on left side of chest cavity.

17. There was about 4 once semi digested material in the abdomen. The other organs were found normal. In the opinion of the doctgor the death of the deceased was due to shock and hemorrhage as a result of the injury to the lungs. Injuries fond on the person of the deceased, in the opinion of the doctor were sufficient to cause the death in the ordinary course of nature. The Anti mortem injuries could be caused with knife and Chhuris.

18. Doctor H.B. Bhutt (PW-9) has also proved post mortem examination report (Ex-Ka 10) of the deceased Manjoo. The Doctor performed the autopsy on his dead body at 12 O'clock noon on 3.5.1981 in the District Hospital, Rampur. In his opinion, the age of deceased was about 33 years

and the death of the deceased occurred at 3.25 AM on 3.5.1981 in the District Hospital, Rampur. The Doctor found the following anti mortem injuries on his person.

1. Multiple abraded contusions present in an area of 10 cm x 7 cm on the front end middle of head 8 cm above the root of the nose.

2. Abrasion 0.25 cm x 0.25 cm on the bridge of nose 0.5 cm below the root of nose.

3. Abrasion 1 cm x 0.25 cm on the left side of the nose 0.5 cm away from the root of the nose.

4. Multiple abrasion in an area of 11 cm x 4 cm in front of the knee left and upper part of left leg.

5. Multiple abrasion in an area of 6 cm x 5 cm on front of right knee.

6. One stitched wound 2 cm long on the right hip 4 cm below the greater trochenter.

19. On internal examination, the Doctor found the fracture of frontal bone under injury no.1 Membranes were congested. The brain was congested. Blood clott were found on the surface of the brain. The other organs of the body were normal.

20. In the opinion of the doctor the cause of the death of the deceased was come as a result of head injury. In his opinion injuries no.1 to 5 could be caused with some blunt object like butt of Tamancha. The injuries were sufficient to cause death in the ordinary course of nature. In his cross examination the Doctor said that the injury no.4 of Aziz was fatal and the other injuries were simple. Injury no.1 of deceased Manjoo was fatal and other injuries were simple. The doctor said that the injuries found on the person of Manjoo Khan could be more probably caused with lathi and the butts of Tamancha. In the opinion of the doctor it was not necessary that Manjoo would have become unconscious immediately after sustaining the injury no.1. The statement of the Doctor has not been challenged in any other point.

21. The manner of occurrence was deposed to at the trial by Iqrar (PW-1), Abrar (PW-2), Amin (PW-4), Doola Mian (PW-4) and Mohammad Yusuf (PW-5).

22. Iqrar (PW-1) is the informant of this case, who had also received injuries in the alleged occurrence. He stated that on Wednesday about 2 days before the incident Aziz Pahelwan had taken the luggage in tonga of Rais Pahelwan to Patti Bazar. On Thursday Aziz demanded the fair charges on which Rais Pahelwan had threatened Aziz by saying that how he dare to demand the money? And some oral altercation took place between them but the matter was intervened by Nazeer Ahmad. He also stated that on Saturday at about 4-4.30 PM some altercation took place between his brother Abrar and Shareef @ Dilphar and abuses were exchanged and his brother slapped to

Shareef @ Dilphar, the matter was intervened by some persons, thereafter Shareef @ Dilphar went to his house. He further stated that his brother Abrar sat on a cot in Taal of Dula Mian (PW-4). That thereafter appellants Inamulla, Rais, Shafiq @ Gama and Mehndi Bhatia came there. Rais and Mehndi were having chhuri in their hands while Shafiq was having country made pistol and Inamulla was having knife. Dula Mian and Amin was also present in the Taal. Shafiq abuses Abrar and Rais said to Aziz as he shall also be given payment thereafter altercation took place between them and all of them went therefrom towaeds the Tiraha of Dak Bunglow. In continuation of such altercation Inamullah, Rais and Mehndi started to assault Aziz by knife and chhuris. First informant Iqrar, his brother Abrar and Manjoo Khan tried to save Aziz but Shafiq opened fire on Abrar but it could not hit him. Thereafter Manjoo caught hold Shafiq then Shafiq caused injuries on his head by Butt of Tamancha. It is also stated by him that he and his brother Abrar further tried to save Aziz but all the three accused persons also assaulted them and Aziz scummed to the injuries sustained. Manjoo Khan was also badly injured. He and Abrar had also received injuries; that Ali Jaan, Amin, Doola Mian and other resident of locality and nearby came on the spot thereafter accused persons went away towards Rock. He also stated that he took Abrar and Manjoo in a Rickshaw thereafter bring them concerning police station where First Information Report was got lodged. Manjoo and Abrar were sent for medical examination and Manjoo expired subsequently during treatment.

23. Abrar Hussain (PW-2), who was injured in this incident, Amin (PW-3), Dulla (PW-4) and Mohammad Yusuf (PW-5), who also witnessed the incident have re-iterated the version in the First Information Report.

24. Learned counsel appearing on behalf of appellants submits that there are inconsistency in the evidence of PW1- Iqrar, PW-2 Abrar Hussain, PW-3 Amin, PW-4 Dulla and PW-5 Mohd. Yusuf and their statements are photographic in nature which should not be accepted. The description of the incident given by witnesses is also suspected as some of the statements made by them were not disclosed to the investigation officer as would also appear from the evidence of Investigating Officer.It is also submitted that all the eye witnesses are interested and inimical and there are discrepancies in their oral testimony as such their evidence is not trustworthy and reliable.

25. The further submission is that the First Information Report is ante timed as in Chitti Majroobi, whereby informant Iqram, Manoo were sent for medical examination does not bear the description of case such as case crime number and Sections. The statements of injured are that they went to the police station, where report was lodged then they were sent for medical examination. The fact that the crime number has not been mentioned in the letters addressed to the doctor for medical examination clearly shows that the FIR is ante timed and it was lodged after inquest and post mortem .

26. Learned A.G.A. per contra submits that the discrepancies as pointed out by learned counsel for the appellant are minor discrepancies. It is a day light murder case. Injured as well as the witnesses present on the spot at the time of occurrence have given actual true version of the incident. It is also submitted that presence of injured witness PW-1 Iqrar and PW-2 Abrar Hussain can not be disputed as they received the injuries in the same incident. Further PW-3 Amin and PW-

5 Yusuf are the witnesses shown in the First Information Report, where as Dulla PW-4 is the Taal owner where incident started and all the witnesses of fact have supported prosecution version by way of reliable and clinching evidence.

27. The contention of the learned counsel for the appellant that First Information Report is anti timed cannot be accepted for the reason that the time of incident mention in it is around 4-15 PM and chick FIR was prepared at 4-45 PM. After lodging the First Information Report, the injured were sent for medical and injured Iqrar and Manjoo Khan were examined at Primary Health Centre, Suar at 5.25 and 5.40 pm respectively. The statements of injured witnesses is that they first went to the police station, where First Information Report was lodged by PW-1 Iqrar then they were sent by the police for medical examination. Time of chick FIR mentioned in the inquest was 9.45 pm. Time of commencement of the inquest of Aziz was mentioned as 6 pm and completion was 7 pm. As such there is no missing link in the sequence of events and the time mentioned in the FIR does not suggest that it is anti timed. There are consistent statements of injured witnesses, Investigating Officer and doctors proving the sequence of events and merely because crime number was not mentioned in the letters sent to doctor along with injured witnesses for medical examination as such it cannot be inferred that FIR is ante timed.

28. The arguments raised on behalf of the appellants regarding relation of witnesses or they are interested/inimical witnesses, in fact, can be discussed together inasmuch as they are based upon somewhat common submissions. There is no doubt that PW1 and PW2, both are real brothers, PW3 is neighbour of deceased Aziz. PW4 Dulla is tall owner where deceased Aziz and Abrar were sitting at the time when accused persons came. In the same way deceased Aziz was maternal uncle of Pw5. The contention raised before us is that all of the witnesses are interested witnesses and have not stated true facts before the Court and thus, their statements should be entirely disbelieved. We are unable to find any merit in this contention. It has come on record that initial altercation just before the incident had taken place between PW2and brother of accused Rais and Shafiq and thereafter all the accused persons came with preparation. There was apparently some anger and rift between the Aziz, Abrar and Accused rais and other accused persons. The deceased was attacked by the accused in the presence of the witness of fact adduced by prosecution and PW1,PW2 and Manjoo tried to save Aziz but they were also belaboured and Manju died subsequently due to injuries sustained in the same incident. It was but natural for the prosecution to produce PW1 and PW2 as the main eye witnesses as they had actually not only seen the occurrence but received injuries in the same incident and they have been believed by the trial Court.In the same way presence of other eye witness is also established. Even before us, no serious attempt has been made and in fact, nothing appears from the record to show that aforesaid witnesses of fact were not present on the site. There is no hard and fast rule that family members or relative witnesses can never be true witnesses to the occurrence and that they will always depose falsity before the Court. It will always depend upon the facts and circumstances of a given case. In the case of **Jayabalan vs Union teritorry [(2010)1 SCC 199]** Hon'ble Apex Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence

cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under:

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

29. In so far as the submission of learned counsel for appellants regarding the discrepancies of prosecution witness is concerned, the witness are in fact on the main points as to how the accused person came on the spot having weapons of assault and inflicted injuries intact.No such a grave contradiction could have been shown in the evidence of witnesses which effect the entire prosecution version adversely. In our view minor contradiction in the testimony of the witnesses are bound to occur. Minor discrepancies not touching the core of the case cannot be the ground for rejection of evidence in entirety.

30. A reference may be made to the judgement of Apex Court delivered in ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,*** M.P. Thakkar, J. observed:

"13. 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.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

31. From a perusal of the record, we find that the evidence of PWs 1 to 5 is clear and categorical in reference to the manner of incident and the role played by accused persons. They have clearly and consistently supported the prosecution version and have unequivocally stated that the deceased Aziz was caused multiple injuries resulting his death on spot and PW1,PW2 along with Manjoo, who tried to save Aziz were also asaulted causing serious injuries due to which Manjoo also died subsequently.The aforesaid version narrated by the prosecution witnesses, viz. PWs 1 to 5 also finds corroboration from the facts stated in first Information Report. Their statements about weapons of assault, as well as the injuries caused by the appellants are duly

supported by the medical evidence, as well as by the statements of the investigating officers. Thus, we find that the contention raised on behalf of the appellants is liable to be rejected.

32. It further comes out that the incident occurred at about 4-15 pm. Injured Iqram (PW-1) along with injured Abrar Hussain (PW-2) and Manjoo Khan, who died subsequently during treatment reached to the police station, lodged the FIR and were taken by police for medical examination to Primary Health Centre, Suar where they were examined by Dr. P.S. Thakar (PW-6). Incident happened in day light, therefore it is improbable that the appellants have been falsely implicated as promptness in lodging of the First Information Report shows that there was no time for manipulation. Further it does not appeal to reason as to why injured witnesses would falsely implicate the appellants and spare the real culprits to go scot free.

33. In view of the discussions made above, we reach an inescapable conclusion that the appellants are guilty of the commission of the offence for which they have been charged, we do not find any force in the present appeal. The appeal lacks merit and is hereby dismissed accordingly.

34. The impugned judgement and order dated 14.10.1982 passed in Sessions Trial No. 254 of 1981 District-Rampur convicting and sentencing the accused-appellants is affirmed. Appellants have to serve out the sentence awarded by the trial Court and affirmed by this Court.

35. The certified copy be sent to the learned Court below within a week. The record of the case be also transmitted the Court below along with certified copy of the judgment.

(2016) 9 ILRA 883
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Application U/S 482/378/407 No.- 3023 Of 2016

Santosh Kumar Yadav & Ors. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite parties

Counsel for the Applicants:
Shri Kaunwar Mukul Rakesh, Shri Kaunwar Shushant Prakash

Counsel for the Opposite Parties:
G.A., Shri Salil Kumar Srivastava

Held –
The applicants filed an application under Section 482 Cr.P.C. seeking quashing of the revisional order dated 21.04.2016, the summoning order dated 03.11.2015, and the criminal complaint under Sections 352, 498-A, 457 IPC and Section 4 of the Dowry Prohibition Act.

The applicants argued that the criminal proceedings were an abuse of process and had been initiated by opposite party no. 2 merely to harass them and reopen an already concluded matter.

The Court recorded the matrimonial dispute between applicant no. 1 and opposite party no. 2, including disputes concerning their child, habeas corpus proceedings, subsequent criminal proceedings, an alleged fabricated death certificate, earlier proceedings under Section 156(3) Cr.P.C., and the later complaint culminating in the summoning order.

The applicants contended that the number of accused persons had been increased, the allegations were false and improved, and no offence under Section 457 IPC was made out.

The applicants challenged both the summoning order and the revisional order on the ground of illegality and non-application of mind.
Opposite party no. 2 argued that the applicants had already exhausted their revisional remedy and could not use Section 482 Cr.P.C. as a further revision.

Relying on Rajiv Modi v. Sanjay Jain, the applicants argued that Section 482 powers may be exercised to prevent abuse of process and secure the ends of justice, particularly in exceptional cases of malicious prosecution.

The complainant argued that, at the summoning stage, the Magistrate only has to determine whether sufficient grounds exist to proceed and cannot decide intricate factual questions.

Referring to State of Bihar v. Murad Ali Khan and other precedents, the Court observed that Section 482 jurisdiction must be exercised sparingly and that the High Court should ordinarily examine only whether the allegations disclose an offence.

The Court reiterated that the High Court cannot appreciate evidence or examine the probability, reliability, or genuineness of allegations while exercising jurisdiction under Section 482 Cr.P.C.
The applicants maintained that the High Court could nevertheless examine the legality of the impugned orders where material illegality had caused a miscarriage of justice.

Relying on Shri Ganesh Narayan Hegde v. Shri S. Bangarappa, it was argued that Section 482 jurisdiction survives even after revision, though the High Court should not function as a second revisional court.

The Court accepted the general principle that interference is justified where continuation of proceedings would amount to abuse of the process of court, but such satisfaction must first be reached by the High Court.

The applicants alternatively submitted, relying on Pepsi Foods Ltd. V. Special Judicial Magistrate, that the petition could be treated as one under Article 226, as nomenclature is not decisive.

The Court reiterated that, at the stage of summoning, the Magistrate only has to determine whether sufficient grounds exist to proceed against the accused.

The Court referred to State of Haryana v. Bhajan Lal, particularly the principle permitting quashing where criminal proceedings are manifestly mala fide or maliciously instituted to wreak vengeance.

On examining the Magistrate's order, the Court found that a categorical finding regarding sufficient grounds to proceed had been recorded; the likelihood of conviction or acquittal was irrelevant at the summoning stage.

The complainant submitted that after dismissal of a revision under Section 397 Cr.P.C., Section 482 jurisdiction could be invoked only where necessary to prevent abuse of process or secure the ends of justice.

Relying on G. Sagar Suri v. State of U.P. and CBI v. Ravi Shankar Srivastava, the Court reiterated that Section 482 jurisdiction must be exercised with great care and only in exceptional circumstances.

The Court referred to V.C. Shukla v. State through CBI and observed that Section 397(3) Cr.P.C. does not extinguish the inherent powers of the High Court under Section 482 Cr.P.C.

Referring to Rajinder Prasad v. Bashir and Krishnan v. Krishnaveni, the Court observed that Section 482 cannot ordinarily be used to circumvent the bar against a second revision, except in cases involving failure of justice, abuse of process, or miscarriage of justice.

The Court held that, on the material available, it could not be said that no offence was made out. The applicants' contentions involved disputed questions of fact and defence matters that could not be adjudicated under Section 482 Cr.P.C. The applicants were left free to seek discharge
before the trial court under the appropriate provisions of the Cr.P.C.

The Court concluded that the application lacked merit and was liable to be dismissed.

Accordingly, the application under Section 482 Cr.P.C. was dismissed.

Case Laws Cited in the Judgment

1. Rajiv Modi v. Sanjay Jain and Others, 2009 (66) ACC 643.
2. State of H.P. v. Pirthi Chand.
3. State of Bihar v. Murad Ali Khan and Others, AIR 1989 SC 1.
4. Municipal Corporation of Delhi v. R.K. Rohtagi, (1983) 1 SCR 884 : AIR 1983 SC 67.
5. Municipal Corporation of Delhi v. P.D. Jhunjunwala, (1983) 1 SCR 895 : AIR 1983 SC 158.
6. State of M.P. v. Awadh Kishore Gupta and Others, AIR 2004 SC 517.
7. Udaipal Singh and Others v. State of U.P. and Another, 2000 Cri LJ 2256.
8. Shri Ganesh Narayan Hegde v. Shri S. Bangarappa and Others, (1995) 4 SCC 41.
9. Dhanalakshmi v. R. Prasanna Kumar and Others, AIR 1990 SC 494.
10. Pepsi Foods Ltd. And Another v. Special Judicial Magistrate and Others, (1998) 5 SCC 749.
11. State of Haryana and Others v. Bhajan Lal and Others, 1992 Supp (1) SCC 335 / 1992 SCC (Cri) 426.
12. G. Sagar Suri v. State of U.P., (2000) 2 SCC 636.
13. Central Bureau of Investigation v. Ravi Shankar Srivastava, (2006) 7 SCC 188.
14. V.C. Shukla v. State through CBI, 1980 Supp SCC 92.
15. Rajinder Prasad v. Bashir and Others, (2001) 8 SCC 522.
16. Krishnan and Another v. Krishnaveni and Others, (1997) 4 SCC 241.
17. R.P. Kapur v. State of Punjab, AIR 1960 SC 866.
18. State of Bihar v. P.P. Sharma, 1992 SCC (Cri) 192.
19. Zandu Pharmaceutical Works Ltd. V. Mohd. Sharaful Haque and Another, 2005 SCC (Cri) 283.

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

1. This Criminal Misc. Application under Section 482 Cr.P.C. has been preferred with the prayer to set aside the order dated 21.04.2016, passed by Additional Sessions Judge,Court No. 17, Lucknow, in Criminal Revision No. 28 of 2016 (Santosh Kumar Yadav and others vs. State of U.P. And another) arising out of order dated 03.11.2015, passed by Additional Chief Judicial Magistrate – Vth, Court No. 29, Lucknow and quashing of complaint dated 20.04.2015 in Criminal Misc. Case No. 1462 of 2015 (Smt.Sushma Yadav vs. Santosh Kumar and others), under Section 352, 498A, 457 I.P.C. and Section 4 D.P. Act, P.S. B.K.T., District Lucknow.

2. Counsel for the applicants has submitted that the present proceedings are nothing but abuse of the process of law. Opposite party no. 2 has left no stone unturned to harass the applicants. He has further submitted that in the garb of the application under Section 156(3) Cr.P.C., the opposite party has reopened the matter which could not have been reopened.

3. Brief facts are that the opposite party no. 2 was married to the applicant no. 1 namely Santosh Kumar Yadav on 06.03.2011. As per the averments of the applicants, the opposite party no. 2 deserted the applicant no. 1 on 11.09.2011 when she was pregnant. She gave birth to a male child on 14.01.2012.The child was concealed by the opposite party no. 2 whereupon the applicants moved a Habeas Corpus Petition no. 231 of 2012 in which an inquiry was ordered. In the Inquiry, it was made to understand that the son of applicant no. 1 had died. The aforesaid Habeas Corpus Petition was decided granting liberty to applicant no. 1 to lodge a first information report against opposite party no. 2 regarding murder of the child. At this, a case was registered against the opposite party no. 2 and her family members on the behest of applicant no. 1. The matter was

investigated and it was revealed that the son of applicant no. 1 was alive who was given in the custody of applicant no. 1. During the course of inquiry, the opposite party no.2 and her parents have submitted a fabricated death certificate of the son of applicant no. 1 issued by Dileep Gupta in an order to pressurise the applicant no. 1 and to conceal her activities. The opposite party no. 2 moved a false and fabricated application under Section 156(3) Cr.P.C. before the concerned Magistrate, Lucknow which was rejected, vide order dated 15.04.2014. Against the aforesaid rejection order, the opposite party no. 2 preferred an application under Section 482 Cr.P.C., in which opposite party no. 2 was directed to file a complaint before the Magistrate. The opposite party no. 2 preferred a complaint which was registered and procedures under Section 200 and 202 Cr.P.C. were followed. On 01.11.2011, a compromise was entered into between the applicant no. 1 and opposite party no. 2, whereby the opposite party no. 2 obtained cash from the applicant no. 1 along with articles including motorcycle given at the time of marriage. After entering into the compromise as stated earlier, the first information report was lodged by the applicant no. 1 under the directions of the High Court which is pending after submission of charge sheet before the learned Magistrate and the instant complaint has been filed just to harass the applicants. A complaint and the statements of the witnesses speak about the falsity of the whole matter. The applicants Santosh Yadav, Muneshwar Yadav, Kusum Yadav and Pramod Yadav on the basis of complaint were summoned under Sections 352, 498A, 457 I.P.C. And 4 D.P. Act, while the applicants Raj Narayan Yadav, Priyanka Yadav and Virendra Yadav were summoned under Sections 498A I.P.C. And 4 D.P. Act.

4. It is note worthy that the number of accused persons have been increased from 4 to 8 by the opposite party no. 2. The summoning order is bad in the eyes of law which is illegal. No offence under Section 457 I.P.C. is made out. A similar application was moved by the opposite party no. 2. Allegations under Section 498A I.P.C. are false on the face of it. The present complaint is an improved reversion of the earlier application moved under Section 156(3) Cr.P.C. which was rejected by the learned Magistrate on 15.04.2014.

5. Against the aforesaid summoning order, the applicants preferred a Criminal Revision which was decided on 21.04.2016 against the applicants. The order of the revisional court again is illegal and has been passed ignoring the principles of law laid down. The impugned orders suffers from non application of mind, hence the order dated 21.04.2016 passed by Additional Sessions Judge, Court No. 17, Lucknow in Criminal Revision No. 28 of 2016 an order dated 03.11.2015 passed by ACJM-V, Court No. 29, Lucknow are liable to be quashed.

6. Sri Salil Kumar Srivastava, counsel for the opposite party no. 2 has vehemently argued that the applicants have exhausted all remedies available to them and now this Court while exercising its power under Section 482 Cr.P.C. cannot quash the orders passed by both the courts below.

7. The learned counsel for the applicant has also relied upon ***2009 (66) ACC 643, Rajiv Modi Vs. Sanjay Jain and others,*** in which the Hon'ble Apex Court has laid down that whole or part of cause of action must have arisen within the territorial jurisdiction of the court. Same must be

decided on the basis of averments made in the complaint without embarking upon any inquiry. In the same Rajiv Modi's case (supra), the Hon'ble Apex Court has also laid down in para 33 as under:-

33. The cardinal principle's which requires to be kept in view while invoking powers under Section 482 of Cr.P.C. has been stated in the case of State of H.P. v. Pirthi Chand wherein this Court has observed that:

"When the court exercises its inherent power under Section 482, the prime consideration should only be whether the exercise of the power would advance the cause of justice or it would be an abuse of the process of the court." (Para 13)

"It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the FIR/charge-sheet/complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognizable offence. After the investigation is conducted (sic concluded) and the charge-sheet is laid, the prosecution produces the statements of the witnesses recorded under Section 161 of the Code in support of the charge-sheet. At that stage it is not the function of the court to weigh the pros and cons of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is concluded. The court has to prima facie consider from the averments in the charge-sheet and the statements of witnesses on the record in support thereof whether court could take cognizance of the offence on that evidence and proceed further with the trial. If it reaches a conclusion that no cognizable offence is made out, no further act could be done except to quash the charge-sheet. But only in exceptional cases, i.e., in rarest of rare cases of mala fide initiation of the proceedings to wreak private vengeance, the court may embark upon the consideration thereof and exercise the power." (Para 12)

8. Counsel for the complainant has argued that the court should be very cautious while exercising jurisdiction under Section 482 Cr.P.C. No intricate questions can be decided in jurisdiction exercised under Section 482 Cr.P.C. In this regard, the counsel for the complainant has argued that the only thing the Magistrate has to look into while passing the summoning order is whether there are sufficient grounds to proceed against the accused or not. The Magistrate found that there were sufficient grounds to proceed against the accused. Thus, section under which the accused was summoned cannot be segregated from the offence.

9. As far as the inherent powers of the court are concerned, the inherent powers of the High Court have been laid down by the Apex Court in ***AIR 1989 Supreme Court 1, State of Bihar Vs. Murad Ali Khan and others***, in which it has been held as under:-

"6. The second-ground takes into consideration the merits of the matter. It cannot be said that the complaint does not spell-out the ingredients of the offence alleged. A complaint only means any allegation made orally or in writing to a Magistrate. With a view to his taking action, that some person, whether known or unknown, has 'committed an offence.

It is trite jurisdiction under Section 482 Cr.P.C. which saves the inherent power of the High court, to make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the Trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet do not in law constitute or spell-out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of the court or not."

In Municipal Corporation of Delhi v. R.K. Rohtagi, [1983] 1 SCR 884 at p. 890 ☹AIR 1983 SC 67 at p.70) it is reiterated:

"It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present Code."

In Municipal Corporation of Delhi v. P.D. Jhunjunwala, [1983] 1 SCR p. 895 : (AIR 1983 SC 158 at p. 159) it was further made clear:

" . . . As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial. We have already held that for purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further."

10. It has been held that so far quashing of the complaints and inquiry on the basis of F.I.R. registered by the complainant are concerned, interference by the High Court with the same and quashing the proceedings by an elaborate discussion on merits of the matter and coming to the conclusion of Section 195 being a bar, is rather premature for the High Court to come to the aforesaid conclusion. The scope of Section 482 has also been given in ***AIR 2004 Supreme Court 517, State of M.P. Vs. Awadh Kishore Gupta and others,*** in which it has been held that the High Court cannot appreciate the evidence to conclude whether the material produced are sufficient or

not for convicting the accused. The inquiry as to the probability, reliability, genuineness of allegations in the F.I.R. is totally beyond the scope of Section 482 as has been laid down in ***2000 CRLJ 2256, Udaipal Singh and others Vs. State of U.P. and another*.**

11. Counsel for the applicants has submitted that it is well within the power of the court to examine the whole matter to prevent the abuse of the process of court. It has further been submitted that since both the courts below have committed material illegality in passing the impugned orders which has resulted in miscarriage of justice. This Court while exercising the jurisdiction under Section 482 Cr.P.C. can examine the legality of the orders.

12. Counsel for the applicants has placed reliance upon ***1995 SCC (4) 41, Shri Ganesh Narayan Hegde vs. Shri S. Bangarappa and others*** in which it has been held as under:-

"12. While it is true that availing of the remedy of the revision to the Sessions Judge under Section 399 does not bar a person from invoking the power of the High Court under Section 482, it is equally true that the High Court should not act as a second Revisional Court under the garb of exercising inherent powers. While exercising its inherent powers in such a matter it must be conscious of the fact that the learned Sessions Judge has declined to exercise his revisory power in the matter. The High Court should interfere only where it is satisfied that if the complaint is allowed to be proceeded with, it would amount to abuse of process of Court or that the interests of justice otherwise call for quashing of the charges. A few decisions of this Court may usefully be referred at this stage. In Mrs.Dhanalakshmi v. R.Prasanna Kumar & Ors. (AIR 1990 S.C.494) this Court stated in a case of similar nature:

"Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/ offences are disclosed, and there is no material to show that the complaint is mala fide frivolous or vexatious, in that event there would be no justification for interference by the High Court."

13. There is no quarrel in the proposition of law that the High Court should interfere where it is satisfied that if the proceedings are allowed to be proceeded with, would amount to the abuse of process of Court but the satisfaction of the court is must before orders are passed for quashing of the proceedings.

14. Counsel for the applicants has also submitted that in case the Court finds that the application under Section 482 Cr.P.C. is not tenable then it can be treated under Article 226 of the Constitution of India and the nomenclature under which a petition is filed is not relevant as per the law laid down in ***(1998) 5 Supreme Court Cases 749, Pepsi Foods Ltd. And another vs. Special Judicial Magistrate and others***.

15. I have said earlier at the time of summoning the accused, the only thing the Magistrate has to see is whether there are sufficient grounds to proceed against the accused or not.

16. In ***1992 Supp (1) Supreme Court Cases 335, State of Haryana and others vs. Bhajan Lal and others***, in which it has been held as under:-

"*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. I have perused the impugned order of the Magistrate. The Magistrate has given a categorical finding that there are sufficient ground to proceed in the matter. At the time of summoning, the Magistrate do not have to examine whether the matter would come under any conviction or acquittal.

18. Sri Salil Kumar Srivastava, learned counsel for the opposite party no. 2 has submitted that when an application under Section 397 Cr.P.C. is filed by any party in the court of session and it is decided against him, the powers of Section 482 can only be invoked if the order of the Sessions Judge has resulted in the abuse of the process of the court and / or calls for interference to secure the ends of justice.

19. In the same context, counsel for the opposite party no. 2 has placed reliance upon ***G. Sagar Suri vs. State of U.P., (2000) 2 SCC 636*** in which it has been laid down as under:-

"8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

This Court therein noticed a large number of decisions to opine that whenever the High Court comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of court and that the ends of justice require that the proceedings should be quashed, it would not hesitate to do so.

13. In Central Bureau of Investigation v. Ravi Shankar Srivastava, [(2006) 7 SCC 188] this Court while opining that the High Court in exercise of its jurisdiction under Section 482 of the Code does not function either as a court of appeal or revision, held :-

"7. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise."

20. I am conscious of the legal position laid down in ***1980 Supp SCC 92, V. C. Shukla vs. State through CBI*** in which it has been held that sub-section (3) of Section 397, however, does not limit at all the inherent powers of the High Court contained in Section 482. It merely curbs the revisional power given to the High Court or the Sessions Court under Section 397(1) of the Code.

21. In ***(2001) 8 Supreme Court Case 522, Rajinder Prasad vs. Bashir and others,*** while discussing the same aspect of the matter, the Hon'ble Apex Court has observed as under:-

"We are of the opinion that when the earlier revision petition filed under Section 397 of the Code had been dismissed as not pressed, the accused-respondents could not be allowed to invoke the inherent powers of the High Court under Section 482 of the Code for the grant of the same relief. We do not agree with the arguments of the learned counsel for the respondents that as the earlier application had been dismissed as not pressed, the accused had acquired a right to challenge the order adding the offence under Section 395 of the Code and arraying four persons as accused-persons by way of subsequent petition under Section 482 of the Code. The object of criminal trial is to render public justice and to assure punishment to the criminals keeping in view that the trial is concluded expeditiously. Delaying tactics or protracting the commencement or conclusion of the criminal trial are required to be curbed effectively, lest the interest of public justice may suffer. For exercising power under Section 482 of the Code the learned Judge of the High Court relied upon a judgment of this Court in Krishnan & Anr. V. Krishnaveni & Ors. [1997 (4) SCC 241]. A perusal of the aforesaid judgment, however, shows that the reliance

by the learned Judge was misplaced. This Court in Krishnan's case (supra) had held that though the power of the High Court under Section 482 of the Code is very wide, yet the same must be exercised sparingly and cautiously particularly in a case where the petitioner is shown to have already invoked the revisional jurisdiction under Section 397 of the Code. Only in cases where the High Court finds that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order was not correct, the High Court may, in its discretion, prevent the abuse of the process or miscarriage of justice by exercise of jurisdiction under Section 482 of the Code. It was further held:

10. "Ordinarily, when revision has been barred by Section 397(3) of the Code, a person – accused/complainant – cannot be allowed to take recourse to the revision to the High Court under Section 397(1) or under inherent powers of the High Court under Section 482 of the Code since it may amount to circumvention of provisions of Section 397(3) or Section 397(2) of the Code."

22. From the perusal of the material on record and looking into the facts of the case, at this stage, it cannot be said that no offence is made out against the applicant. 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***. The disputed defence of the accused cannot be considered at this stage. Moreover, the applicants have got a right of discharge under Section 239 or 227/228 Cr.P.C. as the case may be through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the Trial Court.

23. Thus, on the basis of the aforesaid discussions, the application has no force and is liable to be dismissed.

24. The application is, accordingly, dismissed.

(2016) 9 ILRA 893
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE RAM SURAT RAM(MAURYA), J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 3849 Of 2009
&
Connected with Other Cases

Shiv Ram **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Shri S.C. Varma, Shri Satyendra Kumar Singh, Shri Virendra Singh

Counsel for Respondents:
C.S.C., Shri V.K. Singh

Held –

Para 1: The Court records the appearance of counsel for the petitioners and the State of Uttar Pradesh.

Para 2: Owing to conflicting Single-Judge decisions in Sewak Shanker and Shanker Saran regarding maintainability of writ petitions against orders under Section 122-B of the U.P. Zamindari Abolition and Land Reforms Act, 1950, a Division Bench in Rajendra Singh v. State of U.P. held that the statutory remedy of a suit was an alternative and efficacious remedy and, therefore, writ jurisdiction should not be invoked.

Para 3: A Single Judge doubted the correctness of Rajendra Singh and referred three questions to the Larger Bench concerning: (i) maintainability of writ petitions despite the remedy of suit; (ii) reconsideration of Rajendra Singh in light of earlier precedents; and (iii) whether a civil suit is always the appropriate remedy considering Section 331 of the Act.

Para 4: The Court traces the legislative history of Sections 122-A and 122-B. Section 122-B creates a complete summary procedure for eviction of unauthorised occupants from land vested in the State, Gaon Sabha or local authority, recovery of damages, revision before the Collector, and institution of a suit to establish claimed rights.

Para 5: The 1982 amendment introduced revision under Section 122-B(4-A), a suit under Section 122-B(4-D), finality of orders subject to such remedies, and restrictions concerning suits after revision. The proviso to

Section 229-D prevents interim injunctions in suits challenging Section 122-B orders, reflecting legislative intent for speedy removal of unauthorised occupants from public land.

Para 6: Proceedings under Section 122-B are summary in nature and are often decided on limited material such as a Lekhpal's report. The State or Gaon Sabha must prove illegal occupation when disputed. Questions of land identity may require a survey. Since interim protection may not be available in a suit under the proviso to Section 229-D, a suit may not always constitute an efficacious alternative remedy; therefore, the existence of such remedy cannot automatically bar a writ petition.

Para 7: The Court reproduces Articles 226 and 227 of the Constitution, which confer writ and supervisory jurisdiction upon the High Courts.

Para 8: The jurisdiction under Articles 226 and 227 is wide and forms part of the basic structure of the Constitution. High Courts may review State action for illegality, irrationality and procedural impropriety. Such constitutional jurisdiction cannot be destroyed by legislation or constitutional amendment.

Para 9: A statutory provision declaring an order "final" does not exclude the High Court's constitutional jurisdiction under Articles 226 and 227 to examine illegality, irrationality or procedural impropriety.

Para 10: Although constitutional writ jurisdiction cannot be curtailed by ordinary legislation, it must be exercised consistently with legislative intent and the statutory framework. The power under Article 226 exists to uphold the rule of law, not to bypass it.

Para 11: The rule of alternative remedy is a self-imposed restriction and not an absolute rule of law. Ordinarily, where an effective and efficacious statutory remedy exists, the High Court may decline to entertain a writ petition. Highly disputed questions of fact may also justify refusal, though the High Court retains discretion to examine factual disputes in appropriate cases.

Para 12: The bar of alternative remedy does not apply where the authority lacked jurisdiction or unlawfully assumed jurisdiction.

Para 13: Whirlpool Corporation reaffirmed that Article 226 jurisdiction is plenary. Alternative remedy does not ordinarily bar a writ petition where: (i) fundamental rights are sought to be enforced; (ii) principles of natural justice have been violated; (iii) the proceedings are wholly without jurisdiction; or (iv) the vires of legislation is challenged.

Para 14: While exercising writ jurisdiction, the High Court should consider factors including disputed questions of fact, disclosure of material facts, availability of an effective alternative remedy, delay and laches, limitation, public policy and statutory bars.

Para 15: The Supreme Court reiterated that alternative remedy is a rule of policy, convenience and judicial discretion rather than an absolute legal prohibition. Writ jurisdiction may be exercised where the statutory authority violates the governing enactment, fundamental judicial procedure, acts under repealed provisions, or passes an order in total violation of natural justice.

Para 16: The Court summarises the governing principles: writ jurisdiction is discretionary. The High Court may intervene in cases involving statutory illegality, violation of fundamental judicial procedure or natural

justice, while also considering disputed facts, availability and efficacy of alternative remedies, delay, public policy and other relevant circumstances.

Para 17 – Final Answers of the Larger Bench:

Question (i): Answered in the negative. Articles 226 and 227 form part of the basic structure and cannot be taken away or restricted by legislation, constitutional amendment or judicial dicta.

Question (ii): Answered in the negative. Statutory finality of orders does not prevent the High Court from examining illegality, irrationality and procedural impropriety under Articles 226 and 227.

Question (iii): Answered in the negative. A suit is not invariably an efficacious remedy because interim injunction may be unavailable under the proviso to Section 229-D, and a civil suit may not always be maintainable because of Section 331. A writ petition may therefore be entertained in exceptional cases involving statutory illegality, jurisdictional error, violation of fundamental judicial procedure or total violation of natural justice.

Result: The Larger Bench effectively disapproved the absolute proposition in Rajendra Singh that a writ petition against every order under Section 122-B is barred merely because a remedy of suit exists. The writ petitions were directed to be placed before the Single Judge for disposal in accordance with the Larger Bench judgment.

Case Laws Cited in the Judgment

1. Sewak Shanker v. Additional Collector, Agra and Others, 1985 ALJ 746.
2. Shanker Saran and Others v. State of U.P. and Others, 1987 AWC 755.
3. Rajendra Singh v. State of U.P., 2008 (4) ADJ 37 (DB).
4. K.H. Panjani v. State of U.P., AIR 1959 All 26 (DB).
5. Smt. Shanti Devi v. State of U.P., 1978 AWC 189.
6. Satyapal Singh Chauhan v. Chairman-cum-Chief Executive Officer, 1984 UPLBEC 587 (DB).
7. Buddhu v. Municipal Board, AIR 1952 All 753 (FB).
8. Bijli Cotton Mills Pvt. Ltd., Hathras v. Estate Officer/Secretary, National Textile Corporation, U.P. & Others, 1977 AWC 191 (SB).
9. Shreepat v. Rajendra Prasad, 2000 (7) JT 379 (SC).
10. L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.
11. Union of India v. Shri Kant Sharma, (2015) 6 SCC 773.
12. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
13. Lila Vati Bai v. State of Bombay, AIR 1957 SC 521.
14. Union of India v. A.V. Narasimhalu, (1969) 2 SCC 658.
15. State of H.P. v. Dhanwant Singh, AIR 2004 SC 1636.
16. Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.
17. BALCO Captive Power Plant v. National Thermal Power Corporation, (2007) 11 SCC 234.
18. Committee of Management v. Vice Chancellor, AIR 2009 SC 1159.
19. State of M.P. v. Bhailal Bhai, AIR 1964 SC 1006.
20. Gunwant Kaur v. Municipal Committee, Bhatinda, (1969) 3 SCC 769.
21. Babubhai Muljibhai Patel v. Nandlal Khodidas Barot, AIR 1974 SC 2105.
22. Calcutta Discount Co. Ltd. v. Income Tax Officer, AIR 1961 SC 372.
23. A.V. Venkateswaran v. Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506.
24. Whirlpool Corporation v. Registrar of Trade Marks, (1998) 8 SCC 1.
25. City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168.

26. Commissioner of Income Tax v. Chhabil Dass Agarwal, (2014) 1 SCC 603.

(Delivered by Ram Surat Ram (Maurya), J.)

1. Heard Sri S. C. Varma along with Sri Anil Kumar Aditya for the petitioners and Sri C. B. Yadav, Additional Advocate General, along with Sri Shashank Shekhar Singh, Additional Chief Standing Counsel, for State of U.P.

2. Due to conflict in opinion between two Hon'ble Single Judges in the cases of **Sewak Shanker Vs. Additional Collector, Agra and others, 1985 ALJ 746 and Shanker Saran and others Vs. State of U. P. and others, 1987 AWC 755**, on the issue of maintainability of writ petition, challenging orders passed in proceeding under Section 122-B of U.P. Act No.1 of 1951(hereinafter referred to as "the Act"), the matter was placed before the Division Bench in **Rajendra Singh Vs. State of U.P., 2008 (4) ADJ 37 (DB)**, under the orders of Hon'ble the Chief Justice for resolving the same. The Division Bench framed the following question for consideration:

"Whether as per Section 122-B, sub-section (4-C), (4-D) and (4-E) of the U. P. Z. A. & L. R. Act, 1950, civil suit is the appropriate remedy to resolve the dispute ?"

Or

"Whether writ petition could lie against any order under sub-section irrespective of availability of alternative and efficacious remedy of civil suit ?"

The Division Bench held that in view of alternative and efficacious remedy of suit, under the statute itself, writ jurisdiction of this Court cannot be invoked.

3. Correctness of dictum laid down by the Division Bench in **Rajendra Singh** (supra), was doubted by a Single Judge, who has referred the following questions to be answered by a larger Bench, for which this Bench has been constituted by Hon'ble the Chief Justice:-

(i). Whether the Division Bench in the case of Rajendra Singh (supra) is correct in holding that writ petition challenging the orders passed in proceedings under Section 122-B of the U. P. Zamindari Abolition & Land Reforms Act would not be maintainable in view of alternative remedy of suit provided by the Statute itself, against the orders passed by the Assistant Collector or the Collector in the said proceedings?

(ii). Whether the view expressed by the Division Bench in the case of Rajendra Singh (supra) that since a remedy by way of suit has been provided in sub section (4-D) of Section 122-B, the writ petition challenging the order passed in proceedings under Section 122-B would be barred by principles of existence of alternative remedy requires reconsideration in view of Division Benches of co-ordinate jurisdiction in the case of K.H. Panjani Vs. State of U.P., AIR 1959 All. 26 (DB), Smt. Shanti Devi Vs. State of U.P., 1978 AWC 189 and Satyapal Singh Chauhan Vs. Chairman-cum-chief Executive Officer, 1984 UPLBEC 587 (DB) as well as Full Bench decisions in the case of Buddhu Vs. Municipal Board, AIR 1952 All 753 (FB) and Bijli Cotton Mills Pvt.

Ltd., Hathras Vs. Estate Officer/Secretary, National Textile Corporation, U.P. & Ors. 1977 AWC 191 (SB)?

(iii). Whether the Division Bench judgment in the case of Rajendra Singh (supra) holding that ''civil suit' is the appropriate remedy to resolve every dispute under Section 122-B of U.P.Z.A. & L.R. Act, lays down the correct law, even though the legislature has used the words "suit in a court of competent jurisdiction in sub section ''4-D', and Section 331 of the U.P.Z.A. & L.R. Act specifically bars the jurisdiction of civil court, in respect of any suit, application or proceedings based on a cause of action in respect of which relief could be granted by Revenue courts?

4. By U.P. Act No. XXXVII of 1958, the Act was amended, adding Section 122-A, giving power of superintendence, management, preservation and control of all land vested in Gaon Sabha to Land Management Committee of the village. By U.P. Act No. XXVIII of 1961, Section 122-B was added, providing a summary procedure for ejectment of an unauthorised occupants of the land vested in State of U.P./Gaon Sabha/Local Authority and realization of damages for use and occupation and misappropriation of such property. Rules 115-C etc. were also framed, giving procedures for initiation and deciding the proceeding under Section 122-B of the Act. Various amendments were also made in it time to time, making a complete summary procedure for ejectment of unauthorised occupants from the land of State/Gaon Sabha/Local Authority and imposition of fine for use/occupation and misappropriation of such land. Section 122-B of the Act, as amended, is quoted below:-

122-B. Powers of the Land Management Committee and the Collector.- (1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Goan Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or local authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time not exceeding [thirty days] from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be

used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order, prefer a revision before the Collector on the grounds mentioned in clauses (a) to € of Section 333.

(4-B) The procedure to be followed in any action taken under this Section shall be such as may be prescribed.

(4-C) Notwithstanding anything contained in Section 333 or Section 333-A, but subject to the provisions of this section–

(i) Every order of the Assistant Collector under this section shall, subject to the provisions of sub-sections (4-A) and (4-D), be final,

(ii) Every order of the Collector under this section shall, subject to the provisions of sub-section (4-D), be final.

(4-D) Any person aggrieved by the order of the Assistant Collector or Collector in respect of any property under this section may file a suit in a court of competent jurisdiction to establish the right claimed by him in such property.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

Explanation- For the purposes of this section, the expression 'Collector' means the officer appointed as 'Collector' under the provisions of the U.P. Land Revenue Act, 1901 and includes as Additional Collector.

(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before May 13, 2007 and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, sirdar or asami, does not exceed 1.26 hectare (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and he shall be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land.

(5) Rules 115 -C to 115 -H of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, shall be and be always deemed to have been made under the U.P. Zamindari Abolition and Land Reforms Act, 1950, as amended by the Uttar Pradesh Land Laws (Second Amendment) Act, 1961, as if this section has been in force on all material dates and shall accordingly continue in force until altered or repealed or amended in accordance with the provisions of this Act.

5. Some amendments were made in the Act, by U.P. Act No. 20 of 1982, w.e.f. 20.08.1982, which are necessary for consideration in this case. Sub-sections (1) to (4-E) were substituted in Section 122-B. Section 122-B (4-A) provides for revision , before the Collector from the order of Assistant Collector. Section 122-B (4-D) provides for a suit, against the orders of Assistant Collector or the Collector to establish his right over disputed land. Section 122-B (4-C) makes the orders of Assistant Collector and the Collector as final subject to suit. Section 122-B (4-E) bars suit from the revisional order. Simultaneously a proviso was added under Section 229-D of the Act, taking jurisdiction of the Revenue Court, of granting interim injunction, in the suit, in which the order passed under Section 122-B is challenged. Legislative intention by adding proviso to Section 229-D is that an unauthorised occupant over public land be ejected as early as possible.

6. Section 122-B of the Act provides a summary procedure, for ejectment of unauthorised occupants from the land vested in State/Gaon Sabha/Local Authority and realization of fine. State/Gaon Sabha/Local Authority is not under obligation to file a suit under Section 229 read with Section 209 of the Act, for ejectment of unauthorised occupants, as under the law, relief can be obtained under Section 122-B of the Act. However, the proceeding, being summary in nature, Assistant Collector used to decide the cases under this provision in a cursory manner. It always happens that Assistant Collector used to pass order of ejectment and impose fine relying upon Lekhpal's report or his statement, without considering the objection of the opposite party. Under the law, burden of proof is upon a person, who asserts a fact for a particular relief, to prove that fact in order to get the relief. If the opposite party denied his occupation on State land then State/Gaon Sabha/ Local Authority is liable to prove illegal occupation of the opposite party as well as period of occupation on State land. Sometime dispute relating to identity of the land is raised. In spite of law laid down by Supreme Court in **Shreepat Vs. Rajendra Prasad, 2000 (7) JT 379 (SC)**, that survey report is necessary in order to ascertain identity of the land, survey is not conducted and order of ejectment etc. is passed. If a party does not claim any right over disputed land but raising dispute relating to identity of the disputed land his suit under Section 122-B(4-D) may not be maintainable as in effect it may be a suit for negative declaration. If in a given case, without there being sufficient evidence to prove illegal occupation on State land, the order of ejectment and imposition of heavy penalty is passed, then according to Section 122-B (4-A), aggrieved person can file a revision before the Collector or under Section 122-B (4-D) can file a suit. But in view of proviso to Section 229-D, no interim injunction can be granted in the suit although it may involve demolition of construction or realization of heavy penalty. In such circumstances, availability of alternative remedy by way of suit itself may not be a ground for the High Court to refuse to exercise its jurisdiction as suit cannot be considered to be efficacious alternative remedy, which can be taken as a bar for entertaining writ petition, challenging orders passed under Section 122-B of the Act.

7. Article 226 and Article 227 of the Constitution, which confer extraordinary jurisdiction to the High Court to issue high prerogative writs and exercise supervisory jurisdiction over the authorities subordinate to it, are quoted below:-

"226. Power of High Courts to issue certain writs.—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard,

Makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

"227. Power of superintendence over all courts by the High Court.—

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

8. Jurisdiction under Article 226 and 227 are wide and expansive. The Constitution does not place any fetter on exercise of extraordinary jurisdiction. High Court, under Article 226 is required to protect fundamental rights of the citizens and to enforce rule of law to prevent miscarriage of justice. In exercise of power of judicial review, High Court can examine illegality, irrationality and procedural impropriety of an order passed by State or Statutory Authority. A seven Judges Constitution Bench of Supreme Court in **L. Chandra Kumar v. Union of India, AIR 1997 SC 1125**, held that the jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. Same view has been taken in **Union of India v. Shri Kant Sharma, (2015) 6 SCC 773**. A thirteen-Judge Constitution Bench, in **Kesavananda Bharti Vs. State of Kerala, AIR 1973 SC 1461,** held that though, by virtue of Article 368, Parliament is empowered to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or to destroy its basic structure.

9. Finality attached to the orders passed by Statutory Authority under the Act, also does not affect the jurisdiction of High Court under Article 226 and 227 of the Constitution to examine its illegality, irrationality and procedural impropriety as held by Constitution Bench of Supreme Court in **Lila Vati Bai Vs. State of Bombay, AIR 1957 SC 521** and in other cases of **Union of India Vs. A.V. Narasimhalu, (1969) 2 SCC 658 and State of H.P. Vs. Dhanwant Singh, AIR 2004 SC 1636.** As such jurisdiction of High Court under Article 226 and 227 of the Constitution can neither

be taken away nor be limited either by Constitutional amendments or by other legislations of Central Government or State Governments.

10. However power under Article 226 and 227 of the Constitution has to be exercised within the limits as propounded time to time by Apex Court. A nine-Judge Bench of Supreme Court in **Mafatlal Industries Ltd. V. Union of India, (1997) 5 SCC 536**, while considering the Excise Act and Customs Act held that "the jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. While the jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it."

11. Rule of alternative remedy is a self imposed restriction and not a rule of law as held by Supreme Court in **BALCO Captive Power Plant vs. National Thermal Power Corpn., (2007)11 SCC 234** and **Committee of Management vs. Vice Chancellor, AIR 2009 SC 1159.** When an aggrieved person has an efficacious, effective alternative remedy under the law, High Court can relegate such person to seek his remedy under the Statute, instead of entertaining writ petition. A constitution Bench of Supreme Court in **State of M.P. Vs. Bhailal Bhai, AIR 1964 SC 1006,** held that Article 226 is not intended to supersede completely the modes of obtaining relief in a civil suit. When writ petition raises a highly disputed question of fact, High Court can refuse to entertain a writ petition. Supreme Court in **Gunwant Kaur v. Municipal Committee, Bhatinda, (1969) 3 SCC 769,** held that if, however, on consideration of the nature of the controversy, the High Court decides, as in the present case, that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect. Similar view has been taken in **Babubhai Muljibhai Patel v. Nandlal Khodidas Barot, AIR 1974 SC 2105.**

12. Supreme Court in **Calcutta Discount Co. Ltd. Vs. ITO, AIR 1961 SC 372, A.V.Venkateswaran vs. Ram Chand Sobhraj Wadhwani, AIR 1961 SC 1506,** Full Bench of this Court in **Buddhu vs. Municipal Board, AIR 1952 SC 753** and Special Bench in **Bijli Cotton Mills (Pvt) Ltd. Vs. Estate Officer, 1977 AWC 191** held that when the authority passing the order had no jurisdiction or purported to usurp jurisdiction bar of alternative remedy will not apply.

13. Supreme Court in **Whirlpool Corpn. V. Registrar of Trade Marks, (1998) 8 SCC 1**, held that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution

but also for "any other purpose". Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

14. In City and **Industrial Development Corpn. V. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168**, held that while exercising its jurisdiction under Article 226, High Court is duty-bound to consider whether:

(a) adjudication of the writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) the person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

15. Supreme Court in **CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603**, held that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice. In **Union of India v. Shri Kant Sharma, (2015) 6 SCC 773**, it has been held that it is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction

under Article 226. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

16. From the aforementioned cases, it is clear that writ jurisdiction is discretionary jurisdiction of the High Court.

(i)where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, High Court may entertain writ petition;

(ii) while exercising discretion High Court may consider that adjudication of the writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(iii) The petitioner has any alternative or effective remedy for the resolution of the dispute;

(iv) The person invoking the jurisdiction is guilty of unexplained delay and laches;

(vi) grant of relief is against public policy or barred by any valid law; and host of other factors.

17. In view of the aforesaid discussions, we answer the questions referred to us as follows:-

(i) Answer to question (i) is in negative. The jurisdiction of High Court under Article 226 and 227 of the Constitution are basic structure of the Constitution, it can neither be taken away nor be limited either by Constitutional amendments or by other legislations of Central Government or State Governments or by judicial dicta.

(ii) Answer to question (ii) is in negative. Finality attached to the orders passed by Statutory authority under the Act, also does not affect the jurisdiction of High Court under Article 226 and 227 of the Constitution to examine its illegality, irrationality and procedural impropriety.

(iii) Answer to question (iii) is in negative. In view of Proviso to Section 229-D of the Act, the suit before Revenue Court may not be efficacious alternative remedy in a given case. The suit in Civil Court may not be maintainable in every case in view of Section 331 of the Act. In the cases, where the Statutory Authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions, which are repealed, or when an order has been passed in total violation of the principles of natural justice, writ petition can be entertained.

The reference to the larger Bench stands answered accordingly. The writ petitions shall now be placed before Hon'ble Single Judge for disposal in the light of this judgment.

(2016) 9 ILRA 905
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ C No.- 9994 Of 2012

Radha Madhav Seva Trust ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shri B.C. Rai

Counsel for the Respondents:
C.S.C., Shri Anil Tiwari, Shri Shiv Nath Singh

Held –

Formal Amendment Allowed The court allows the petitioner's amendment application to incorporate a formal claim flowing from facts already on record, directing that necessary corrections be made immediately.
Representation of Parties & Relief Sought Advocate Sri B.C. Rai represented the petitioner, Standing Counsel appeared for Respondent Nos. 1 to 4, and Advocate Sri Shiv Nath Singh appeared for Respondent No. 5. The writ petition seeks to quash the State Government's order dated January 10, 2012 (under Section 48 of the Land Acquisition Act, 1894), direct the respondents not to dispossess the petitioner from Plot No. 399, and exempt the plot from acquisition.
Amendment Claiming Lapsing of Acquisition By way of the allowed amendment, the petitioner additionally prayed that the acquisition proceedings be declared as lapsed, alleging no award was made within two years of the declaration under Section 6 of the 1894 Act.
Factual Background & Initial Acquisition Notifications Plot No. 399 (Village Dohriya, Tehsil & District Bareilly) was subjected to a Section 4 notification read with Section 17 on June 3, 2004, followed by a Section 6 notification on July 4, 2005 under the 1894 Act.
First Writ Petition & Interim Relief The petitioner, having purchased the plot via two sale deeds dated June 6, 2002, and November 14, 2003, filed Writ Petition No. 77878 of 2005 challenging the acquisition. The High Court granted an interim stay on dispossession on December 22, 2005.
Disposal of First Writ Petition On March 2, 2009, the Division Bench disposed of the initial writ petition, directing the State Government to consider the petitioner's application for exemption under Section 48. By necessary implication, the challenge to the Section 4 and Section 6 notifications stood rejected.
Impugned Rejection Order by the State Government The State Government rejected the petitioner's exemption request on the grounds that the petitioner purchased the land after the Development Authority submitted a preliminary acquisition proposal on October 27, 2001, and no constructions had been raised on the plot prior to the acquisition.

Second Writ Petition & Interim Order Status Challenging the rejection, the petitioner filed the present writ petition, where an interim order of *status quo* was passed on March 1, 2012. Due to this stay, possession could not be taken nor could an award be made for Plot No. 399.

Status of Other Plots & Precedent Case For other plots in the same acquisition, an award was made on April 26, 2010, with compensation determined under Section 24 of the 2013 Act. The court noted a companion case (*Prashanti Niketan Educational Society v. State of U.P.*), decided on September 5, 2016, where 10% developed land was awarded pursuant to the *Savitri Devi* and *Gajraj* precedents.

Petitioner's Arguments on Land Purchase & Constructions The petitioner argued that purchasing land after a proposal (prior to Section 4 notification) does not invalidate a purchaser's rights. Further, the petitioner asserted that Plot No. 399 was being utilized for school events, parking, and a platform, contradicting the State's claim of no construction.

Court's Findings on Land Purchase Subsequent to Proposal The court observed that the State Government did not void the petitioner's title; rather, it exercised its administrative discretion under Section 48 not to exempt the land. Considering the purchase occurred after the acquisition proposal was submitted was not an irrelevant factor in exercising that discretion.

Distinguishing Case Laws & Reviewing Admission on Constructions The court held the cited authorities distinguishable. Examining the petitioner's own admissions, the court noted CBSE permission was only granted in April 2005 and no structural constructions were built prior to the Section 4 notification; Plot No. 399 was primarily used as a playground and parking lot.

Adequacy of Remaining Land The site plan revealed that unacquired land (Khasra No. 400) held by the petitioner was sufficient for school parking and playground needs. Consequently, acquiring Plot No. 399 would not adversely affect the running of the school.

Court's Ruling on Exemption Finding no illegality in the State Government's discretion under Section 48, the court refused to interfere with the order denying exemption from acquisition.

Rejection of Claim on Lapsing of Proceedings Addressing the Section 11-A lapse argument, the court held that after excluding periods covered by interim stay orders (granted on Dec 22, 2005, and March 1, 2012), the mandatory two-year period for making an award had not expired.

Final Relief & Directions In the interest of justice, the court granted relief in line with *Gajraj Singh* and *Savitri Devi*:

Compensation to be determined and paid within **one month** under Section 24 of the Act, 2013.

10% developed land to be provided within **two months** of submitting a certified copy of the order to the Chairman, Bareilly Development Authority.

The writ petition was disposed of accordingly.

List of Citations

U.P. Jal Nigam v. Kalra Properties (P) — (1996) 3 SCC 124
Prashanti Niketan Educational Society v. State of U.P. & others — Writ Petition No. 70494 of 2013 (Decided on 05.09.2016)
Savitri Devi v. State of Uttar Pradesh and Ors. — (2015) 7 SCC 21
Gajraj and others v. State of U.P. and others — 2011 ADJ 11 (11) Page 1 (Full Bench)
1992 Supp (2) SCC 136 (Para 2)
2001 (7) SCC 545 (Para 10 & 11)
2015 (126) RD 28 (Para 14, 16 & 23)
2015 (10) SCC 241 (Para 29)
2010 (7) ADJ 172 (Para 213-218)
2008 (2) AWC 1832 (Para 15, 18)

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. In the facts of the case, the amendment, which is sought to be incorporated, flows from the facts already on record and the same is formal in nature. The amendment application is allowed.

2. Let necessary corrections be made today.

3. Heard Sri B.C. Rai, Advocate on behalf of the petitioner. Standing Counsel on behalf of respondent nos. 1 to 4 and Sri Shiv Nath Singh, Advocate on behalf of respondent no. 5.

4. This writ petition has been filed for quashing of the order dated 10.01.2012 passed by the State Government on the application of the petitioner under Section 48 of the Land Acquisition Act, 1894 as well as for a mandamus directing the respondents to not to dispossess the petitioner from plot no. 399 and not to interfere with the use and occupation of the same by the petitioner as well as to exempt the same from the acquisition proceedings.

5. By means of the amendment application it has been added that since no award has been made even after more than two years of the declaration under Section 6 of the Act, the proceedings may be declared to have lapsed.

6. Facts in short leading to the present writ petition are as follows:

7. Plot No. 399, village Dohriya, tehsil and district Bareilly was subject matter of notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as 'Act, 1894') dated 03rd June, 2004 read with Section 17 of the same Act. This notification was followed by notification under Section 6 of the Act, 1894 dated 04th July, 2005.

8. Petitioner before this Court, who claims to have purchased the plot vide two separate sale deeds dated 06th June, 2002 and 14th November, 2003, filed Writ Petition No. 77878 of 2005 for quashing of the acquisition notifications. In the said writ petition an interim order was granted by the High Court on 22.12.2005. As a result whereof the dispossession of the petitioner from the disputed plot was stayed.

9. The writ petition was disposed of vide judgment and order dated 02.03.2009. The Division Bench held that the petitioner, if so advised, may make an application for exemption of the land from acquisition proceedings before the State Government. The State Government was asked to take an appropriate decision after affording opportunity to the petitioner thereon. The net result of the order of the High Court was that so far as the notification under Section 4 and 6 are concerned, the challenge to the same was not accepted and the prayer in that regard stood rejected by necessary implication.

10. The State Government under the order impugned in the present writ petition has noticed that the petitioner had purchased the land after a preliminary proposal for acquisition of land in respect of plot no. 399 had been submitted by the Development Authority to be precise on 27.10.2001. It has further been recorded that up to the date of acquisition no constructions had been raised by the petitioner over the plot in question. Therefore, the State Government decided not to exempt the land from acquisition proceedings.

11. This order of the State Government has been subjected to challenge by means of the present writ petition, wherein an interim order was granted by the High Court on 01.03.2012 directing the parties to maintain the status quo. As a result of interim order neither possession of the plot could be obtained by the development authority nor an award in respect of the Plot No. 399 could be made.

12. However, to keep the record straight we may point out that in respect of the other plots, which were subject matter of acquisition, award was made by the Special Land Acquisition Officer on 26.04.2010. The compensation under the said award has been determined with reference to the provisions of Section 24 of the Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as 'Act, 2013').

13. We may also record that another writ petition, being Writ Petition No. 70494 of 2013 (Prashanti Niketan Educational Society vs. State of U.P. & others), filed for challenging the same notification and with the prayer for declaration that the acquisition proceedings have lapsed under Section 11-A of the Act, 1894, has been decided by us on 05.09.2016 following the judgment of the Apex Court in the Case of **Savitri Devi vs. State of Uttar Pradesh and Ors.,** reported in (2015) 7 SCC 21. It has been held that the petitioner therein would be entitled to benefit of the Full Bench judgment of the High Court in the case of **Gajraj and others vs. State of U.P. and others reported in ADJ 11 (11) page 1** and they shall be provided 10% of the developed land. No direction for payment of additional compensation has been made by us keeping in mind that the compensation has been determined under the Act, 2013, which would be much more than the relief of 67% additional compensation to be determined with reference to the date of notification under Section 4 of Act 1894.

14. So for as the present petitioner is concerned, it has been contended before us that the State Government has rejected the representation on wholly misconceived ground, namely, that (a) on the date of proposal submitted by the development authority the petitioner was not the recorded tenure holder of the plot in question and (b) that no constructions had been raised till the date of acquisition of the plot in question.

15. On behalf of the petitioner it is submitted that no rights of a purchaser are adversely affected under the Act, 1894 if he purchases the land subsequent to the submission of the proposal by a development authority for the purposes of acquisition. Rights of only such purchases are adversely affected where the purchase is made subsequent to the issuance of notification under

Section 4 of the Act, 1894. Reference- **1996 SCC (3) 124; U.P. Jal Nigam vs. Kalra Properties (P)**.

16. So far as the issue of constructions having not been raised by the petitioner over the plot in question are concerned, it has been stated before us that a platform had been constructed on the disputed plot, which is being used for cultural functions etc. of the school and that the vacant land is being used for the parking of the buses and vans etc. of the school. It is, therefore, submitted that the State Government is not correct in saying that no constructions had been raised over the plot in question.

17. We may first deal with the issue as to whether any rights in the property purchased subsequent to the proposal submitted by the development authority stand diluted or not in light of the judgment of the Apex Court in the case **of U.P. Jal Nigam vs. Kalra Properties (P).**

18. We may at the very outset record that the State Government has not rejected the exemption application of the petitioner on the ground that he does not get a valid title over the plot in question because of purchase of the plot subsequent to the proposal. The State Government in fact has not found it fit and proper to exercise its discretion for exemption of the plot in question from acquisition proceedings in exercise of power under Section 48 of the Act, 1894 on the said fact.

19. As already noticed above, the challenge to the notifications under Section 4 and 6 of the Act, 1894 by the petitioner in respect of plot in dispute stands repelled with the dismissal of the Writ Petition No. 77878 of 2005 filed by the present petitioner. Therefore, it is only the legality of the exercise of discretion by the State Government under Section 48, which needs to be examined by this Court. If State Government has taken note of the fact that the land had been purchased subsequent to the proposal submitted by the development authority, then it cannot be said that any factor completely irrelevant has been taken into consideration.

20. The petitioner has placed reliance upon the judgments of the Apex Court in the cases of 1992 Supp (2) SCC 136 (Para 2), 2001 (7) SCC 545 (Para 10 & 11), 2015 (126) RD 28 (Para 14, 16 & 23), 2015 (10) SCC 241 (Para 29), 2010 (7) ADJ 172 (Para 213-218) and 2008 (2) AWC 1832 (Para 15, 18), which in our opinion are clearly distinguishable in the facts of the case.

21. So far as the issue of constructions over the plot in question up to the date of issuance of section 4 notifications are concerned, we may refer to the own admission of the petitioner as contained in paragraph 11 and 12 of the application filed before the State Government by the petitioner himself. In paragraph 12 it has been stated that the permission for introduction of additional subjects was granted by the CBSE in favour of the petitioner only on 13.04.2005. There is no averment qua any constructions having been raised over Plot No. 399 prior to the date of notification under Section 4. On the contrary in paragraph 22 it has been stated that in Plot Nos. 399 and 452 are being used as playground and for parking of school buses and school vans.

22. From the document, which has been enclosed at page 181 of the paper book, said to be site plan of the school building, we can safely record that the area of Khasra No. 400 is more than enough for the use as playground and parking of the vehicles etc., which admittedly had not been acquired by the development authority and is still available with the petitioner.

23. In the totality of the circumstances, we have no hesitation in coming to the conclusion that because of acquisition of Plot No. 399 neither the running of the school would be adversely affected nor the facility of parking, playground etc. would be adversely affect.

24. Therefore, we do not find any good ground to interfere with the decision of the State Government in refusing to exempt the land from acquisition.

25. This take the Court to the issue as to whether the proceedings of acquisition would lapse under the Act, 1894 on the ground that the award had not been made even after expiry of two years of the date of notification under Section 6.

26. As already noticed above, because of the interim order granted in the first writ petition dated 22.12.2005 and the interim order granted in the present writ petition on 01.03.2012 as well as having regard to the final direction of this Court dated 02.03.2009, in our opinion, the period of two years after excluding the period when there had been an stay order, has not expired. Even otherwise the said issue has been considered by us in the case of Prashanti Niketan Educational Society vs. State of U.P. & others in respect of the same notification.

27. In our opinion it would be in the interest of justice to permit the petitioner to have the benefit of the Full Bench judgment in the case of Gajraj Singh (supra) as has been provided for by the Apex Court in the case of Savitri Devi (supra) to the extent indicated below.

28. The petitioner shall be entitled to the compensation, to be determined and paid within one month in accordance with Section 24 of the Act, 2013, as also 10% of the developed land be provided to the petitioner within two months from the date of filing of a certified copy of this order before the Chairman, Bareilly Development Authority, Bareilly.

29. With the above observations and directions, the writ petition is disposed of.

(2016) 9 ILRA 911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ C/ Civil Misc. Writ Petition No.- 17778 Of 2016

Abhishek Mishra **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Shri Neeraj Kumar Pandey

Counsel for Respondent:
C.S.C., Shri Sandeep Arora

Held –

1. Factual Background and Parties Involved
The petitioner's late father took two loans from Respondent No. 3 (Bank) and mortgaged properties including *khasra no. 762* in Rudrapur as security. Following defaults in repayment, the Bank initiated proceedings under Section 13 of the SARFAESI Act, 2002. After issuing notices under Sections 13(2) and 13(4), the Bank filed an application under Section 14 before the Chief Judicial Magistrate (CJM) seeking assistance to take possession of the secured property. The CJM allowed the application via an order dated March 18, 2016, directing police assistance and ordering the Sub-Divisional Magistrate to prepare an inventory.

2. Petitioner's Contentions
Learned Counsel for the petitioner argued that Section 14 of the SARFAESI Act explicitly mentions only the "Chief Metropolitan Magistrate" (CMM) or the "District Magistrate" (DM) to entertain such applications. Therefore, the order passed by the CJM was patently without jurisdiction. It was contended that the Act is a self-contained code with plain wording, meaning the court cannot supply a *casus omissus* (an omitted scenario) or delegate powers to a CJM by expanding the statutory nomenclature.

3. Respondent-Bank's Counter-Arguments
Learned Counsel for the Bank submitted that excluding the CJM would defeat the legislative intent of the Act, which aims at the expeditious recovery of Non-Performing Assets (NPAs). It was highlighted that metropolitan areas with CMMs are rare in Uttar Pradesh, whereas CJMs are present across non-metropolitan districts. Excluding CJMs would result in administrative bottlenecks and severe delays in debt recovery.

4. Core Question for Adjudication
The central legal issue before the High Court was whether a Chief Judicial Magistrate exercising jurisdiction in a non-metropolitan area has the power under Section 14 of the SARFAESI Act, 2002 to assist a secured creditor in taking possession of a secured asset.

5. Division of Opinions Among Various High Courts
The Court acknowledged conflicting views across various High Courts:
Restricted View: The Full Bench of the Madras High Court (*K. Arockiyaraj*) and Division Benches of the Bombay High Court (*Arjun Urban Co-op Bank* and *Ravindrakumar Prakash Bhargodev*) held that in the absence of an explicit mention of "CJM" in Section 14, only CMMs or DMs have jurisdiction.
Inclusive View: The Division Bench of the Kerala High Court (*Mohd. Ashraf*) and Full Bench of the Andhra Pradesh High Court (*T.R. Jewellery*) took the opposite view, empowering CJMs in non-metropolitan regions.

6. Statutory History and Objects of the SARFAESI Act
The Court traced the origins of debt recovery legislation in India, examining reports from the **Tiwari Committee** and **Narsimham Committee** (1st & 2nd reports), which led to the Recovery of Debts Act, 1993 and subsequently the SARFAESI Act, 2002. The primary objective of the Act was identified as quick recovery of NPAs and enabling liquidity in the economy without prolonged court interference.

7. Supreme Court Jurisprudence on the Act's Object
Referring to the Supreme Court's landmark ruling in *Mardia Chemicals Ltd. v. Union of India*, the Court underscored that while certain provisions of the SARFAESI Act may seem stern toward borrowers, they serve the broader public interest of rapid capital flow and economic growth.

8. Framework of Section 14
Section 14 functions as a procedural mechanism empowering the specified magistrate to render administrative and coercive assistance (such as using necessary force and taking possession of assets) to the secured creditor. Under Section 14(3), actions taken by the magistrate in pursuance of this section cannot be questioned in any court.

9. Harmonious Interpretation with the Code of Criminal Procedure (Cr.P.C.)
Analyzing Sections 2(k), 3, 8, and 12 of the Cr.P.C., the Court noted that the powers, status, and duties of a CJM in a non-metropolitan area are identical and synonymous to those of a CMM in a metropolitan area. The titles alter solely based on the territorial classification of the area where the magistrate is posted.

10. Rules of Statutory Construction & Purposive Interpretation
Drawing on precedent from the Apex Court (*L.V.A. Dixitulu*, *Kehar Singh*, *Tata Iron & Steel*, *Padmasundara Rao*, *Bangalore Water Supply*, *National Insurance Co.*, and *Girdhari Lal & Sons*) as well as English legal principles (Lord Denning in *Seaford Court Estates*), the Court emphasized that literal interpretation must give way to purposive construction when a literal reading produces absurdity or defeats the object of the enactment.

11. Overruling the Restrictive View on Section 35 vs. Section 37
Addressing the Madras High Court's ruling in *K. Arockiyaraj*, which held that Section 35 (overriding effect) excludes the application of the Cr.P.C., the Allahabad High Court highlighted **Section 37 of the SARFAESI Act**. Section 37 explicitly provides that the Act applies *in addition to, and not in derogation of* other laws, which includes the Cr.P.C. Hence, relying on Cr.P.C. provisions to interpret CMM as inclusive of CJM is fully valid.

12. Final Holding and Dismissal
The Court held that the term "Chief Metropolitan Magistrate" in Section 14 of the SARFAESI Act includes a "Chief Judicial Magistrate" operating in non-metropolitan areas. Thus, the impugned order of the CJM directing assistance to the Bank was held to be within jurisdiction and lawful. The writ petition was dismissed without costs.

List of Case Laws Cited in the Judgment

K. Arockiyaraj v. Chief Judicial Magistrate, Srivilliputhur & Anr., 2013 (4) L.W. 485 *(Full Bench, Madras High Court)*
Arjun Urban Co-operative Bank Limited, Solapur v. Chief Judicial Magistrate, Solapur & Anr., 2009 (5) MLJ 380 *(Division Bench, Bombay High Court)*
Ravindrakumar Prakash Bhargodev v. State of Maharashtra, 2008 (110) BOMLR 2880 *(Division Bench, Bombay High Court)*
Mohd. Ashraf and Smt. C. Arifa v. Union of India, 2008 Law Suit (Ker) 477 *(Division Bench, Kerala High Court)*
T.R. Jewellery & Ors. v. State Bank of India & Ors., Laws (APH)-2015-11-17 *(Full Bench, Andhra Pradesh High Court)*
Mardia Chemicals Ltd. v. Union of India, 2004 (4) SCC 311 *(Supreme Court of India)*
Chief Justice of A.P. & Ors. v. L.V.A. Dixitulu & Ors., (1979) 2 SCC 34 *(Supreme Court of India)*
Kehar Singh & Ors. v. State (Delhi Admn.), AIR 1988 SC 1883 *(Supreme Court of India)*
District Mining Officer v. Tata Iron & Steel Co., (2001) 7 SCC 358 *(Supreme Court of India)*
Padmasundara Rao (Dead) & Ors. v. State of Tamil Nadu & Ors., AIR 2002 SC 1334 *(Constitution Bench, Supreme Court of India)*
Artemiou v. Procopiou, (1966) 1 QB 878 *(Court of Appeal, England)*
Seaford Court Estates Ltd. v. Asher, (1949) 2 All ER 155 *(Court of Appeal, England)*
Bangalore Water Supply and Sewerage Board v. A. Rajappa, AIR 1978 SC 548 *(Supreme Court of India)*
State of Karnataka v. Hansa Corporation, AIR 1981 SC 463 *(Supreme Court of India)*
Directorate of Enforcement v. Deepak Mahajan, AIR 1994 SC 1775 *(Supreme Court of India)*
NEPC Micon Ltd. v. Magna Leasing Ltd., AIR 1999 SC 1952 *(Supreme Court of India)*
Reema Agarwal v. Anupam, (2004) 3 SCC 199 *(Supreme Court of India)*
Organo Chemical Industries v. Union of India, AIR 1979 SC 1803 *(Supreme Court of India)*
National Insurance Company Ltd. v. Laxmi Narain Dhut, AIR 2007 SC 1563 *(Supreme Court of India)*
M/s. Girdhari Lal & Sons v. Balbir Nath Mathur & Ors., AIR 1986 SC 1499 *(Supreme Court of India)*
Luke v. IRC, 1963 AC 557 *(House of Lords)*
IndusInd Bank Ltd. v. State of Maharashtra *(Bombay High Court)*

(Delivered by Hon'ble Krishna Murari, J.)

1. Heard Shri Neeraj Kumar Pandey, learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1, 2 and 5 and Shri Sandeep Arora for respondent no. 3-Bank.

2. Admittedly, late father of the petitioner took two loans from respondent no. 3-Bank and mortgaged the property bearing khasra no. 762, area 1128 sq. ft. situated in Rudrapur and another residential plot nos. 820 and 821, area 2128 sq. ft. as security to the said loans. The dispute in the present writ petition is in respect of the khasra no. 762. Late father of the petitioner defaulted in making repayment, as a result, proceedings under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'Act, 2002') was initiated. Notice under Section 13 (2) of the Act, 2002 was issued and subsequently after notice under Section 13 (4) of the Act, 2002, the respondent-Bank made an application under Section 14 of the Act, 2002 before the Chief Judicial Magistrate seeking assistance in taking possession of the secured asset. Chief Judicial Magistrate vide order dated 18.03.2016, impugned in this petition, allowed the application and directed the concerned police

station to assist the Bank in taking over possession of the mortgaged property and Sub Divisional Magistrate was directed to make an inventory of the articles in the mortgaged property.

3. Learned counsel for the petitioner contends that since Section 14 of the Act, 2002 only authorises either the Chief Metropolitan Magistrate or the District Magistrate to entertain and pass orders on the application made under the said Section, as such, the impugned order passed by the Chief Judicial Magistrate is patently without jurisdiction and is not liable to be sustained. It is further submitted that since Act, 2002 is a self contained code and the language of Section 14 is clear and unambiguous, no jurisdiction can be said to vest with the Chief Judicial Magistrate to exercise the power under Section 14 of the Act. He further submits that the power is to be exercised by the Chief Metropolitan Magistrate under the provisions of the Act, the same cannot be delegated to a Chief Judicial Magistrate by giving a wider meaning to the nomenclature to the Chief Metropolitan Magistrate and if the Legislature has omitted the use of word 'Chief Judicial Magistrate', the Court cannot supply the omission and it can only interpret the law.

4. On the other hand, learned counsel for the respondent-Bank submits that the very purpose of the enactment, viz., the expeditious recovery of bad loans classified as Non Performing Asset, would fail, if the Chief Judicial Magistrate is excluded from exercising the power conferred by Section 14 of the Act, 2002. He points out that only a few areas in the State of U.P. has been declared to be metropolitan areas where the Chief Metropolitan Magistrate functions and in most of the areas, there are Chief Judicial Magistrate and, in case, if he is excluded from exercising the power conferred by Section 14 of the Act, it would result in endless delay in recovery of debts of the Banks and financial institutions frustrating the very purpose of the Legislature enacting the Act, 2002 for speedy recovery of the loans.

5. The core issue, which arises for reconsideration is whether the Chief Judicial Magistrate exercising jurisdiction in non metropolitan area in exercise of powers conferred by Section 14 of the Act, 2002 can assist a secured creditor in taking possession of the secured asset and pass an order in favour of the secured creditor for the purpose of taking possession or control of any secured asset.

6. This issue has been subject matter of consideration before various High Courts, who have expressed divergent views, however, no authoritative pronouncement by the Hon'ble Apex Court or by this Court, has been placed before us.

7. A Full Bench of Madras High Court in **K. Arockiyaraj Vs. Chief Judicial Magistrate, Srivilliputhur & Anr., 2013 (4) L.W. 485** and two Division Benches judgment of Bombay High Court in the case of **Arjun Urban Co-operative Bank Limited, Solapur Vs. Chief Judicial Magistrate, Solapur & Anr. (2009 (5) MLJ 380) and Ravindrakumar Prakash Bhargodev Vs. State of Maharashtra, (2008 (110) BOMLR 2880)**, have taken view that in absence of any reference to Chief Judicial Magistrate, in Section 14, it is only the Chief Metropolitan Magistrate in the metropolitan area and the District Magistrate in non-metropolitan area, who can entertain an application under Section 14. Whereas a Division Bench of Kerala High Court in the case of the

Mohd. Ashraf and Smt. C. Arifa Vs. Union of India, 2008 Law Suit (Ker) 477 and a Full Bench of Andhra Pradesh High Court in the case of **T.R. Jewellery & Ors. Vs. State Bank of India & Ors., Laws (APH)-2015-11-17**, has taken a totally contrary view.

8. Before answering the question posed before us for adjudication, we find it expedient to notice the statement of object and reasons of Act, 2002 in order to explore the purpose and intention of the Legislature for enacting the said Act. Finding that several hundred crores of public money was blocked in unproductive ventures, the Government of India constituted a committee under Shri P. Tiwari to examine the legal and other difficulties faced by the Banks and financial institutions in the recovery of their dues and suggest remedial measures. The Tiwari Committee noticing that the existing procedure for recovery was very cumbersome, suggested setting up special Tribunals for recovery of the dues of Banks and financial institutions by following a procedure, which was summary in nature. The issue was further considered by the committee on the financial system headed by M. Narsimham. In its first report, the Narsimham committee suggested setting up special Tribunals with special powers for adjudication of cases involving the dues of Banks and financial institutions. On a consideration of the report of the two committees, namely, Tiwari committee and Narsimham committee, the parliament enacted the Recovery of Debts due to Banks and Financial Institutions Act, 1993. By the new enactment, a specialised forum by the name of Debts Recovery Tribunal and Debts Recovery Appellate Tribunals were constituted for expeditious disposal of cases relating to recovery of debts due to Banks and financial institutions. The principles applicable in a civil proceeding before civil court in such matters was barred and all pending matters above a certain valuation were transferred to such newly created Tribunals. For a certain period, the new system worked well and the Tribunals ensured that cases involving recovery of dues of Banks and financial institutions are decided expeditiously. However, with the passage of time, the proceedings before the Tribunal also became sluggish like those before regular civil courts and on account of the various procedural technicalities, there was great impediment in the expeditious adjudication of cases by the Debt Recovery Tribunal. A survey conducted by the Ministry of Finance, Government of India in 2001 revealed that a huge sum of more than Rs.1,20,000 crores of the Banks and financial institutions was blocked in bad loans, which was adversely affecting the economy of the country. The Government again referred the matter to Narsimham committee to suggest ways and means for expediting the recovery of debts of Banks and financial institutions. Narsimham committee submitted its 2nd report. Andhyarujina committee was also constituted by the Central Government for the purpose of examining banking sector reforms and to consider the need for changes in the legal system in respect of these dues. Both the committees, inter alia, suggested enactment of a new Legislation for securitization and empowering the banks and financial institutions to take possession as security and to sell them without the intervention of the Court. Accepting the recommendations made by the two committees, the Parliament proceeded to enact Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, which was promulgated on 21st August, 2002, which was later on converted into Act, which came into force w.e.f. 17th December, 2002.

9. Act, 2002 provides a detail procedure for constitution of Securitisation company or Reconstruction company for regulation of securitisation and reconstruction of financial assets of

Banks and financial institutions. The provisions of the Act also provide a procedure for enforcement of the security interest. Under Section 13 of the Act, any security interest created in favour of any secured creditor, is liable to be enforced without the intervention of the Court or Tribunal by the said creditor in accordance with the provisions contained in the Act. This power has been vested notwithstanding anything contained in Section 69 or Section 69 A of the Transfer of Property Act, 1882.

10. While upholding the constitutional validity of Act, 2002, the Hon'ble Apex Court in the case of **Mardia Chemicals Ltd. Vs. Union of India, 2004 (4) SCC 311**, has observed that though the effect of some of the provisions of the enactment could be a bit harsh for some of the borrowers, but the impugned provisions of the Act cannot be said to be unconsitutonal on that ground because the object of the Act is to achieve speedy recovery of dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would sub serve the public interest.

11. From the above observations made by the Hon'ble Apex Court and also the statement of object and reasons, it becomes abundantly clear that the purpose of the Act is to achieve speedier recovery of the bad debts of the Bank and financial institutions declared as NPAs without the intervention of the Tribunal or the Courts and quick resolution of disputes arising out of the action taken for recovery of such dues, which would go a long way in making better availability of capital liquidity and resources to help growth of the economy of the country and welfare of the public at large in order to further sub serve the purpose and object of the Act. The Legislature after enacting Section 13 providing a procedure for enforcement of security interest by the secured creditor enacted Section 14 conferring power upon the Chief Metropolitan Magistrate or the District Magistrate to assist secured creditor in taking the possession of the secured asset. The said Section reads as under.

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that –

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has not been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with;

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets;

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

[(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.]

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate of the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority."

12. A plain reading of the above Section shows that it is procedural whereunder the Chief Metropolitan Magistrate or the District Magistrate as the case may be on an application made by the secured creditor shall render assistance to it to take possession of the secured asset or document relating to such assets and forward such assets and documents to the secured creditor. Under sub-section (2) of Section 14, the authority is empowered to take such steps and use such course as may be necessary for taking possession of the secured assets and documents relating thereto. Sub-section (3) of Section 14 further provides that any act done by the authority in exercise of powers conferred by the provision shall not be called any question in any court or before any authority.

13. The crux of the argument advanced on behalf of the petitioner is that in view of the phraseology of Section 14 of the SARFAESI Act, it is only the Chief Judicial Magistrate who can exercise the powers conferred by said Section. Whereas the counter argument advanced on behalf of the respondent-bank is that the words 'Metropolitan Magistrate' used in Section 14 would include the Chief Judicial Magistrate if the area in question is not a Metropolitan area as the function assigned to both the Magistrate are similar.

14. Metropolitan area is defined under Section 2(k) of the Code of Criminal Procedure (for short 'Cr.P.C.') as under :

"2(k). "Metropolitan area" means the area declared, or deemed to be declared, under Section 8, to be a metropolitan area."

15. At this stage, it may also be relevant to extract the relevant part of Section 3 of the Cr.P.C., which speaks of construction of references.

"3(1) In this Code - (a) any reference, without any qualifying words, to a Magistrate shall be construed, unless the context otherwise requires, -

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate."

16. Section 3(1)(d) reads as under:

"any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area."

Section 3(2) - In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a Metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area."

17. Under Section 8 of Cr.P.C., the State Government is empowered to declare by a notification with effect from such date as may be specified therein any area within the State comprising a city or town whose population exceeds one million shall be a metropolitan area.

18. Under Section 12 of Cr.P.C., the High Court of the State is empowered to appoint in every district, which is not a metropolitan area, a Judicial Magistrate of First Class to be the Chief Judicial Magistrate. Similarly, with respect to every metropolitan area, the High Court is empowered to appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area.

19. From a reading of the aforesaid provisions, it is clear that the function and powers of Chief Judicial Magistrate in non-metropolitan area and that of Chief Metropolitan Magistrate in metropolitan area are one and the same.

20. A Chief Judicial Magistrate working, if transferred to a metropolitan area, will discharge the function as Chief Metropolitan Magistrate and similarly, if a Chief Metropolitan Magistrate working in a metropolitan area is transferred in a non-metropolitan area, he will discharge the function and duties as Chief Judicial Magistrate. The function and powers are the same and these words are interchangeably used as per their placement in a metropolitan or non-metropolitan area. One is synonymous for the other dependent upon the area under his transfer.

21. A reading of the above provisions makes it clear that powers of Chief Judicial Magistrate in non-metropolitan area and powers of Chief Metropolitan Magistrate working in metropolitan area, are one and the same, their functions are same and one is synonymous to other. The only difference is that former one exercises jurisdiction over non-metropolitan areas while the later exercises jurisdiction in metropolitan area only. The nomenclature gets changed depending upon whether the area has been declared as a metropolitan area.

22. The main thrust of the argument of learned counsel for the petitioner is that since the Legislature did not use the words Chief Metropolitan Magistrate in Section 14 of the Act, the same cannot be read in the said Section. In effect, the argument is that what has not been provided for in the Statute cannot be supplied by the Court as the same will amount to legislation and not construction.

23. In view of above, the question for consideration would be whether there is any casus omissus if nomenclature, Chief Metropolitan Magistrate used in Section 14 is interpreted to include Chief Metropolitan Magistrate.

24. In the case of **Chief Justice of A.P. & Ors. Vs. L.V.A. Dixitulu & Ors., (1979) 2 SCC 34**, Hon'ble Apex Court held as under.

"The primary principle of interpretation is that a constitutional or statutory provision should be construed 'according to the intent of they that made it' (Coke). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation."

25. Again in the case of **Kehar Singh & Ors. Vs. State (Delhi Admn.), AIR 1988 SC 1883**, the Hon'ble Apex Court observed as under.

"But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences."

26. In the case of **District Mining Officer Vs. Tata Iron & Steel Co., (2001) 7 SCC 358**, the Hon'ble Apex Court observed as under.

"The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

27. A Constitution Bench of the Hon'ble Apex Court in the case of **Padmasundara Rao (Dead) & Ors. Vs. State of Tamilnadu & Ors., AIR 2002 SC 1334**, while laying down the principles for interpretation of statutes has held as under.

"Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on an particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result." said Danckwerts, L.J., in Artemiou Vs. Procopiou (1966 1 QB 878), "is not to be imputed to a statute if there is some other construction available." Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction."

28. In this connection it may be relevant to refer to the following observations of Lord Denning in the case of **Seaford Court Estates Ltd. Vs. Asher (1949) 2 All ER 155, P. 164**.

"When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give force and life to the intention of the Legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

29. The above observation of Lord Denning was quoted with approval by the Hon'ble Apex Court in Banglore Water Supply and Sewerage Board Vs. A. Rajappa, AIR 1978 SC 548, State of Karnataka Vs. Hansa Corporation, AIR 1981 SC 463, Directorate of Enforcement Vs. Deepak Mahajan, AIR 1994 SC 1775, NEPC Micon Ltd. Vs. Magna Leasing Ltd., AIR 1999 SC 1952 and also in Reema Agarwal Vs. Anupam (2004) 3 SCC 199.

30. In the case of Argano Chemical Industries Vs. Union of India, AIR 1979 SC 1803, the Hon'ble Apex Court has observed that "A bare mechanical interpretation of the words and application of Legislative intent devoid of concept of purpose will reduce most of the remedial and beneficent legislation to futility.

31. In National Insurance Company Ltd., Vs. Laxmi Narain Dhut, AIR 2007 SC 1563, the Hon'ble Apex Court while considering the manner of interpretation of Statues, has held as under.

"34. A statute is an edict of the Legislature and in construing a statute, it is necessary to seek the intention of its maker. A statute has to be construed according to the intent of those who make it and the duty of the court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises difficulties because of various reasons, in as much as the words used may not be scientific symbols having any precise or definite meaning an the language may be an imperfect medium to convey one's though or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to foresee all situations exhaustively and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the Courts is only to expound and not legislate. Legislation in the modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of constructions combines both literal and purposive approaches. In other words the legislative intention, i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. (See District Mining Officer and Ors. Vs. Tata Iron and Steel Co. and Anr. (JT 2001 (6) SC 183)."

32. It is well settled that to decide the true intention of the Legislature, depending upon the objects for which enactment has been made, the Courts can resort to historical, contextual and purposive interpretation leaving aside the textual interpretation. Purposive interpretation has been described by Fransis Bennion in his book 'Statutory Interpretation' as under.

"A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or

(b) applying a strained meaning where the literal meaning is not in accordance with legislative purpose.

33. Hon'ble Apex Court in the case of **M/s. Girdhari Lal & Sons Vs. Balbir Nath Mathur & Ors., AIR 1986 SC 1499**, while explaining the principles of interpretation of statutes, has held as follows.

"The foremost task of a court, as we conceive it, in the Interpretation of Statutes, is to find out the intention of the legislature. Of course, where words are clear and unambiguous no question of construction may arise. Such words ordinarily speak for themselves. Since the words must have spoken as clearly to legislators as to judges, lt may be safely presumed that the legislature intended what the words plainly say. This is the real basis of the so called golden rule of construction that where the words of statutes are plain and unambiguous effect must be given to them. A court should give effect to plain words, not because there is any charm or magic in the plainness of such words but because plain words may be expected to convey plainly the intention of the Legislature to other as well as judges. Intention of the legislature and not the words is paramount. Even where the words of statutes appear to be prima facie clear and unambiguous it may some times be possible that the plain meaning of the words does not convey and may even defeat the intention of the legislature; in such cases there is no reason why the true intention of the legislature, if it can be determined, clearly by other means, should not be given effect. Words are meant to serve and not to govern and we are not to add the tyranny of words to the other tyrannies of the world.

Parliamentary intention may be gathered from several sources. First, of course, it must be gathered from the statute itself, next from the preamble to the statute, next from the Statement of Objects and Reasons, thereafter from Parliamentary debates, reports of Committees and Commissions which preceded the legislation and finally from all legitimate and admissible sources from where there may be light. Regard must be had to legislative history too.

Once Parliamentary intention is ascertained and the object and purpose of the legislation is known, it then becomes the duty of the court to give the statute a purposeful or a functional interpretation. this is what is meant when, for example, it is said that measures aimed at social amelioration should receive liberal or beneficent construction. Again, the words of a statute may not be designed to meet the several uncontemplated forensic situations that may arise. The draftsman may have designed his words to meet what Lord Simon of Glaisdale calls the 'primary situation'. It will then become necessary for the court to impute an intention to Parliament in regard to 'secondary situations'. Such 'secondary intention' may be imputed in relation to a secondary

situation so as to best serve the same purpose as the primary statutory intention does in relation to a primary situation.

So we see that the primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the court must then strive to so interpret the statute as to promote or advance the object and purpose of the enactment. For this purpose, where necessary the court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anamoly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing, the written word if necessary."

34. Applying the above well settled principles of interpretation of Statute, the answer to the issue is nomenclature 'Chief Metropolitan Magistrate' used by legislature is Section 14 of the Act includes Chief Judicial Magistrate functioning in non-metropolitan area and shall have jurisdiction to entertain an application made under Section 14 of the SARFAESI Act, 2002. In our considered opinion, there is no casus omissus. The interpretation given by us does not amount to reading anything in the provision, which the legislature never intended to, nor the interpretation given by us, in any way, defeats the intention of the Legislature. It is a purposive interpretation to advance the true intention of the legislature for enacting the Act, viz. speedy recovery of bad debts of the banks and financial institutions declared as NPAs. On the contrary, adopting the principles of literal construction in interpretation of the word 'Chief Metropolitan Magistrate' would not only defeat the object and purpose of legislation but would lead to manifestly anomalous result which could not have been intended by the legislature. As per Lord Reid in the case of **Luke Vs. IRC, 1966 AC 557**, where to apply words would literally defeat the obvious intention of the legislation and produce a wholly unreasonable result, we must do some violence to the words and so achieve that obvious intention and produce a rational construction.

35. The view taken by us finds support from the Full Bench decision of Andhra Pradesh High Court in the case of **T.R. Jewellery & Ors. Vs. State Bank of India & Ors. (supra)** and a Division Bench of High Court of Kerala in the case of **Muhammed Ashraf, C Arifa Vs. Union of India**, we are unable to agree with contrary view taken by Bombay High Court in the case of Indusind Bank Ltd. Vs. State of Maharastra and High Court of Madras in K. Arockiyaraj Vs. The Chief Judicial Magistrate, Srivilliputhur & Anr., 2013 (4) L.W. 485. The Full Bench of Madras High Court in the case of K. Arockiyaraj (supra) was of the view that phraseology used in Section 14 of the Act, 2002 should be given its true meaning without taking any assistance from Code of Criminal Procedure in view of Section 35 of Act, 2002, which provides that provisions of the Act will override all other laws which includes Code of Criminal Procedure. It was also held that when SARFAESI Act is a complete code, there is no need to take resort to Section 3 of Cr.P.C.

36. With respect to the learned Judges, we have been unable to persuade ourselves to agree to the view taken. The Full Bench failed to take notice of Section 37 of the Act, 2002 which provides that application of other laws is not barred. The said section reads as under.

"**37. Application of other laws not barred**.- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

37. There can be no manner of doubt that words "any other law for time being in force" used in Section 37 would also include Code of Criminal Procedure within its ambit and the application of provisions of Cr.P.C. cannot be excluded from consideration while dealing with the provisions of Act, 2002. Hence, the view taken by Full Bench of Madras High Court that in view of Section 35 of Act, 2002, the provisions of said Act would override the provisions of Cr.P.C. and the words 'Chief Metropolitan Magistrate' used in Section 14 should be given literal interpretation without taking any aid or assistance of Cr.P.C. does not, to us, appear to be correct.

38. Fort the aforesaid facts and discussions, we are of the considered view that nomenclature 'Chief Metropolitan Magistrate' used in Section 14 of Act, 2002 is inclusive of 'Chief Judicial Magistrate' functioning in a non-metropolitan area and shall have jurisdiction to entertain an application made by a secured creditor under Section 14 of Act, 2002.

39. In view of above, there is no illegality or error of jurisdiction in the impugned order by Chief Judicial Magistrate, warranting any interference.

40. Writ petition, accordingly, fails and stands dismissed. However, in the facts and circumstances we do not make any order as to costs.

(2016) 9 ILRA 926
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.09.2016

BEFORE

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Misc. Single No.- 20842 Of 2016

M/S Lucknow Chain Links Thru Partner Amit Rastogi & Ors. ...Petitioners
Versus
Asset Reconstruction Company (India) Ltd & Ors. ...Respondents

Counsel for Petitioners:
Shri Prashant Kumar

Counsels for Respondents:
Shri Avdhesh Shukla, Shri Akhilesh Kalra, Shri Sachin Garg

Held –

1. Context and Legal Background

Impugned Order: The petitioners challenged an order dated August 8, 2016, passed by the Debts Recovery Tribunal (DRT), Lucknow, in Securitization Application No. 157 of 2015.

DRT Decision: The DRT had allowed a preliminary objection raised by respondent no. 6 (the auction-purchaser) and dismissed the petitioners' application under Section 17 of the SARFAESI Act, 2002 as not maintainable.

2. Preliminary Objection on Maintainability

Respondent's Argument: Respondent no. 6 raised a preliminary objection before the High Court, contending that the writ petition was not maintainable because an efficacious alternative statutory remedy was available via an appeal under Section 18 of the SARFAESI Act before the Debt Recovery Appellate Tribunal (DRAT).

Petitioner's Argument: The petitioners admitted the availability of an appeal under Section 18, but argued that the DRT committed a manifest error by failing to consider their rejoinder and misapplying the principle of *res judicata* regarding connected proceedings currently pending before the High Court at Allahabad.

3. Court's Analysis & Ruling

Statutory Bar & Self-Restraint: The High Court examined Section 18 of the SARFAESI Act, emphasizing that while Article 226 jurisdiction is a basic Constitutional feature, High Courts must exercise self-restraint and decline to entertain writ petitions when a specific, effective statutory forum for appeal exists.

Special Focus on SARFAESI/DRT: Citing established Supreme Court jurisprudence (notably *Satyavati Tondon* and *Kanhaiya Lal Sachdev*), the High Court reinforced that bypassing statutory remedies in banking and recovery matters under the SARFAESI Act should generally not be permitted.

Dismissal: The High Court dismissed the writ petition solely on the ground of the availability of an alternative statutory remedy, leaving all substantive pleas open for the Appellate Tribunal or review.

4. Relief Regarding Limitation

Extension Granted: Acknowledging the petitioner's submission that the statutory limitation period under Section 18 was expiring, the High Court directed that if the petitioners file their appeal within **7 days** of obtaining a certified copy of the order, the Appellate Authority shall decide the appeal on its merits without dismissing it on the ground of limitation.

List of Cited Case Laws

The following judicial precedents are cited in the judgment:

Umang Gyanchandani v. Debts Recovery Tribunal, Lucknow and others — *[2015 (33) LCD 1986]*
Union Bank of India v. Satyavati Tondon and others — *(2010) 8 SCC 110*
Kanhaiya Lal Sachdev v. State of Maharashtra and others — *(2011) 2 SCC 782*
General Manager, Sri Siddheshwara Cooperative Bank Limited and another v. Ikbal and others — *(2013) 10 SCC 83*
Thansingh Nathmal v. Superintendent of Taxes — *AIR 1964 SC 1419*
Titaghur Paper Mills Company Ltd. v. State of Orissa — *(1983) 2 SCC 433*
Mafatlal Industries Ltd. v. Union of India — *(1997) 5 SCC 536*
L. Chandra Kumar v. Union of India and others — *AIR 1997 SC 1125 / (1997) 3 SCC 261*
Karnataka Chemical Industries and others v. Union of India and others — *(2000) 10 SCC 12*
Central Coalfields Ltd. v. State of Jharkhand and others — *(2005) 7 SCC 492*
Nivedita Sharma v. Cellular Operators Association of India and others — *Civil Appeal No. 10706 of 2011 (Decided on 07.12.2011)*
Sadhana Lodh v. National Insurance Co. Ltd.
Surya Dev Rai v. Ram Chander Rai.
SBI v. Allied Chemical Laboratories.
City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala — *(2009) 1 SCC 168*

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

1. On 2.9.2016, while entertaining the writ petiton, this court directed for issuance of notice to opposite party nos. 1 to 5 and 8 and directed for listing of the matter today.

2. Today, learned counsel for the petitioner has filed today the affidavit of service, which is taken on record.

3. Sri Imran Khan, Advocate has filed power on behalf of opposite party no. 1 whereas Sri Nitesh Kumar Tripathi has filed fresh Vakalatnama on behalf of opposite party no. 2.

4. Heard Sri Prashant Kumar, learned counsel for the petitioners, Sri Imran Khan, learned counsel for the opposite party no. 1, Sri Nitesh Kumar Tripathi & Sri Avdhesh Shukla for the UCO Bank, Sri N.K. Seth, learned Senior Advocate assisted by Sri Sachin Garg and Sri Alok Saran holding brief of Sri Akhilesh Kalra.

5. In the instant writ petition, petitioners have assailed the order dated 08.08.2016 passed by Debts Recovery Tribunal, Lucknow in the Securitization Application No. 157 of 2015 whereby the Tribunal has allowed the preliminary objection raised by the respondent no.6 (auction-purchaser) regarding maintainability of Securitization Application and rejected the same as not maintainable.

6. From the impugned judgment, it comes out that on the application under Section 17 of the Act moved by the petitioner before the Debts Recovery Tribunal, respondent no.6 [auction-purchaser] moved an application dated 29.5.2015 about the maintainability of Securitization Application. The Tribunal has observed that the learned Counsel for the petitioners/applicants have not filed any rejoinder in reply to prelimiary objection. However, they orally objected to the preliminary objection and it was urged during oral arguments that the Securitization Application under Section 17 of the SARFASI Act, 2002 is maintainable. However, Sri N.K. Seth, learned counsel for the Auction-Purchaser (opposite party no.6) has submitted that no rejoinder to the preliminary objection was ever served, and, therefore, he is unable to say anything about filing of the rejoinder to the preliminary objection as alleged by the petitioners before the learned Tribunal.

7. At the out set, Sri N.K.Seth has raised a preliminary objection with regard to the maintainability of the present writ petition on the ground that petitioners have remedy of filing appeal before the Appellate Tribunal under Section 18 of the Act and submitted that the writ petition is liable to be dismissed on the ground of availability of alternative remedy.

8. To strengthen the aforesaid arguments, learned counsel has placed reliance upon the judgment of this Court reported in **Umang Gyanchandani Vs. Debts Recovery Tribunal Lucknow and others**, [2015 (33) LCD 1986], **Union Bank of India Vs. Satyavati Tandon, (2010) 8 SCC 110, Kanhaiya Lal Sachdev Vs. State of Maharastra (2011) 2 SCC 782 and General Manager Sidheshwara Cooperative Bank Vs. Iqbal and others (2013) 10 SCC 83**.

9. In reply to the aforesaid preliminary objection, Sri Prashant Kumar, learned counsel for the petitioners while fairly admitting that there is a provision of filing appeal against the order dated 08.08.2016 passed under Section 17 of the Act before the Appellate Tribunal in view of the provisions of Section 18 of the Act but vehemently contended that learned Tribunal has committed manifest error by not appreciating the rejoinder submitted by the petitioners to the preliminary objections of Auction Purchaser (opposite party no. 6) and has wrongly relied upon the findings of Debts Recovery Tribunal given in Transfer Application no. 128 of 2002 and observed that the issue cannot be adjudicated in the Securitization Application as the same is barred by the principle of res-judicata overlooking the fact that the order of Debts Recovery Tribunal passed on the transfer application no. 128 of 2002, is presently pending before this Court at Allahabad and, therefore, the present writ petition is maintainable.

10. It has been urged that with regard to making counter claim in respect of alleged gold bars securitieis, the judgment passed by the Tribunal dated 2.6.2008 in Transferred Application No. 128 of 2002 and the order passed by the DRAT, Allahabad in Appeal No. R-991 of 2008 and Appeal No. R-992 of 2008 on 8.12.2011 have been challenged before this Court at Allahabad in Writ Petition No. 60932 of 2011 on 08.12.2011, which is still pending. Therefore, there is no question of drawing any inference on the judgments passed by the DRT, Lucknow and DRAT,Allahabad.

11. I have examined the submissions advanced by learned counsel for the parties and gone through the record.

12. The order under challenge has been passed by the Debts Recovery Tribunal on the application moved under-Section 17 of the Act whereby petitioners challenge the steps/procedure adopted by the Securitizing Company under the provisions of Section 13(4) of the Act as well as notice alongwith counter-claim for compensation against the loss and damages claimed under Section 19 of the Act.

13. To examine the issue regarding maintainability of the instant writ petition, it would be apt to reproduce Section 18 of the SARFAESI Act, 2002 which provides filing of appeal to the Appellate Tribunal. Said section reads as under:-

"18. Appeal to Appellate Tribunal: (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of Debts due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of Debts referred to in the second proviso.]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

14. Now, I would like to deal the objections raised by the respondents Counsel regarding non-exhaustion of alternative remedy by the petitioners. In this context, it may be observed that the existence of alternative remedy is not an absolute bar, is a legal proposition, which has been propounded by the Apex Court and this Court in series of cases. It would be useful to refer some of the decisions rendered by the Apex Court on this issue.

15. In ***Thansingh Nathmal v. Superintendent of Taxes; [AIR 1964 SC 1419]***, the Apex Court adverted to the rule of self-imposed restraint that writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

"The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article

226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved Petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

16. In ***Titaghur Paper Mills Company Ltd. v. Suite of Orissa (1983) 2 SCC 433*** the Apex Court while examining the question of availability of alternative remedy observed as under:

"It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

17. In ***Mafatlal Industries Ltd. v. Union of India; (1997) 5 SCC 536***, it has been observed by the Apex Court that:

"So far as the jurisdiction of the High Court under Article 226 or for that matter, the jurisdiction of this Court under Article 32 is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

18. In the case of ***L. Chandra Kumar Vs. Union of India and others, reported in AIR 1997 SC 1125***, a seven Judges Constitution Bench of Hon'ble Supreme Court held as under:-

"Though judicial review in the basic feature of the Constitution, the vesting of power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, would not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court."

19. In the case of ***Karnataka Chemical Industries and others vs. Union of India and others (2000) 10 SCC 12***, it was held that:

"When there is no challenge to the validity of any statutory provision, we see no reason as to why a writ petition should have been filed by passing the alternative remedy which is provided under the statute. On the short ground, we dismiss this appeal, vacate the interim orders, direct the payment of the balance amount of duty alongwith interest @ 15% per annum with yearly rests. It will be open to the appellant to avail of such statutory remedy as may be available to it. If an appeal is filed within four weeks from today, the Department will take a lenient view in condoning the delay."

20. In the case of ***Central Coalfields Ltd. vs. State of Jharkhand and others (2005) 7 SCC, 492***, it has been held that :

"If there is statutory alternative remedy available to a person under an statute itself, in that case the writ petition should not be entertained under Article 226 of the Constitution of India and the petitioner is directed to avail the alternative statutory remedy."

21. Recently, the Hon'ble Supreme Court in Civil Appeal No. 10706 of 2011 ***(Nivedita Sharma Versus Cellular Operators Assn. Of India and others)*** decided on 07.12.2011, considered the question of alternative remedy/exhaustion of remedies and has held that Articles 226/227 are not available if an efficacious alternative remedy is available to aggrieved person. The relevant paragraphs of the aforesaid judgment reads as under:-

"We have considered the respective arguments/ submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L. Chandra Kumar v. Union of India; (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency / instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

22. Thus, by a series of decisions it has been settled that the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ, if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power, if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

23. In **United Bank of India Vs. Satyawati Tondon and others**; (2010)8 SCC 110 the Apex Court while dealing with the issue whether the alternative statutory remedy available under the Act can be bypassed and jurisdiction under Article 226 of the Constitution could be invoked, observed in paragraph 55 as under:-

" 55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues.

We hope and trust that in future the High Courts will exercise their discretion in such matters with great caution, care and circumspection.

24. The law as propounded hereinabove has been reiterated again in the case of ***Kanhaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others, (2011) 2 SCC 782*** wherein the Hon'ble Supreme Court on the question of alternative remedy/exhaustion of remedies held that Articles 226/227 are not available, if an efficacious alternative remedy is available to aggrieved person. Relevant paragraphs 23 and 24 of said judgment read as under:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if any efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh Vs. National Insurance Co. Ltd., Surya Dev Rai Vs. Ram Chander Rai and SBI Vs. Allied Chemical Laboratories).

24. In City and Industrial Development Corpn. Vs. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168, this Court had observed that: (SCC p. 175, para 30)

"30. The Court while exercising its jurisdiction under Article 226 is duty bound to consider whether:

(a) adjudication of the writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) the person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors."

25. It may be noted that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not to invoke the extra ordinary jurisdiction of the High Court to issue a prerogative writ as the writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum.

26. In the instant case, petitioners have rushed directly to this Court and have by-passed the statutory alternative remedy, which is not permissible in view of the aforesaid settled position.

27. In view of the above, the writ petition is dismissed on the ground of availability of alternative statutory remedy. It is made open to the petitioners to raise the pleas before the appellate court which have been raised before this Court or make an application for recall/review, if so advised.

28. At this stage, Sri Prashant Kumar, learned counsel for the petitioners submits that the limitation of filing the appeal against the impugned order under Section 18 of the Act is expiring today, therefore, he may be permitted to present the same before the appellate Forum within a week.

29.Appreciating the request of learned counsel for the petitioners, it is provided that if any appeal is filed within seven days from the date of issue of certified copy of this order, the said appeal will be considered and decided by the Appellate Authority on merits and shall not be rejected/dismissed on the ground of limitation.

(2016) 9 ILRA 934
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 22127 Of 2010

Prabhakar Shukla & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsels for the Petitioners:
Shri Radha Kant Ojha, Shri Deepak Kumar Jaiswal, Shri Manuvalkya Upadhyaya, Shri P.K. Jaiswal, Shri Rajeev Misra, Shri S.K. Singh, Shri S.K. Singh Paliwal

Counsels for the Respondents:
C. S. C., Shri H.P. Dube, Shri Pushpendra Singh, Shri Rishi Kant Singh, S.C., Shri V.P. Varshney

Held –

Para 1: This is a review application seeking to review the order dated January 29, 2013, passed by Justices Rajiv Sharma and Satyendra Singh Chauhan. The review came before this Court because both judges were unavailable.
Para 2: The Court heard the arguments presented by the counsels for both parties and thoroughly perused the case record.
Para 3: The grounds raised in the review application and the arguments made demonstrate that the applicant is attempting to re-argue the case, which is impermissible under the guise of a review.
Para 4: A review application cannot be treated as a second opportunity to argue a case fresh on its merits.
Para 5: In *Thungabhadra Industries Ltd.*, the Supreme Court ruled that a review is not an appeal in disguise to correct an erroneous decision, but is restricted strictly to patent errors.
Para 6: In *Aribam Tuleshwar Sharma*, the Supreme Court held that while High Courts possess inherent review powers under Article 226 to prevent miscarriage of justice, these powers are limited to discovering new material, correcting errors apparent on the face of the record, or analogous grounds—not re-evaluating merits.
Para 7: In *Meera Bhanja*, the Supreme Court reaffirmed that review proceedings must strictly stay within the scope of Order 47 Rule 1 of the Civil Procedure Code (CPC) rather than acting as an appeal.
Para 8: In *Parsion Devi*, the Supreme Court clarified that an error requiring a detailed process of reasoning to detect cannot be deemed an "error apparent on the face of the record."
Para 9: In *Rajendra Kumar*, the Apex Court emphasized that a review petition requires a clear, self-evident error that would cause a failure of justice if left uncorrected; otherwise, finality attached to the original judgment cannot be disturbed.

Para 10: The Court reiterated that review is an exception to the rule of finality of judgments. Citing *Lily Thomas* and *Inderchand Jain*, the Court stressed that review power is meant to correct mistakes, not substitute a new judgment.
Para 11: In *Kamlesh Verma*, the Supreme Court summarized when a review is maintainable (new evidence, error apparent on face of record, or analogous sufficient reason) and when it is not maintainable (re-arguing, seeking alternative views, or re-appreciating evidence).
Para 12: Because the applicant failed to satisfy any of the established statutory grounds for review, the Court dismissed the review petition.

List of Citations / Case Laws Cited:

Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh, AIR 1964 SC 1372
Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, 1979 (4) SCC 389
Meera Bhanja v. Nirmala Kumari Choudhury, AIR 1995 SC 455
Parsion Devi and others v. Sumitri Devi and others, 1997 (8) SCC 715
Lily Thomas v. Union of India, AIR 2000 SC 1650
Rajendra Kumar v. Rambai, AIR 2003 SC 2095
Inderchand Jain v. Motilal, (2009) 4 SCC 665
Kamlesh Verma v. Mayawati and others, 2013 (8) SCC 320
Chhajju Ram v. Neki, AIR 1922 PC 112
Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526
Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors., 2013 (8) SCC 337

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This is an application seeking review of order dated 29.01.2013 passed by Hon'ble Rajiv Sharma and Hon'ble Satyendra Singh Chauhan, J.J. Since Hon'ble Judges are not available, hence this Review Application has come up before this Court.

2. Heard learned counsels for parties and perused the record.

3. The grounds taken in the Review Application as also arguments advanced show that review-applicant wants to re-argue the matter which is not permissible in the garb of review.

4. An application for review cannot be treated to be an opportunity to argue the case on merits afresh. In the garb of a review application reargument on merits of the case cannot be allowed.

5. In **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372** the Court said:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

6. In **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma 1979 (4) SCC 389** the Court said:

"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

7. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury AIR 1995 SC 455** while quoting with approval the above passage from **Abhiram Taleshwar Sharma Vs. Abhiram Pishak Shartn (supra)**, the Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

8. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715** it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

9. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095,** the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgement/order cannot be disturbed."

10. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650**, the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in **Inderchand Jain Vs. Motilal (2009) 4 SCC 665.**

11. In **Kamlesh Verma Vs. Mayawati and others 2013 (8) SCC 320**, the Court said:

*"**19**. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.*

Summary of the Principles:

***20.** Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*

***20.1.** When the review will be maintainable:-*

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

*The words "any other sufficient reason" has been interpreted in **Chhajju Ram vs. Neki, AIR 1922 PC 112** and approved by this Court in **Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526,** to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in **Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., 2013 (8) SCC 337.***

22.2. When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

***(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.**" (emphasis supplied)*

12. In the case in hand, since no ground for review, as above, is made out, the review petition is dismissed.

(2016) 9 ILRA 938
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 24669 Of 2016

Salhuddin & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite parties**

Counsel for the Applicants:
Shri Ravindra Prakash Srivastava

Counsel for the Opposite Parties:
G.A.

Held –
Matter Before the Court: The High Court heard arguments under Section 482 Cr.P.C. seeking to quash the charge sheet dated 28.11.2014 and the entire proceedings of Case No. 1702 of 2015 (*State vs. Salahuddin and others*), arising out of N.C.R. No. 143 of 2014 under Sections 323, 504, and 506 IPC (P.S. Dudhara, District Sant Kabir Nagar), pending in the Court of Civil Judge (Senior Division), Sant Kabir Nagar.

Factual Matrix & Applicant's Submissions: Following the lodging of N.C.R. No. 143 of 2014 on 11.07.2014, the Investigating Officer submitted a charge sheet under Sections 323, 504, and 506 IPC, upon which the Judicial Magistrate took cognizance. The applicants challenged the cognizance order on the ground that all alleged offences are non-cognizable and bailable; thus, under Section 2(d) Cr.P.C., the police report ought to have been treated as a private complaint rather than a State case, and no cognizance could be taken on a police report without prior sanction for investigation under Section 155(2) Cr.P.C.

State's Objection & Analysis of Legal Precedents: The learned AGA opposed the application, relying on the Full Bench judgment in *Mata Sewak Upadhyaya*, which upheld the U.P. Government Notification (No. 777/VIII-94(2)-87 dated July 31, 1989) making Section 506 IPC cognizable and non-bailable. The Court noted that although a Division Bench in *Virendra Singh* later declared this notification illegal, a subsequent decision in *Parveen Kumar* clarified that *Virendra Singh* cannot be given effect because it failed to consider or distinguish the binding Full Bench ruling in *Mata Sewak Upadhyaya*, which has not been set aside by any larger Bench or the Supreme Court.

Court's Ruling on Cognizance: The Court held that Section 506 IPC remains cognizable, non-bailable, and non-compoundable in the State of Uttar Pradesh pursuant to the valid 1989 notification. Consequently, Section 2(d) Cr.P.C. does not apply to this case, and the Judicial Magistrate's cognizance order is valid. The prayer to quash the charge sheet and proceedings was accordingly refused.

Directions Regarding Bail & Final Disposal: The Court directed that if the applicants appear and apply for bail within 30 days from the order date, the court below shall endeavour to decide their bail application in light of the principles laid down in *Amrawati* (affirmed by the Supreme Court in *Lal Kamlendra Pratap Singh*). The Court further directed that no coercive action be taken against the applicants during this 30-day period, finally disposing of the application.

List of Citations

Mata Sewak Upadhyaya Vs. State of U.P. and others, 1995 AWC 2031 (FB)
Virendra Singh and others Vs. State of U.P. and others, 2002 (45) ACC 609 (DB)
Parveen Kumar and others Vs. State of U.P. and another, ADJ 2011 (5) 418
Amrawati and another Vs. State of U.P., 2004 (57) ALR 290 (FB)
Lal Kamlendra Pratap Singh Vs. State of U.P., 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the applicants and learned AGA for the State.

2. This is an application under Section 482 Cr.P.C. for quashing the charge sheet dated 28.11.2014 as well as entire criminal proceedings of case no. 1702 of 2015, State Vs. Salahuddin and others, arising out of N.C.R. No. 143 of 2014, under Sections 323, 504, 506 I.P.C., P.S. Dudhara, District Sant Kabir Nagar, pending in the Court of Civil Judge (Senior Division), Sant Kabir Nagar.

3. The facts relevant for disposal of this application are that on 11.7.2014, the opposite party no. 2 lodged a report against the applicants, which was registered as N.C.R. No. 143 of 2014, under Section 323, 504, 506 I.P.C. After investigation, the I.O. submitted charge sheet against the applicants under Sections 323, 504, 506 I.P.C and the Judicial Magistrate, Sant Kabir Nagar, took cognizance on the said charge sheet.

4. The aforesaid order of taking cognizance has been challenged by the applicants before this Court in the present application under Section 482 Cr.P.C. on the ground that all the offences being non-cognizable and bailable, the case was to be dealt with in accordance with the provisions of section 2(d) of Cr.P.C., which provides that a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant. Learned counsel has contended that in view of the above, the charge-sheet submitted by the police in the present case under Sections 323, 504, 506 I.P.C. should not have been treated as a State case and the same ought to have been treated as a complaint and no cognizance could be taken on the police report as there was no sanction for the investigation as is required under section 155(2) of Cr.P.C.

5. Learned AGA has opposed the application placing reliance on the Full Bench judgment of this court rendered in the case of ***Mata Sewak Upadhyaya Vs. State of U.P. and others***, reported in ***1995 AWC 2031*** wherein the validity of notification making section 506 I.P.C as a cognizable offence, was upheld.

6. Considered the submissions of the parties.

7. The offence under section 506 I.P.C. was made cognizable and non-bailable vide U.P. Government Notification No. 777/VIII-94(2)-87 dated July 31, 1989 but later on in the case of ***Virendra Singh and others Vs. State of U.P. and others, 2002(45) ACC 609*** a Division Bench of this court declared the above notification to be illegal and making the offence under section 506 I.P.C. cognizable and non-bailable.

8. Section 10 of Criminal Law Amendment Act, 1932, gives power to the State Government to declare certain offences cognizable and non-cognizabe by issuing notification in the official Gazette. The U.P. Government vide Notification No. 777/VIII-94(2)-87 dated July 31, 1989 has made the offence under section 506 I.P.C. as cognizable and non-bailable. The legality and validity of this notification came up for consideration before the Full Bench of this Court in the case of ***Mata Sewak Upadhyay and another versus State of U.P. and others (supra)*** wherein the Full Bench of this Court held the aforesaid notification as valid.

9. The above matter again came for consideration of this Court, in the case of ***Parveen Kumar and others Vs. State of U.P. and another, ADJ 2011 (5) 418,*** wherein it was observed that since the Full Bench decision of this Court in **Mata Sevak Upadhyaya and another Vs. State of U.P. and others (supra)** has not been over-ruled or set-aside by any larger Bench of this Court or by the Apex Court, so the decision of Division Bench in ***Virendra Singh Vs. State of U.P. and others (supra)*** case cannot be given effect to.

10. A perusal of judgment of ***Virendra Singh Vs. State of U.P. and others (supra)*** makes it clear that the Full Bench decision of this Court in the case of ***Mata Sevak Upadhyaya and another Vs. State of U.P. and others (supra)*** was not brought before the Division Bench and it was neither considered nor discussed nor distinguished by the Division Bench.

11. In view of the discussions made above, I am of the considered view that offence under Section 506 I.P.C. may not be treated as non-cognizable as per submissions made by the learned counsel for the applicant and since the offence under Section 506 I.P.C. has been made, cognizable, non-bailable and non-compoundable vide above mentioned notification in the State of U.P., the provisions of Section 2 (d) of Cr.P.C. do not apply to the present case. The impugned order of cognizance passed by Judicial Magistrate is not liable to be quashed and the prayer for quashing the same is refused.

12. However, it is directed that if the applicants appear before the court below and apply for bail within 30 days from today, the court below shall make endeavour to decide their bail application 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).***

13. For the aforesaid period of 30 days no coercive action shall be taken against the applicants.

14. With the aforesaid observation this application is finally disposed of.

(2016) 9 ILRA 941
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 33429 Of 2015

Lallan Yadav @ Pahalwan ...Applicant
Versus
State Of U.P. ...Opposite party

Counsel for the Applicant:
Shri Rajesh Kumar Rao, Shri O.P. Singh

Counsel for the Opposite Party:
G.A.

Held –

Paragraph 1: The applicant seeks release on bail; counter and rejoinder affidavits are taken on record, and arguments from both sides were heard alongside a review of the case records.
Paragraph 2: The FIR (lodged by the deceased's brother on the day of the incident, March 12, 2013) stated that the deceased was shot dead while riding a motorcycle with a witness named Deepak; two individuals were named as accused, while three unknown, face-covered shooters were also mentioned.
Paragraph 3: The applicant's counsel argued that the informant first implicated the applicant on March 31, 2013, based on separate suspicious sources rather than any statement from Deepak, and that Deepak himself only named the applicant months later on July 15, 2013.
Paragraph 4: Counsel highlighted that if Deepak already knew the applicant, there was no explanation for omitting his name from the FIR or delaying his involvement for months, making the allegation look like a suspicious afterthought.
Paragraph 5: The applicant's role was argued to be distinguishable from the named co-accused, citing his lack of criminal history, detention since July 10, 2015 (over a year in jail), low likelihood of an early trial conclusion, and a commitment to cooperate with proceedings.
Paragraph 6: The learned A.G.A. opposed the bail application.
Paragraph 7: Considering the nature of the evidence, period of detention, delayed implicating statements, low risk of evidence tampering, and unlikely early trial completion, the Court found it fit to grant bail.
Paragraph 8: The Court ordered the release of the applicant (**Lallan Yadav @ Pahalwan**) in Case Crime No. 151 of 2013 (under Sections 147, 148, 149, 302, 34, and 120B IPC, P.S. Kasia, District Kushinagar) upon executing a personal bond and two sureties, subject to conditions against tampering with evidence and ensuring personal court attendance.
Paragraph 9: The lower court was granted liberty to initiate bail cancellation proceedings if any conditions are breached.
Paragraph 10: The Court clarified that observations made in this order are strictly limited to deciding the bail application and shall not impact the trial's ultimate merits.

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

1. Applicant by way of this application seeks his release on bail.

2. Counter affidavit and rejoinder affidavit filed today are taken on record.

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

4. Perused the record.

5. Submission of the counsel for the applicant is that the first information report was lodged by the brother of the deceased in which the version was given out by him that the deceased had gone along with one Deepak on the motorcycle to the place of occurrence where he was done to death in a shoot out that took place there. Two accused persons namely Balindra Yadav and Munna Singh were named in the F.I.R. by name while it was alleged that three unknown assailants came over there with covered faces who started shooting at the deceased resulting in his death. Further submission is that this incident is said to have taken place on 12.3.2013 and the F.I.R. was lodged on the same very day. Thereafter, on 31.3.2013 the first informant was again examined by the police in which he disclosed the complicity of the applicant in the crime. Submission is that even in this version, it was not stated by the complainant that the aforesaid witness Deepak ever told him that the applicant is one of those shooters. Actually, the source of information on the basis of which suspicion on the applicant was placed was entirely different. It has further been pointed out that after a long gap of period that is to say on 15.7.2013, the aforesaid Deepak was examined by the police and at that belated stage, Deepak named the applicant as one of the shooters and claimed to have known the applicant from before. Submission is that if the applicant was known to the aforesaid witness Deepak then there is absolutely no explanation as to how and under what circumstances the applicant's name was not nominated in the F.I.R. and as to how and why his complicity did not surface for such a long drawn out period of time. Argument is that it is so obvious from the aforesaid circumstances that the introduction of the applicant in the case is nothing but a result of afterthought. Contention is that the belated introduction of the applicant's complicity in the crime without any adequate or acceptable explanation for the same detracts very substantially much of the credibility from the allegations and the evidence against applicant becomes highly suspicious in nature. Submission is that in the aforesaid circumstances, the applicant's case becomes clearly distinguishable from the co-accused, who were nominated in the F.I.R. 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 10.7.2015 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.

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

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

8. Let the applicant- Lallan Yadav @ Pahalwan, involved in Case Crime No. 151 of 2013, u/s 147, 148, 149, 302, 34/120B I.P.C., P.S.- Kasia, District- Kushinagar, 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.

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

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

(2016) 9 ILRA 944
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE RAM SURAT RAM (MAURYA), J.

Writ B No.- 34437 Of 2009

Ram Dawar Yadav & Ors. **...Petitioners**
Versus
Chakbandi Ayukt & Anr. **...Respondents**

Counsel for the Petitioners:
Shri S.C. Tripathi

Counsel for the Respondents:
C.S.C., Shri A.N. Bhargava

Held –

Para 1: Heard learned counsel Sri S.C. Tripathi for the petitioners, Standing Counsel for the State of U.P., and Sri A.N. Bhargava for respondent-2.
Para 2: The writ petition challenges the Consolidation Commissioner's order dated May 12, 2009, which canceled the Provisional Consolidation Scheme for village Udhpur Gelhuwa (Jaunpur district) and ordered a fresh scheme under the U.P. Consolidation of Holdings Act, 1953 (the Act). Petitioners also seek a mandamus preventing interference with their chak possession.
Para 3: Petitioners state consolidation started in 1981, sector roads/rectangulation were set in 1999, the scheme was prepared by 2001, published under Section 20 in 2002, and chak demarcation/possession occurred between 2005 and 2007. Complainants' grievances were subsequently addressed by a committee by July 2008.
Para 4: Dissatisfied villagers and the Consolidation Committee unanimously resolved in 2008 to request cancellation of the scheme. Upon representation, a joint committee reported major irregularities on May 5, 2009, prompting the Consolidation Commissioner to pass the impugned cancellation order on May 12, 2009.
Para 5: The Consolidation Commissioner cited eleven key grounds for cancellation, including: lack of local inquiry; exclusion of 401 out of 1,802 tenure holders; illegal valuation of public/banjar lands; improper chak allotments over existing houses; backdated Section 20 publication; zigzag sector roads; improper allotment over roads/drains; creation of *uran chaks* (disjointed allotments); and paper-only demarcation.
Para 6: The petitioners argued that the Commissioner lacked jurisdiction due to statutory delegation to local officers, violated natural justice under Section 48 by not hearing holders or conducting a proper inquiry, ignored 28 years of spent time/resources, and disregarded judicial orders and existing private/public investments. They relied on several Supreme Court and High Court precedents.

Para 7: The High Court examined the arguments and set out the statutory definitions and relevant provisions of the Act (Sections 3(4), 3(4-A), 21(4), 23(1), 44, 44-A, 48) and Rule 111 of the U.P. Consolidation of Holdings Rules, 1954.
Para 8: The Court noted state notifications appointing the Consolidation Commissioner as Ex-officio Director of Consolidation and authorizing various district-level consolidation authorities to exercise Section 48 powers, while Rule 111 merely sets procedural guidelines for revision applications.
Para 9: The Court held that conferring Section 48 powers on subordinate/district officers via notifications does not divest the Director of Consolidation (or Consolidation Commissioner) of primary jurisdiction. Both higher and delegated authorities hold concurrent statutory power, and state notifications cannot override statutory authority.
Para 10: Citing Privy Council and Supreme Court precedents (*Blackpool*, *Barium Chemicals*, *Ishwar Singh*), the Court emphasized that delegating power does not mean the delegating authority loses its own underlying jurisdiction to act.
Para 11: The Court clarified that Section 48 provides supervisory control. While the order referenced Section 48(3), the Commissioner effectively exercised powers akin to Section 23(1) read with Section 44-A to cancel a flawed scheme. Mere citation of an incorrect provision does not invalidate an order if the authority inherently possesses jurisdiction.
Para 12: Examining the joint committee report, the Court confirmed severe defects in the initial process under Section 19-A, including backdated publications, improper handling of Gaon Sabha lands, non-demarcation of public spaces, and widespread dissatisfaction among villagers.
Para 13: The Court found no documentary proof of prior permission under Section 5(1)(c) for improvements claimed by the petitioners (constructions, borings). Additionally, public investments like pitch roads can be accommodated during the fresh scheme preparation.
Para 14: The Court concluded the writ petition lacked merit and dismissed it.

List of Case Citations:

Gadde Venkateswara Rao v. Govt. of A.P., *AIR 1966 SC 825*
Syed Niyaz Ahmad v. State of U.P., *AIR 1968 All 430*
M/s Sir Shadi Lal Distillery and Chemical Works v. State of U.P., *AIR 1977 All 349 (DB)*
Rajendra Prasad v. State of U.P., *1978 ALJ 724 (DB)*
Jaga v. Deputy Director of Consolidation, *1984 RD 176*
Jhingai v. Deputy Director of Consolidation, *1991 RD 136*
Brij Lal v. Deputy Director of Consolidation, *1996 RD 115*
Ram Deo v. Consolidation Commissioner U.P., *2003 (95) RD 457*
Blackpool Corporation v. Locker, *(1948) 1 All ER 538*
Barium Chemicals Ltd. v. Company Law Board, *AIR 1967 SC 295*
Ishwar Singh v. State of Rajasthan, *(2005) 2 SCC 334*

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

1. Heard Sri S.C. Tripathi, for the petitioners and Standing Counsel for State of U.P. and Sri A.N. Bhargava, for respondent-2.

2. The writ petition has been filed against the order of Consolidation Commissioner, U.P. dated 12.05.2009, canceling Provisional Consolidation Scheme of village Udhpur Gelhuwa, tahsil Badlapur, district Jaunpur and directing Settlement Officer Consolidation to frame Provisional Consolidation Scheme afresh in the village under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act) and for mandamus directing consolidation authorities not to

interfere in possession of the petitioners over their chaks as allotted to them during consolidation proceeding.

3. According to the petitioners, village Udhpur Gelhuwa was placed under consolidation operation in 1981. Consolidation staff made sector roads in village on 17.07.1999, which was confirmed on 26.07.1999. Thereafter rectangulation was done and Statement of Principles were prepared. Assistant Consolidation Officer prepared Provisional Consolidation Scheme during 14.12.1999 to 02.07.2001, distributed CH Form-23 to the chak holders up to 20.02.2002 and published the village under Section 20 of the Act on 20.02.2002. Demarcation of chaks and delivery of possession was done during 2005 to 2007. Some of the chak holders made complaint relating to demarcation of their chaks and delivery of possession. On which Chief Revenue Officer constituted a committee, which has completed demarcation of the chaks and delivery of possession to the complainants up to 07.07.2008.

4. The villagers and Consolidation Committee were not satisfied with the consolidation proceeding in the village. A meeting of chak holders of the village was called by Chairman, Consolidation Committee, in which a resolution, for cancellation of Provisional Consolidation Scheme and framing fresh Provisional Consolidation Scheme, was unanimously passed. In pursuance thereof, a representation was made to Deputy Director of Consolidation Jaunpur and Consolidation Commissioner U.P. on 08.09.2008, in this respect. On which Deputy Director of Consolidation called for a report from a committee consisting of Settlement Officer Consolidation, Consolidation Officer and Assistant Consolidation Officer, who submitted its report on 05.05.2009, which was forwarded by Deputy Director of Consolidation to Consolidation Commissioner, U.P., on which, he passed impugned order on 12.05.2009, canceling Provisional Consolidation Scheme and directing Settlement Officer Consolidation to frame Provisional Consolidation Scheme afresh. Hence this writ petition has been filed.

5. Consolidation Commissioner U.P. found that (i) Inquiry Committee has not conducted any inquiry in village nor recorded statement of the villagers due to which complainants version has not been noticed. (ii) There were total 1802 chak holders in the village but 401 chak holders were kept out of consolidation scheme. (iii) Valuation of 14 plots, recorded as banjar, grove, abadi and bhita in revenue records, were determined and included in consolidation. (iv) Although 10 chak holders were having their houses over part of their holdings but they were not allotted chaks on it and other chak holders were allotted chaks on their holdings. (v) Assistant Consolidation Officer has not conducted actual survey in the village, due to which Provisional Consolidation Scheme could not be framed in correct manner. (vi) Publication under Section 20 was made prior to distribution of CH Form-23 to the chak holders, due to which none of the chak objections could be filed within time. (vii) Sector road were also made in zigzag. (viii) Several chak holders were allotted chaks on the land of sector road, chak road and chak nali. (ix) 310 small chaks holders having up to 30 decimal original holdings were allotted uran chaks. (x) Demarcation and delivery of possession over confirmed chaks were not completed rather paper works was made and (xi) 105 chak holders were given possession at the different places, which was not allotted to them.

6. The counsel for the petitioners submitted that impugned order has been passed in exercise of powers under Section 48 (3) of the Act. There is a statutory delegation of power of Director of Consolidation under Rule 111 of the Rules, 1954 to Joint/Deputy/Assistant Director of Consolidation of consolidation district, for the purposes of Section 48 of the Act. Without withdrawing powers already delegated, Consolidation Commissioner U.P. had no jurisdiction to pass impugned order. Section 48 (1) and (3) mandatorily require to give opportunity of hearing and examine record of subordinate authorities before passing any order. In the present case, joint committee submitted its report without spot inspection and without giving opportunity of hearing to the chak holders of the village, thus there was no valid reference under Section 48 (3) of the Act. Consolidation Commissioner U.P. also passed the impugned order without giving opportunity of hearing to the chak holders and without examining the record prepared during consolidation, as such correct facts could not be considered. Consolidation was started in 1981. During long span of time of about 28 years, lot of money and energy of chak holders as well as Government was wasted. Chak disputes were contested up to stage of revision. Some revisions and writ petitions are also pending before revisional court and this Court, in which interim orders have been granted. Impugned order set at naught all the judicial orders. 34 chak holders have raised constructions and 48 chak holders have sink boring and installed pumping set over their new chaks, Government has constructed a pitch road in the village, investing about Rs. 400 lakhs. These facts were escaped from consideration while passing impugned order. There is no provision of representation under the Act, no order would have been passed by respondent-1 on the complaint of respondent-2. In case confirmed Provisional Consolidation Scheme is canceled after delivery of possession, it will cause irreparable loss to the Chak holders of the village as they had been deprived from their original holdings which had also lost its identity after demarcation of new chaks. Impugned order is illegal and liable to be set aside. He relied upon judgment of Supreme Court in **Gadde Venkateswara Rao Vs. Govt. Of A.P., AIR 1966 SC 825,** judgment of this Court in **Syed Niyaz Ahmad Vs. State of U.P., AIR 1968 All 430 and M/S Sir Shadi Lal Distillery and Chemical Works Vs. State of U.P., AIR 1977 All 349 (DB)** in which it has been held that if personal legal right is affected of a person, he can file writ petition under Article 226 of the Constitution. Judgment of this Court in **Rajendra Prasad Vs. State of U.P., 1978 ALJ 724 (DB)**, in which it has held that adjudication of right of a tenure holder in consolidation proceeding is conclusive and entry made during consolidation cannot be questioned. **Jaga Vs. Deputy Director of Consolidation, 1984 RD 176,** in which it has been held that although Deputy Director of Consolidation can also exercise his powers under Section 21 (4) of the Act but there must be substantial reason for interference in **Provisional Consolidation Scheme. Jhingai Vs Deputy Director of Consolidation, 1991 RD 136**, in which it has been held that when Statute provides a mode for exercising power, then power has to be exercised according to that mode only. **Brij Lal Vs. Deputy Director of Consolidation, 1996 RD 115,** in which it has been held that proceeding under Section 48 (3) of the Act are judicial proceeding and can be initiated only on valid reference of subordinate authorities. **Ram Deo Vs. Consolidation Commissioner U.P., 2003 (95) RD 457,** in which it has been held that Director of Consolidation has no power to sit in review over decision of Deputy Director of consolidation,

7. I have considered the arguments of the counsel for the parties and examined the record. Relevant provisions of the Act are quoted below:

Section-3 (4) – 'Director of Consolidation' means the person appointed as such by the State Government to exercise the powers and perform the duties of the Director of Consolidation under this Act or the rules made thereunder and shall include an Additional Director of Consolidation and a Joint Director of Consolidation.

Section-3 (4-A) Â- 'Deputy Director of Consolidation' means a person appointed as such by the State Government to exercise such powers and perform such duties of the Director of Consolidation as may be delegated to him by the State Government and shall include a District Deputy Director of Consolidation and Assistant Director of Consolidation.

Section-21 (4)- If during the course of the disposal of an objection or the hearing of an appeal, the Consolidation Officer or the Settlement Officer Consolidation, as the case may be, is of the opinion that material injustice is likely to be caused to a number of tenure-holders in giving effect to the provisional Consolidation Scheme, as prepared by the Assistant Consolidation Officer, or as subsequently modified by the Consolidation Officer, as the case may be, and that a fair and proper allotment of land to the tenure-holders of the units is not possible without revising the provisional Consolidation Scheme, or getting a fresh one prepared, it shall be lawful, for reasons to the recorded in writing for –

(i) The Consolidation Officer to revise the provisional Consolidation Scheme, after giving opportunity of being heard to the tenure-holders concerned, or to remand the same to the Assistant Consolidation Officer, with such directions as the Consolidation Officer may consider necessary; and

(ii) The Settlement Officer Consolidation, to revise the provisional Consolidation Scheme, after giving opportunity of being heard to the tenure holders concerned or to remand the same to the Assistant Consolidation Officer, or the Consolidation Officer, as the Settlement Officer Consolidation, may think fit with such directions as he may consider necessary.

Section-23 (1) – The Settlement Officer Consolidation shall confirm the provisional Consolidation Scheme-

(a) if no objections are filed within the time specified in Sectiion 20; or

(b) where such objections are filed, after such modifications or alterations as may be necessary in view off the orders passed under sub-sections (1) to (4) of Section 21.

Section-44- Delegation- The State Government may, by notification in the Official Gazette, and subject to such restrictions and conditions as may be specified in the notification:

(i) Delegate to any officer or authority any of the powers conferred upon it by this Act; and

(ii) Confer powers of the Director of Consolidation, Deputy Director of Consolidation, the Settlement Officer, Consolidation and the Consolidation Officer under this Act or the Rules made thereunder, on any officer or authority.

Section-44-A- Powers of subordinate authority to be exercised by a superior authority – Where powers are to be exercised or duties to be performed by any authority under this Act or the rules made thereunder, such powers or duties may also be exercised or performed by any authority superior to it.

Section-48 Revision and reference – (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order (other than an interlocutory order) passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Rule-111 of UP C. H. Rules 1954- Sections 48 and 54- An application under Section 48 of the Act shall be presented by the applicant or his duly authorised agent to the Joint/Deputy/Assistant Director of Consolidation, nominated by the Director of Consolidation, Uttar Pradesh for the District or Settlement Officer, Consolidation unit concerned or failing posting of any such Joint/Deputy/Assistant Director of Consolidation in the district, to the District Deputy Director Consolidation within 30 days of the order against which the application is directed. It shall be accompanied by copy of the judgment or order in respect of which the application is preferred. Copies of judgment or order, if any, of other sub-ordinate authorities in respect of dispute shall also be filed along with the application.

8. State of U.P. by notification Revenue (A) Department Notification No. 8524-(5)/IA-825-1954 dated November 22, 1956 authorized all Deputy Director of Consolidation of consolidation district to exercise powers under Sections 26, 43 and 48 of the Act. By notification Revenue (A) Department Notification No. 8524-(i)/IA-825-1954 dated November 22, 1956 authorized Deputy Director of Consolidation of consolidation district to exercise powers under Section 48 (3) of the Act. By notification Revenue (A) Department Notification No. 5630-CH/IA-351-1958 dated December 23, 1958 appointed "Consolidation Commissioner" as "Ex-officio Director of Consolidation". By notification Revenue (E) Department Notification No. 113-74 Revenue-8 (868) dated 22.11.1974 authorized all Additional District Magistrate of consolidation district to exercise

powers under Section 48 of the Act. So far as Rule 111 of the Rules 1954 is concerned, it provides a procedure for presentation of revision.

9. Jurisdiction under Section 48 of the Act is conferred upon Director of Consolidation U.P. which includes Additional Director of Consolidation U.P. and Joint Director of Consolidation U.P. By virtue of notification dated December 23, 1958 "Consolidation Commissioner" is "Ex-officio Director of Consolidation" therefore he can exercise all powers of Director of Consolidation under the Act. Under various notifications as mentioned above as well as in view of Section 3 (4-A) of the Act, District Deputy Director of Consolidation, Deputy Director of Consolidation, Assistant Director of Consolidation and Additional District Magistrate of consolidation district were also conferred powers of Director of Consolidation U.P. under Section 48 of the Act. There is nothing either under the Act or the Rules and various notification, which excludes the powers of Director of Consolidation U.P. As such all the aforesaid authorities can concurrently exercise powers under Section 48 of the Act. Aforesaid notifications do not amount to delegation of powers within the meaning of Section 44 (i) of the Act. It only confer powers to various authorities as provides under Section 44 (ii) of the Act. Statute prevails over Rules and Notifications which are subsidiary legislation.

10. Privy Council in **Blockpool Corporation Vs. Locker (1948) 1 All E R 538,** held that principal an**d delegate both can act simultaneously.** Supreme Court in **Barium Chemicals Ltd. V. Company Law Board, AIR 1967 SC 295,** held that as a general rule, whatever a person has power to do himself, he may do by means of an agent. This broad rule is limited by the operation of the principle that a delegated authority cannot be re-delegated, *delegatus non potest delegare*. The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot re-delegate his authority. In **Ishwar Singh v. State of Rajasthan, (2005) 2 SCC 334**, held that expression ''delegation of authority of power' is a term which like the word ''delegate' does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."

11. Powers under Section 48 of the Act is supervisory in nature through which Director of Consolidation has administrative and judicial control over all the sub-ordinate authorities. For the purposes of judicial powers, Deputy Director of Consolidation etc. Of consolidation district are co-ordinate authority but for administrative purpose they are subordinate authorities. Consolidation Commissioner has noted that impugned order was passed exercising powers under Section 48 (3) of the Act, as the report of joint committee was forwarded by Deputy Director of Consolidation to Consolidation Commissioner. In fact, he canceled Provisional Consolidation Scheme framed under Section 19-A of the Act. Provisional Consolidation Scheme can be canceled by Consolidation Officer and Settlement Officer Consolidation under Section 21 (4), while deciding chak objections and appeals. It has to be confirmed by Settlement Officer Consolidation under Section 23 (1) of the Act, which necessarily includes power to cancel it. Section 23 (1) does not contemplate for opportunity of hearing to the chak holders. Powers under Section 23 (1) of the Act can be exercised

by Consolidation Commissioner also in view of Section 44-A of the Act as held by this Court in **Jaga Vs. Deputy Director of Consolidation, 1984 RD 176**. Consolidation Commissioner, after considering the complaint of respondent-2 and report of joint committee found that gross illegality had been committed in framing Provisional Consolidation Scheme. Due to mentioning wrong provision, the order can not held as illegal, as Consolidation Commissioner has otherwise jurisdiction to pass the order.

12. Provisional Consolidation Scheme is prepared under Section 19-A of the Act. Section 19-A and Rule 46 provides that Assistant Consolidation Officer shall prepared Provisional Consolidation Scheme in consultation with members of Consolidation Committee after making inquiries from as many as tenure holders as he is able to collect. From report of joint committee, it is proved that Assistant Consolidation Officer made sector roads in village on 17.07.1999, which was confirmed on 26.07.1999. Thereafter Statement of Principles must have been prepared. Assistant Consolidation Officer allegedly prepared Provisional Consolidation Scheme during 14.12.1999 to 02.07.2001. It has been held that publication under Section 20 was ante-dated. Large area of gaon sabha land was included in consolidation proceeding without assigning any reason. Land reserved for public purposes was not demarcated nor possession was given over it to Land Management Committee. The villagers and Consolidation Committee were not satisfied with Provisional Consolidation Scheme. A meeting of chak holders of the village was called by Chairman, Consolidation Committee, in which a resolution, for cancellation of Provisional Consolidation Scheme and framing fresh Provisional Consolidation Scheme, was unanimously passed in September, 2008. Illegalities have been mentioned in paragraph-5 (supra).

13. Although, the petitioners have stated that 34 chak holders had raised constructions and 48 chak holders had sink boring and installed pumping set over their new chaks, but no proof of the allegation has been filed. In any case, there is no evidence to show that prior permission of Settlement Officer Consolidation was obtained for making improvements as required under Section 5 (1) (c) of the Act. So far as construction a pitch road in the village, by investing about Rs. 400 lakhs, is concerned Provisional Consolidation Scheme is framed after making Sector Roads and rectangulation. In any case, while preparing fresh Provisional Consolidation Scheme, it may be taken in to account.

14. In view of the aforesaid discussions, writ petitions has no merit and is **dismissed**.

(2016) 9 ILRA 952
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE VIPIN SINHA, J.

Writ C/ Civil Misc. Writ Petition No.- 39477 Of 2016

Ram Bahadur **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Shri Harish Chandra Singh

Counsel for the Respondents:
C.S.C., Shri Krishna Agarwal

Held –

Paragraph 1: Counsel Sri Harish Chandra Singh (for the petitioner) and Sri Krishna Agarawal (for the Electricity Department) were heard by the Court.
Paragraph 2: The petitioner applied for an electric connection for a tubewell, which was formally granted by the department on April 14, 2015.
Paragraph 3: Following an inspection on June 3, 2015, the department found the petitioner bypassing the meter to run an "Aata Chakki" (flour mill). A provisional assessment of ₹5,73,682 was issued, objections were rejected, and a final assessment order (dated October 27, 2015) and recovery citation (dated August 20, 2016) were issued for the same amount, prompting this writ petition.
Paragraph 4: The calculation for the final assessment order relied on the formula in Annexure-6.3 under the Electricity Supply Code, 2005.
Paragraph 5: The Court highlights Section 126(5) of the Electricity Act, 2003, which dictates that assessment for unauthorized use must cover the actual period of misuse, or a maximum capped at 12 months prior to inspection if the exact period cannot be ascertained.
Paragraph 6: This reinforces that applying a full 12-month period is a fallback default, reserved only for when the exact duration of unauthorized use cannot be identified.
Paragraph 7: Clause 6.8(c)(iii) of the Code echoes Section 126, outlining the procedure for provisional assessment per Annexure 6.3 and noting that "unauthorized use" may be concluded based on factual evidence without requiring dishonest intent.
Paragraph 8: The detailed mathematical formula (\text{Units Assessed} = L \times F \times D \times H) from Annexure-6.3 is set out, defining how connected load, hours, duration, and load factors are calculated and billed at 1.5\times the standard tariff rate.

Paragraph 9: The Court re-emphasizes that both Section 126(5) of the Act and Clause 6.8(c)(iii) of the Code strictly require calculating the actual duration first before defaulting to 12 months.
Paragraph 10: The Court isolates the core legal issue: factor **'D'** (duration/period of misuse) in the formula, noting that the Assessing Officer must actively record satisfaction when determining the actual period.
Paragraph 11: The Court finds that the Assessing Officer failed to apply his mind or record satisfaction, mechanically defaulting to a full 365-day period for the assessment.
Paragraph 12: The Court holds the 365-day calculation patently erroneous. Since the connection was only granted on April 14, 2015, and the inspection took place on June 3, 2015 (less than two months later), the period of unauthorized use could not logically precede the date the connection was first given.
Paragraph 13: The Electricity Department cited past Supreme Court and Allahabad High Court decisions (*J.M.D. Alloys*, *Lalit Kumar Kapoor*, and *Sri Bhagwan Gupta*) to justify using the 12-month period.
Paragraph 14: The Court distinguishes those precedents because, in those cases, the actual period of misuse could not be established. Here, the start date was clearly bound by the date the connection was granted.
Paragraph 15: The recovery citation and final assessment order are quashed, the writ petition is allowed, and the Executive Engineer is directed to issue a revised assessment calculated from the connection date forward.

Citations-

J.M.D. Alloys Ltd. v. Bihar State Electricity Board and Ors., (2003) 5 SCC 226
Lalit Kumar Kapoor v. Kanpur Electricity Supply Company, Kanpur and Another, 2011(11) ADJ 484
Sri Bhagwan Gupta v. Kanpur Electricity Supply Company Ltd. and Ors., 2005(2) AWC 1269

(Delivered by Hon'ble Tarun Agarwala, J.)

1. We have heard Sri Harish Chandra Singh,the learned counsel for the petitioner and Sri Krishna Agarawal, the learned counsel for the Electricity Department.

2. The petitioner applied for an electric connection for the purpose of running a tubewell. After completion of necessary formalities an electric connection was granted by the Electricity Department on 14.04.2015.

3. It transpires that the Electricity Department carried out an inspection and found that the petitioner was using the electricity unauthorizedly by-passing the meter and using it for running an "Aata Chakki". An inspection report dated 03.06.2015 was filed, based on which a provisional assessment order was issued on 12.06.2015 for a sum of Rs.5,73,682/-. The petitioner filed its objection on 20.07.2016, which was considered and rejected and a final assessment order for a sum of Rs. 5,73,682/-was passed on 27.10.2015. A recovery citation dated 20.08.2016 was issued. The petitioner, being aggrieved by the recovery citation and the final assessment order has filed the present writ petition.

4. A perusal of the final assessment order dated 27.10.2015 indicates that the calculation has been made on the basis of a formula contained in Annexure-6.3 prescribed under the Electricity Supply Code, 2005 (hereinafter referred to as the Code).

5. In order to understand the controversy it would be relevant to mention a few provisions of the Act and the Code. Assessment is required to be made under Section 126 of the Electricity Act, 2003 (hereinafter referred to as the Act). Section 126(5) of the Act states as under:

"(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection."

6. The aforesaid provision indicates that if the Assessing Officer finds that unauthorized use of electricity had taken place, in that case, assessment shall be made for the entire period during which the unauthorized use of electricity had taken place and if the period of such unauthorized use of electricity could not be ascertained, in such case the period would be limited to a period of twelve months immediately preceding from the date of inspection.

7. The procedure for making the assessment has been given under Clause 6.8 of the Code. Clause 6.8 (c)(iii) of the Code provides as under:

"(iii) If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection for all categories of services, and he shall provisionally assess the consumption as per the procedure specified in Annexure 6.3.

***Note.**--The assessing officer can draw 'conclusions' that unauthorized use of electricity has taken place, based on findings that reveal existence of conditions of "unauthorized use of electricity" given in "Explanation" of clause 6.8, and evidence found suggests that unauthorized use of electricity was not made with 'dishonest' intentions, but due to ignorance of procedure or rules or compulsions that only warrant a suitable assessment commensurate with the Act."*

8. The formula given under Annexure-6.3 of the Code, is extracted hereunder:

*"[**Annexure 6. 3 (Ref. Clause 6.8(c)(iii) & 8.1(b)(iv)***

A). Assessment in case of unauthorized use of electricity
*1. Units Assessed = L * F * D * H.*
Where L = is the connected load in kW and in KVA where KVAh rate is applicable.
H = is the actual no. of hours the supply is made available on the feeder if available for the period, or average number of hours per day the supply is made available for different categories as below:

a) Single shift industry (Day / night only), Agriculture: 10 hrs

b) Non-continuous industry (Day / night only): non-domestic general including restaurants, Hotels, guest-houses, petrol pumps, and nursing homes and private hospitals: 20 hrs

c) Continuous process industry: 24 hrs

d) Domestic: 8 hrs

e) Temporary connections: 12 hrs

D = Period during which such unauthorized use of electricity has taken place, and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of 12 months (365 days) immediately preceding the date of inspection.

***Note**: For determining the 'actual period' of unauthorized use, the assessing officer shall satisfy himself by (I) the report of meter reader/Junior engineer of the facts reporting first instance of the unauthorized use detected (ii) Further scanning by the assessing officer, by checking previous consumptions, and 'tamper' evidence from meter reading records, MRI reports etc. (iii) Any other record or evidence acquired from the connected premise/installation or site.*

F = connected load factor for different types of supply as given below:

a) For L & F and domestic power consumers F = 0.30

b) For non-domestic L & F and power consumers F = 0.50

c) For Small and Medium power consumers F= 0.50

d) For large and heavy power consumer F = 0.75

e) Agriculture F=0.30

f) Categories not covered above F= 0.50

2. The consumption so assessed shall be charged at one and half times the rate per unit of the tariff applicable to the consumer category after adjusting the amount paid by the consumer/person for the energy consumption assessed for the assessment period if any. The amount billed at this rate (one and half times rate) shall not be taken into consideration for the purpose of computing consumer's liability to pay monthly/ annually minimum charges, wherever applicable.

3. In cases where fix monthly tariff exist, monthly assessment shall be made at one and half times the monthly rate.

4. For the case where the usage of electricity is for premises or areas other than those for which the supply of electricity was authorized, the procedure mentioned at Sl.No.1 to 3, shall be followed."

9. Section 126(5) of the Act clearly indicates that where unauthorized use of electricity is found to have taken place, the assessment would be made for the entire period in which such unauthorized use of electricity had taken place and if the period cannot be ascertained then such period would be limited to a period of 12 months immediately preceding the date of inspection. Clause 6.8 (c) (iii) of the Code

also speaks of the same thing. The assessment has been made on the basis of formula indicated in Annexure-6.3 of the Code.

10. We are confining the present controversy to the criteria 'D' indicated in the formula which relates to the determination of the period during which such unauthorized use of electricity had taken place. The "Note" indicated in Annexure 6.3 of the Supply Code,2005 indicates that for determining the "actual period" of unauthorized use of electricity, the Assessing Officer has to satisfy himself, which would become the actual period of unauthorized use.

11. In the instant case, we find that there has been no determination of the actual period of unauthorized use of the electricity by the Assessing Officer. No satisfaction has been recorded by the Assessing Officer. On the other hand, without application of mind and mechanically, a period of twelve months, i.e., 365 days has been determined as the actual period of unauthorized use based on which the assessment order has been passed.

12. This determination of 365 days is patently erroneous. This 365 days can only be used for making the assessment, when the Assessing Officer is satisfied that the actual period of unauthorized use cannot be ascertained. In the instant case, the electricity connection was granted on 14.04.2015. The unauthorized use of electricity was found during the course of inspection after two months on 03.06.2015. The period of unauthorized use can be determined from the date when the connection was granted, i.e., from 14.04.2015 onwards. Unauthorized use of energy cannot be extended prior to the date of connection nor there can be a deemed presumption of unauthorized use of electricity for twelve months or 365 days, which precedes the date of actual date of connection being granted. We are of the opinion that when the electricity connection was granted on 14.042015 unauthorized use of energy at best can be determined from that date onwards.

13. Learned counsel for the respondents has placed reliance upon a decision of Supreme Court in **J.M.D. Alloys Ltd. Vs. Bihar State Electricity Board and Ors., (2003) 5 SCC 226** and decisions of this Court in **Lalit Kumar Kapoor Vs. Kanpur Electricity Supply Company, Kanpur and Another, 2011(11) ADJ 484** and in **Sri Bhagwan Gupta Vs. Kanpur Electricity Supply Company Ltd. and Ors, 2005(2) AWC 1269**.

14. The said decisions are distinguishable inasmuch as the period of unauthorised use of electricity could not be established and consequently, the maximum period was taken into consideration for computation of the assessment as per the formula. In the instant case, the period is determined namely, from the date of grant of the electricity connection.

15. In the light of the aforesaid, the recovery certificate dated 20.08.2016 and the assessment order dated 27.10.2015 cannot be sustained and are quashed. The writ petition is allowed. The Executive Engineer is directed to pass a fresh assessment order in the light of the observations made above.

(2016) 9 ILRA 957
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ C No.- 39634 Of 2016

Km. Amrita Yadav ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shri Amar Nath Singh, Shri Surendra Kumar Chaubey

Counsel for the Respondents:
C.S.C., Shri Syed Nadeem Ahmad

Held –

Hearing: The Court heard learned counsel for the petitioners and the State respondents.
BTC/D.El.Ed. Selection: Pursuant to the Government Order dated 14.06.2016, the State initiated selection for the BTC 2015 Teacher Education Course in Government and private institutions approved by NCTE and affiliated by the State Government.
Eligibility and Age: Candidates were required to possess a graduation degree with at least 50% marks by the last date of registration, i.e. 11.07.2016. The prescribed age was 18 to 35 years as on 01.07.2015, subject to applicable relaxations.
Selection Procedure: Selection was based on merit and quality-point marks calculated from educational qualifications.
Petitioners' Challenge: The petitioners challenged 01.07.2015 as the cut-off date for determining age, contending that it was arbitrary because the selection process was initiated in 2016.
Petitioners' Main Arguments: They argued that the cut-off date lacked nexus with the BTC course; qualified graduates were excluded; Rule 6 of the U.P. Basic Education Teachers (Service) Rules, 1981 required a different age reckoning; and acceptance of forms and fees created an estoppel against denial of counselling.
State's Defence: The State submitted that the selection related to the delayed BTC 2015 session, hence 01.07.2015 was the appropriate cut-off date. BTC 2016 would follow shortly, enabling presently ineligible candidates to apply.
Effect of Changing Cut-off Date: The State further argued that shifting the date to 2016 would prejudice candidates who were within the upper age limit on 01.07.2015 and would require reopening the entire selection process.
Question for Determination: The sole issue was whether fixing 01.07.2015 as the age cut-off date for BTC 2015 was arbitrary, fanciful, whimsical or capricious.
Undisputed Facts: The BTC 2015 selection process commenced under the Government Order dated 14.06.2016, with advertisements issued on 23.06.2016 and the last registration date fixed as 11.07.2016.
Application Schedule: The prescribed schedule provided for registration by 11.07.2016, fee deposit by 14.07.2016, completion of forms by 18.07.2016, and corrections by 22.07.2016.

Rule 6 Argument: The petitioners relied upon Rule 6 of the 1981 Rules, which prescribes the age requirement for recruitment to the post of teacher in a Basic School.
Training and Recruitment Distinguished: Following Divyanshi Tiwari v. State of U.P. and others, the Court held that admission to BTC training and recruitment as a teacher are entirely different processes.
1981 Rules Held Inapplicable: The Court held that the 1981 Rules govern recruitment to teaching posts and have no application to the selection of candidates for a training course. Therefore, the challenge based on Rule 6 was rejected.
Challenge on Arbitrariness: The petitioners alternatively contended that, since the advertisement was issued in 2016, the age cut-off should also have been fixed as 01.07.2016.
State's Explanation Accepted for Consideration: The State explained that the BTC academic sessions were delayed and that the process initiated in 2016 actually related to the BTC 2015 session.
Supreme Court Directions on Academic Session: Referring to Baba Shiv Nath Singh, Shikshan Evam Prashikshan Sansthan v. NCTE and others, the Court noted that the academic calendar for BTC 2015 had already been judicially regulated, including commencement of the session on 22.09.2016.
Limited Judicial Interference with Cut-off Dates: Relying on National Council for Teacher Education v. Sri Shyam Shiksha Prashikshan Sansthan, the Court held that a cut-off date should not ordinarily be interfered with unless it is shown to be capricious or whimsical.
Principle on Choice of Date: Referring to Union of India v. Parameswaran Match Works, the Court reiterated that the choice of a particular date cannot be declared arbitrary merely because another date could also have been chosen.
Reasonable Latitude to Authorities: A cut-off date must ordinarily be accepted unless it is shown to be wholly unreasonable or far removed from a rational basis.
Application of Supreme Court Precedent: Relying on State of Bihar v. Ramjee Prasad, the Court held that merely because some candidates would become eligible if the date were shifted does not make the existing cut-off date arbitrary.
Cut-off Date Upheld: The Court found that fixing 01.07.2015 was neither whimsical nor capricious, particularly because shifting it to 2016 could exclude candidates who were within the upper age limit for BTC 2015.
Individual Hardship Not Sufficient: The exclusion of some candidates who became otherwise qualified in 2016 did not, by itself, render the cut-off date unconstitutional or arbitrary.
Zero-Year/Merger Plea: The request to declare an academic year a "zero year" and merge delayed sessions was treated as a matter of policy. The Court declined to issue a positive direction but left it open to the State Government to consider the matter.
Previous Government Orders Distinguished: Earlier Government Orders fixing the age cut-off in the same year as the notification were held inapplicable because those academic sessions were regular and not delayed.
Final Decision: The Court found no reason to differ from Divyanshi Tiwari and consequently dismissed the writ petition.
Interim Orders Vacated: All interim orders permitting provisional counselling for BTC 2015 in similar writ petitions were vacated and were held not to bind the Regulatory Authority or DIET Principals.
No order as to costs.

Case Laws Cited in the Judgment

1. Divyanshi Tiwari v. State of U.P. and others
2. Baba Shiv Nath Singh, Shikshan Evam Prashikshan Sansthan v. National Council for Teacher Education and others
3. National Council for Teacher Education v. Sri Shyam Shiksha Prashikshan Sansthan
4. Union of India v. Parameswaran Match Works
5. Louisville Gas Co. V. Alabama Power Co.
6. M. Match Works v. Assistant Collector, Central Excise

7. State of Bihar v. Ramjee Prasad
8. Uttar Pradesh Mahavidyalaya Tadarth Shikshak Niyamitikaran Abhiyan Samiti, Varanasi v. State of U.P.

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

1. Heard learned counsel for the parties.

2. The State Government pursuant to Government Order dated 14 June 2016 initiated the process of conducting Teacher Education Course/D.El.Ed. The candidates were to be selected for Government and Private Training Institutions which were duly approved by the National Council for Teachers Education and affiliated by the State Government. Pursuant to the notification, advertisement were published inviting applications from candidates having graduation degree with minimum 50% marks, on the last date of registration i.e. 11 July 2016. Paragraph 3(ii) of the notification prescribes the age limit. A candidate must have attained the age of 18 years and should not be over 35 years as on 1 July 2015. Relaxation in the upper age limit was provided to some category of candidates viz. Scheduled Caste, Scheduled Tribe, Other Backward Class, Handicapped etc.

3. Paragraph 4 provides for procedure for selection which is based on merit and quality point marks determined on educational qualification.

4. The petitioners are assailing the cut of date i.e. 1 July 2015 prescribed for determination of age. All the petitioners before the Court are less than 18 years as on the cut of date and would submit: (i) cut of date being arbitrary and having no nexus with the BTC course, as applications are being invited in 2016 but the cut of date has been fixed in July 2015; (ii) persons having obtained graduation degree as on the last date of registration i.e. 11 July 2016 have been deprived by arbitrarily fixing the cut of date in the preceding year; (iii) as per Rule 1981 the candidate must have attained the age of 18 years and must not have attained the age of more than 35 years on the first day of July following the year in which the vacancy is notified; (iv) candidates who have obtained graduation degree have legitimate expectation of employment upon completing BTC training; (iv) registration form and fee have been accepted, therefore, the respondents are estopped from not sending the petitioners for counselling.

5. Learned Standing Counsel appearing for the respondents would contend: (i) BTC being two year training programme, the session being delayed, therefore, the cut of date has been fixed as per the session 2015; (ii) selection are being made for BTC 2015, therefore, cut of date has been fixed on 1 July 2015, the date and year in which advertisement has been issued would, therefore, have no bearing; (iii) State would shortly be inviting applications for BTC 2016, therefore, all candidates who are ineligible as on 1 July 2015 would become eligible for BTC 2016; (iv) upon disturbing the cut of date, would deprive a large number of candidates who have attained the age of 35 years from participating in the selection process; (v) candidates likely to be affected in shifting the cut of date, would disturb the entire selection process, therefore, a fresh advertisement would have to be issued inviting application from such candidates; (vi) the session for 2015-16 is already delayed, therefore, the Government in order to regularize the session would shortly be issuing notification for BTC 2016; (vii) reliance has been placed on a decision rendered in ***Divyanshi Tiwari vs. State of U.P. And others***[3]**.**

6. Rival submissions fall for consideration.

7. I have perused the pleadings, records of the case and considered the rival submissions advanced at the Bar.

8. The sole question for determination is, as to whether, the cut of date i.e. 1 July 2015 fixed by notification dated 14 June 2016 for BTC 2015, for determination of age is arbitrary, fanciful and whimsical.

9. The facts *inter se* parties are not in dispute.

10. The State Government initiated the processes for selection of candidates for BTC 2015 pursuant to Government Order dated 14 June 2016. Advertisements were published and notified on 23 June 2016 inviting applications from eligible candidates. The last date for registration of the candidates, having educational qualification was fixed for 11 July 2016, thereafter, counselling would commence.

11. The Examination Regulatory Authority, Uttar Pradesh Allahabad[4] posted on their official website the schedule for registration and filling of form which is as follows: (i) Last date for registration: 11 July 2016 up to 6:00 pm only; (ii) Last date for fee deposit: 14 July 2016; (iii) Last date for complete the form: 18 July 2016; (iv) Last date for correction: 22 July 2016 upto 6:00 pm.

12. As per the scheme of the Government Order, a candidate must possess minimum educational qualification on the last date of registration, apart from fulfilling the age criterion as on 1 July 2015.

13. The learned counsel for the petitioner would contend that in respect of teachers of primary schools maintained by the Board, the U.P. Basic Education Teachers (Service Rules) 19815 would apply. Rule 6 of Rule 1981 provides that a candidate for recruitment for a post of teacher in a Basic school must have attained the age of 18 years and must not have attained the age of more than 35 years on the first day of July following the year in which the vacancy is notified.

14. Heavy reliance has been placed on the Rule to impress that training is an essential qualification for appointment of a teacher, therefore, determination of age for training course should be in terms of Rule 6 of Rule 1981, it is therefore, urged that the cut of date fixed under the notification for BTC 2015 is against the statutory provision.

15. In my opinion, this matter has been dealt in detail in **Divyanshi Tiwari (supra),** wherein it has been held:

Recruitment to a post of teacher and admission to undergo BTC Training course are two different things and it appears that the petitioner is confused that she is being appointed for BTC. As a matter of fact, for obtaining BTC certificates by the candidates, the State Government has issued Government Order dated 14.06.2016 and in pursuance thereof, the advertisement was issued. The successful candidates are required to undergo training for BTC training and after being declared successful

in the training, they are issued BTC certificate, which is one of the requisite qualification for being appointed as a Teacher in Basic Schools. Therefore, the stand of the petitioner that the age is to be determined as on the 1st July, 2016 and not on 1st July, 2015 is not legally acceptable.

16. I have no reason to take a different view, Rule 1981 would not apply to selection of candidates for a training course. Recruitment for the post of a teacher and selection of candidates for training course are entirely different and are governed under different provisions. Rule 1981 is not directly or indirectly, even remotely connected with the method of selection of candidates for undergoing training, which is dependent upon the terms and conditions and the criterion determined by the State Government and the Regulatory Authority from time to time. It is upon acquiring the training certificate, a candidate would, thereafter become eligible for applying for the post of a teacher upon successfully qualifying Teachers Eligibility Test (TET). The plea, that the cut of date for determining the age is in violation of Rule 6, therefore, is rejected.

17. The other contention, as to whether, the State Authorities have committed an error in fixing the cut of date on 1 July 2015 for determination of age being arbitrary, whimsical or capricious.

18. It is sought to be urged on behalf of the petitioners that the advertisement was notified in June 2016 but the cut of date for determination of age has been fixed in the preceding year i.e. 2015, whereas, if not fixed as per Rule 1981, then in that event, it should have been fixed on 1 July 2016. It is not in dispute that all the petitioners before the Court have obtained graduation degree and are having the requisite qualification on the last date of registration i.e. 11 July 2016, but for the cut of date fixed in the preceding year i.e. 2015 a large number of meritorious candidates have been eliminated, therefore, it is contended that the cut of date is arbitrary. Further, it is contended that selection for BTC training course is not a recruitment process, it is merely, a selection to undergo training which is not linked with employment or selection of teachers, therefore, fixing the cut of date in 2015 has no reasonable nexus with the purpose sought to be achieved. All the candidates otherwise qualified would loose one year and would have to wait for the subsequent advertisement.

19. In rebuttal learned Standing Counsel would contend that the session for BTC training, in the State, is delayed, the process for BTC 2015 which should have been initiated and concluded in 2015 has spilled over to the subsequent year, therefore, it is sought to be urged that the State Government in its wisdom while fixing the cut of date for determination of age, has fixed it on 1 July 2015 as the training programme is for 2015 and not for 2016. It is further contended that for BTC 2016 a notification would shortly follow, petitioners can apply and that would not prejudice them. The cut of date is justified for the reason that all candidates who have already attained the age of 35 years as on 1 July 2015 would be deprived, in case, the cut of date is shifted to 2016. All such affected candidates are not before the Court, even otherwise, it is not possible at this stage to modify the cut of date, for the reason that the session is already delayed and in the event of the cut of date being shifted, a fresh advertisement would have to be notified so as to permit all such candidates who are not before the Court to enable them to apply.

20. In **Baba Shiv Nath Singh, Shikshan Evam Prashikshan Sansthan vs. National Council for Teacher Education and others** the petitioner institution therein was granted recognition by the NCTE

for 2015-16 for conducting the Teacher Education Course/BTC course. The plea of the institution before the Court was that the session for 2015-16 is yet to be commenced and such commencement will be inordinately delayed as the academic session for the previous year i.e. 2014-15 is yet to start, therefore, it was prayed for ante-date the recognition of the institutions either to the academic session 2013-14 or academic session 2014-15, as may be. The Court inter alia directed that academic session for 2015-16 (BTC 2015) would commence on 22 September 2016 and in respect of the said academic session "*affiliation and admissions etc. in respect of the academic year would stand concluded well in time to enable the commencement of the session from the date mentioned i.e. 22 September 2016*". It was further provided that the academic session 2015-16 similarly will be brought to its earliest conclusion so that the next academic session "*can begin as per the original academic calendar i.e. July 2017 and thereafter, each academic session will strictly upheld to the academic calendar of the State*".

21. The decision pertains to BTC 2015, therefore, the cut of date fixed for commencement and conclusion of the course by the Supreme Court is binding upon the State and the Institutions. The notification of the State has adhered to the cut off date which cannot be altered by this Court.

22. As to whether the cut off date for determination of age as notified is arbitrary, Supreme Court in ***National Council for Teachers Education vs. Sri Shaym Shiksha Prashikshan Sansthan***[7] declared that the cut of dates would not be declared illegal unless "it is shown to be capricious or whimsical in the circumstances". The Court held that a reasonable degree of latitude was required to be provided to be law-makers and thus when a cut-off date was fixed, it was ordinarily not to be interfered with by the judiciary.

23. In ***Union of India vs. Parameswaran Match Works***[8] wherein the Court relied upon following judgments, viz., **Louisville Gas Co.**[9] **vs. Alabama Power Co. and M. Match Works vs. Assistant Collector, Central Excise**[10], the Court observed as follows:

> The choice of a date as a basis for classification cannot be 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 we can say that it is very wide off the reasonable mark.

24. In ***State of Bihar vs. Ramjee Prasad***[11], the Court reversed the judgment of the Patna High Court which had struck down the cut off date fixed for receipt of the application. After adverting to the judgments in ***Union of India vs. Parameshwaran Match Works (supra) and Uttar Pradesh Mahavidyalaya Tadarth Shikshak Niyamitikaran Abhiyan Samiti, Varanasi vs. State of U.P.***, the Court observed:

> 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. …….. 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 or 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**.

25. Having due regard to the statement of law, it cannot be said that fixation of date for determination of age on 1 July 2015, Government has acted whimsically or capriciously. It cannot be brushed aside that all candidates who are at the brink of upper age limit i.e. 35 years would be deprived from participating in the selection process in the event the cut of date is shifted to the year of notification i.e. 2016. Merely, because some eligible candidates who have obtained graduation degree in 2016 are not eligible due to the cut of date fixed for the determination of age would not mean that the action on the part State Government is whimsical or arbitrary. Further, the State Government has to strictly comply with the directions issued in **Baba Shiv Nath (supra).**

26. Finally, the argument that academic year 2015-16 or 2016-17 be declared "zero" year and merge academic session for both the years into one i.e. 2017-2018, so as to regularize the session. A similar plea was raised before the Supreme Court in **Baba Shiv Nath (surpa)** which was rejected in the absence of all the institutions and the representations of the students who may be affected, therefore, this Court would not dwell upon the issue for the same reason, but it would be appropriate for the State Government in consultation with the Regulatory Authority and the Institutions, to take a decision in that regard upon deliberation. The plea falls within the ambit of policy decision, therefore, no positive direction can be issued, however, it is always open for the State Government to dwell upon the issue and take an appropriate decision.

27. Reliance has been placed on several Government Orders pertaining to previous selections issued for BTC training course to demonstrate that the cut of date for age determination was fixed in the year of notification. The Government Orders relied upon by the petitioners is of no help for the reason that the session was regular and not delayed as in the facts of the present case.

28. For the reasons and law stated herein above, the Court is not inclined to take the different view from Divyanshi Tiwari, consequently, the writ petition fails, accordingly, stands dismissed.

29. It is provided that interim orders directing provisional counselling for BTC 2015 granted in all similar writ petitions shall stand vacated even in respect of those petitions which are not before the Court and shall not bind the Regulatory Authority or the Principals of District Institute of Education and Training.

30. No cost.

(2016) 9 ILRA 964
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 40062 Of 2015

Kamlesh Kumar Sonkar **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for the Applicant:
Shri Santosh Kumar Nigam, Shri Manvendra Singh

Counsel for the Opposite Party:
G.A.

Held –

1. The Court heard learned counsel for the applicant and the learned A.G.A. and perused the record.

2. The applicant, husband of the deceased, sought bail on the ground that he had no role in her death caused by consumption of **Aluminium Phosphide poison**.

3. The defence contended that at the time of the incident, the applicant was employed and physically present in **Goa**, far from the place of occurrence. Annexures 11 and 12 and material collected during investigation were relied upon to support his alibi.

4. It was submitted that the deceased was living separately in another house. The applicant's brother discovered her dead and informed the police, following which the inquest proceedings were conducted.

5. The post-mortem report allegedly showed **no marks of violence** on the deceased's body. The defence argued that she had consumed poison either accidentally or deliberately and had not been subjected to physical violence before her death.

6. The deceased's real brother participated as a witness in the inquest proceedings on **28.07.2014**, but lodged the F.I.R. only on **03.08.2014**. The defence relied upon this delay to question the genuineness of the allegations of dowry demand and cruelty.

7. It was argued that the delayed F.I.R. was the result of subsequent deliberation and consultation and that the applicant had been falsely implicated.

8. The marriage had taken place about two months before the incident. According to the defence, the applicant thereafter returned to his place of employment, while the deceased expected to accompany him, and she may have committed suicide due to emotional distress.

9. The applicant had remained in custody since **12.03.2015**, for more than one year, and the defence argued that, due to heavy pendency of cases, an early conclusion of the trial was unlikely.

10. The applicant undertook to cooperate with the proceedings and remain available before the Trial Court whenever required. The learned A.G.A. opposed the bail application.

11. Considering the overall facts and circumstances, nature of evidence, period of detention, likelihood of delay in conclusion of the trial, and absence of convincing material suggesting possible tampering with evidence, the Court found the applicant entitled to bail.

12. The Court directed the release of **Kamlesh Kumar Sonkar** on bail in **Case Crime No. 112 of 2014**, under Sections **498A, 304B, 302, 504 and 506 IPC and Sections 3/4 of the Dowry Prohibition Act**, P.S. Zafarganj, District Fatehpur, subject to execution of a personal bond and two sureties.

13. Bail was subject to the conditions that the applicant would **not tamper with prosecution evidence** and would **personally appear before the Court on every date**, unless exempted by the Court in the interest of justice.

14. In case of breach of the bail conditions, the Trial Court was given liberty to proceed with cancellation of bail.

15. The Court clarified that the observations made in the bail order were confined solely to the disposal of the bail application and would have **no bearing on the merits of the trial**.

(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 but he has not at all contributed in the incident which took place as a result of consuming poison 'Aluminium Phosphide'. Further submission is that at the time of occurrence the applicant was far away at the place of his employment in Goa. Counsel has drawn the attention of the Court in this regard to annexure no. 11 and 12. Some material was also collected by the investigating officer affirming the applicant's presence in Goa during the occurrence hundreds of miles away from the place of occurrence. It was further pointed out that the deceased lived separately in a different house and information about the death of the deceased was given by the brother of the applicant to the police after discovering her dead lying in the house and it was on this information furnished by the brother of the applicant that the police reached at the place of occurrence and inquest proceeding was done and subsequently it was found that she had died after consuming poison. It has further been pointed out that the post mortem report would indicate no mark of violence on her body. Submission is that it is so obvious that the deceased died either accidentally or deliberately consuming the poison and she was not subjected to any kind of violence by anybody before her death. Much emphasis was laid by the counsel on the fact that in the inquest proceeding the real brother of the deceased was one of the witnesses of panchnama which took place on 28.7.2014 on the very next day of the occurrence, yet surprisingly enough the first information report was lodged by the same brother of the deceased on 3.8.2014 after several days of the occurrence. Submission is that had there been any truth in the allegation made against the applicant with regard to demand of dowry and ill-treating the deceased, then there is no explanation as to how and under what circumstances the F.I.R. would still not be lodged till so many days after the occurrence even though the first informant is the brother of the deceased and he himself was a party of the inquest report and was having ample opportunity

to report the matter to the police, people who were present on the spot. Submission is that actually there was nothing to complain against the applicant for several days and it was only after a lot of confabulations and concert that the present F.I.R. has been lodged with false allegations. It was also submitted that the marriage took place just two months back and soon thereafter, the applicant went to join his place of employment and the wife felt badly indignited with this act of the applicant, who was having expectation that she would be taken along by the applicant to the place of employment. Submission is that the deceased was a sensitive lady and out of frenzied outburst of emotions, she appears to have committed suicide. 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 12.3.2015 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- Kamlesh Kumar Sonkar, involved in Case Crime No. 112 of 2014, u/s 498A, 304B, 302, 504, 506 I.P.C. and 3/4 D.P. Act, P.S.- Zafarganj, District- Fatehpur, 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

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(2016) 9 ILRA 967
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 42450 Of 2016

Abha Srivastav & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Shri Rohit Upadhyay

Counsel for the Respondents:
C.S.C., Shri Anurag Pathak

Held –
1. Representation & Appearances
Petitioners: Sri Rohit Upadhyay (Counsel).
Respondents 1, 2 & 3: Sri P.P. Choudhary (Standing Counsel).
Respondents 4 & 5 (U.P. Bhumi Sudhar Nigam): Sri Harshit Pathak holding brief for Anurag Pathak.
2. Reliefs Sought by Petitioners
Certiorari: To quash the order dated 12.04.2016 passed by the Managing Director, U.P. Bhumi Sudhar Nigam.
Mandamus: To direct the respondents to regularise the petitioners' contractual services on their respective posts.
3. Petitioners' Submissions
Claimed entitlement to regularisation under Government Orders dated **13.08.2015** and **24.02.2016**.
Argued that the impugned order dated 12.04.2016 was passed in violation of these Government Orders.
Contended that shortage of funds is not a valid ground to reject regularisation; if Respondent No. 4 lacked funds, it should have requested grants from the State Government.
4. Respondents' Submissions
Pointed out that the relevant Government Orders impose **three mandatory conditions** for regularisation:
The organisation/Nigam must bear the extra financial burden from its **own resources** without demanding grants from the State.
For grant-aided bodies/autonomous institutions, regularisation must not require an increase in State financial grants.
Exclusion of certain non-eligible classes of employees.
Submitted that Respondent No. 4 receives **no State grant-in-aid** and is financially unable to bear the extra salary burden from its own resources.
5. Court's Analysis of Facts
Petitioners were engaged purely on a **contractual basis in 1999** for fixed periods without facing a regular, competitive selection process under Articles 14 and 16 of the Constitution.

Respondent No. 4 (a Government company under the Companies Act, 1956) operates on specific, time-bound projects funded by external agencies such as the **World Bank** and European Economic Community.
Following a direction in an earlier petition (*Sanjay Kumar Mishra v. State of U.P.*), the Managing Director examined the claim and passed the impugned rejection order dated 12.04.2016.

6. Court's Findings on the Impugned Order

From 2007 to 2009 (between the 2nd and 3rd Sodic Land Reclamation Projects), almost all contractual staff were disengaged as project funding ceased.
Respondent No. 4 relies strictly on project-specific funding and receives **no grant-in-aid** from the State Government.
Because Respondent No. 4 cannot bear the additional financial burden from its own independent resources, the rejection order fully aligns with the conditions set out in the Government Orders dated 13.08.2015 and 24.02.2016.

7. Constitutional Principles & Precedents

Reaffirmed the landmark Constitution Bench ruling in ** State of Karnataka v. Umadevi (3)**: Public employment must adhere strictly to statutory rules and equal opportunity principles (Articles 14, 16, and 309). Back-door entries, contractual engagements, or casual appointments do not create a legal right to regularisation or permanent absorption.
The theory of **legitimate expectation** cannot be invoked by contractual employees appointed without a proper selection process.
A writ of **mandamus** requires a clear statutory duty on the employer and a enforceable legal right of the employee—neither exists for regularisation of non-regular appointees.

8. Final Judgment

Because the petitioners were engaged without a proper selection process and Respondent No. 4 lacks the requisite independent funds required by the governing Government Orders, the Court refused to interfere.
Decision: The writ petition was **dismissed** with no order as to costs.

List of Case Laws Cited in the Judgment:-

Sanjay Kumar Mishra and 2 Others v. State of U.P. and 4 Others - Writ – A No. 3208 of 2016 (Allahabad High Court, order dated 27.01.2016)
Secretary, State of Karnataka and Others v. Uma Devi (3) and Others (2006) 4 SCC 1
State of Orissa v. Chandra Sekhar Mishra (2002) 10 SCC 583
Surender Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mandi Samiti and Others (2006) 7 SCC 684
Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College (1962) Supp. 2 SCR 144

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Rohit Upadhyay, learned counsel for the petitioners, Sri P.P. Choudhary, learned standing counsel for respondent nos.1, 2 and 3 and Sri Harshit Pathak holding brief of Anurag Pathak, learned counsel for the respondent nos. 4 and 5.

2. Petitioners have filed this writ petition for the following relief:

I. Issue a writ, order of direction in the nature of certiorari quashing the order dated 12.4.2016 passed by the M.D. (Managing Director U.P. Bhumi Sudhar Nigam).

II. Issue a writ, order of direction in the nature of mandamus directing the respondents to regularise the services of the petitioners on the posts held by them.

SUBMISSIONS OF PARTIES

3. Learned counsel for the petitioner submits that in terms of Government Order dated 13.8.2015 and Government Order dated 24.2.2016 for regularisation of work charge/contractual employee, the petitioners are entitled for regularisation on the post they are working but the impugned order dated 12.4.2016 has been passed in contravention of the aforesaid Government Orders. He submits that in case the respondent no.4 was finding difficulty due to shortage of funds to meet the expences of salary on account of regularisation of the petitioners then in that situation the respondent no.4 should have asked for funds from the State Government.

4. He submits that on the ground of non availability of funds to meet the extra burden on account of regularisation, the claim of petitioners under the aforesaid two Government Orders for regularisation can not be rejected and consequently the impugned order is wholly arbitrary and illegal and therefore deserves to be quashed.

5. Learned standing counsel and Sri Harshit Pathak jointly submit that the aforesaid two Government Orders clearly provides for regularisation of daily wagers or work charge and contractual employee continuously working prior to the cut of date, subject to the three conditions provided in the aforesaid two Government Orders. Condition No.1 clearly stipulates that a Nigam may regularise the services of the duly appointed contractual employee only in the situation that it shall meet the extra financial burden from its own resources and there shall be no need to demand any financial grant from the State Government. Condition No.2 provides that in case of local bodies, Jal Sansthan, Jila Panchyat and such autonomous institutions which are being run by hundred percent or partial State Financial grant, then regularisation may be done only in the circumstances that to meet the extra financial burden, the financial grant has not to be increased. Condition no.3 provides class of persons on which these Government Orders shall not be applicable.

6. They further submit that in the impugned order a finding has been recorded that the respondent no. 4 is not being given hundred percent or partial State grant. It has also been recorded in the impugned order that respondent no.4 is not able to bear the extra financial burden from its own resources. They, therefore, submit that the impugned order has been passed lawfully and it does not suffer from any infirmity.

7. I have carefully considered the submissions of learned counsel for the parties.

FACTS

8. Briefly stated the facts of the present case are that according to the petitioners they were engaged on contractual basis in the year 1999 for a definite period. The contract was renewed from time to time. They have neither faced the regular selection process for appointment nor the provisions of Article 14 and 16 of the Constitution of India were applied. Respondent no.4

undertakes projects which are funded by agencies like European Economic Community and World Bank. This fact has also been admitted by the petitioners in paragraph 8 of the writ petition.

9. According to the own case of the petitioners the respondent No.4 Nigam has been constituted for carrying out projects relating to development of land. The projects undertaken by it are funded by the World Bank or other such types of agencies. The respondent no.4 is a Government company constituted under the Companies Act 1956. Depending upon the requirement of man power, it engages persons to complete its project which are either assigned to it or which are undertaken by it.

10. It appears that some contractual employees were insisting for their regularisation and therefore they filed a Writ A No.3208 of 2016, Sanjay Kumar Mishra and two others Vs. State Of U.P. and 4 others which was disposed of by order dated 27.1.2016 as under:

It is submitted that petitioners have been working on contractual basis for last more than 20 years, and their claim for regularization is not being examined. Reliance has been placed upon a Government Order dated 13th August, 2015, and it has been contended that in view of the policy decision taken by the State to regularize employees working since prior to 31st March, 1996, petitioners' claim is also liable to be examined. Various representations in this regard have been made by petitioners, which are pending, and it is stated that no decision has been taken.

Learned Standing Counsel, who has accepted notices on behalf of respondent nos.1, 2 and 3, and Sri Anurag Pathak, learned counsel appearing for the respondent nos.4 and 5, submit that the claim of petitioners, noticed above, shall be examined, in accordance with law.

Considering the above, the writ petition stands disposed of with a direction upon respondent no.5 to examine the claim of petitioners, noticed above, strictly in accordance with law, by means of a reasoned speaking order, within a period of three months from the date of presentation of a certified copy of this order.

However, it is made clear that this Court has not examined the entitlement of petitioners, on merits, and all questions are left open to be examined, at the first instance, by the authority concerned, in accordance with law.

11. Pursuant to the directions of this Court in the writ petition as aforenoted, the representation of the petitioners of the aforesaid Writ - A no.3208 of 2016 was decided by the respondent no.5 by order dated 12.4.2016.

12. Aggrieved with this order the petitioners have filed the present writ petition.

Discussion and Findings

13. I have perused the impugned order in which the three conditions of the aforesaid Government Orders have been examined as under:-

शासनादेश संख्या 44/2015/ वे0आ0–2–795/ दस–54 (एम)/2008 टीसी दिनांक 13.08.2015 में उल्लिखित शर्तें।	समिति का मतव्य/संस्तुति
1. सार्वजनिक उपक्रमो/निगम/विकास प्राधिकरण/ऐसी स्वशासी संस्थायें, जो स्वयं के स्रोतों से संचालित है, उनमें उपरोक्त विनियमितीकरण की कार्यवाही उसी स्थिति में की जायेगी, जब इससे आने वाले अतिरिक्त व्यय भार को संबंधित उपक्रम/निगम/स्वशासी संस्था स्वयं के स्रोतों से वहन करने में सक्षम हों और इस अतिरिक्त व्यय भार को वहन करने हेतु उन्हें राज्य सरकार से कोई वित्तीय सहायता मांगे जाने की आवश्यकता न हो।	रजिस्ट्रार आफ कम्पनीज, उ0प्र0, कानपुर द्वारा जारी विज्ञप्ति दिनांक 27.11.1996 के माध्यम से उ0प्र0 भूमि सुधार निगम को कम्पनीज एक्ट 1956 के अंतर्गत पंजीकृत कम्पनी घोषित किया गया है। तत्कालीन प्रबंध निदेशक, उ0प्र0 भूमि सुधार निगम के पत्रांक 9263 दिनांक 26.12.1996 के अनुसार उक्त संदर्भित पंजीकरण के फलस्वरूप निगम एक बिना लाभ–हानि वाली कम्पनी में भी परिवर्तित हो गया है। निगम का अपना आय का कोई स्रोत नही है। निगम द्वारा वर्ष 1993 से राज्य सरकार/केन्द्र सरकार/विश्व बैंक के सहयोग से विभिन्न सोडिक परियोजनाओं का कार्यान्वयन किया जाता रहा है तथा निगम में कार्यरत कर्मियों का व्यय भार इन परियोजनाओ में उपलब्ध धनराधि से होता रहा है। इसी कारण वर्ष 2007 में उ0प्र0 सोडिक लैण्ड रिक्लेमेशन द्वितीय परियोजना के समापन पर तत्समय अति अपरिहार्य कार्यो हेतु अल्प संख्या में नितांत आवश्यक पदों से संबंधित कर्मियों को छोडकर निगम में प्रतिनियुक्ति/संविदा पर कार्यरत समस्त कार्मिकों को मूल विभाग में प्रत्यावर्तित/कार्यमुक्त कर दिया गया था। परिणामस्वरूप वर्ष 2007 से वर्ष 2009 तक उपरोक्तानुसार वर्णित अल्प कार्मिकों को छोड़कर कोई कार्मिक कार्यरत नहीं रहे। सितंबर, 2009 में विश्व बैंक पोषित उ0प्र0 सोडिक लैण्ड रिक्लेमेशन तृतीय परियोजना की स्वीकृति के उपरांत पुनः आवश्यकतानुसार शासन द्वारा सृजित अस्थायी विभिन्न पदों को प्रतिनियुक्ति/संविदा आदि के आधार पर भरा गया है तथा संबंधित कार्मिकों के वेतन एवं भत्तें पर आने वाला वित्तीय अधिभार परियोजना कियान्वयन हेतु प्राप्त धनराशि से किया जा रहा है। परियोजना की समापन तिथि 29 दिसंबर, 2017 है। उपरोक्त तथ्यों से स्पष्ट है कि निगम स्वयं के स्रोतों से संचालित नहीं है तथा शासनादेश दिनांक 13.08.2015 के अनुसार दिनांक 31.03.1996 तक नियुक्त दैनिक वेतन/वर्कचार्ज एवं संविदा के कार्मिकों का विनियमितीकरण किये जाने की कार्यवाही की स्थिति में, इससे आने वाले अतिरिक्त व्यय भार को स्वयं के स्रोतों से वहन करने में सक्षम नहीं है और यदि विनियमितीकरण किये जाने की कार्यवाही की जाती है तो राज्य सरकार से वित्तीय सहायता मांगे जाने की आवश्यकता होगी। उपरोक्त आख्या के अनुसार निगम शासनादेश दिनांक

	13.08.2015 में दी गयी प्रथम शर्त को पूर्ण नहीं करता है।
2. स्थानीय निकाय, जल संस्थान, जिला पंचायत एवं ऐसी स्वशासी संस्थायें, जो शत प्रतिशत अथवा आंशिक रूप से राजकीय अनुदान से संचालित हैं, उनमें उपरोक्त विनियमितीकरण की कार्यवाही इस प्रतिबंध के अधीन की जायेगी कि इससे आने वाले अतिरिक्त व्यय भार को संबंधित संस्था वहन करेगी और इस हेतु राज्य सरकार द्वारा वर्तमान में अधिष्ठान व्यय मद को वहन करने हेतु जितने अंश की वित्तीय सहायता दी जा रही है, उसमें कोई वृद्धि नहीं की जायेगी।	उ0प्र0 भूमि सुधार निगम द्वारा वर्तमान में विश्व बैंक पोषित उ0प्र0 सोडिक लैण्ड रिक्लेमेशन तृतीय परियोजना का कार्यान्वयन किया जा रहा है तथा इस परियोजनान्तर्गत प्राप्त धनराशि से कार्यो का संचालन करते हुये परियोजना में कार्यरत कार्मिकों के वेतन एवं भत्तों का भुगतान किया जा रहा है। निगम को किसी भी मद में शत प्रतिशत अथवा आंशिक रूप से कोई राजकीय अनुदान नहीं दिया जा रहा है। ऐसी स्थिति में प्रथम शर्त में दिये गये विवरण के अनुसार विनियमितीकरण की कार्यवाही से आने वाले अतिरिक्त व्यय भार को निगम स्वयं के स्रोतों से वहन करने में सक्षम नहीं है। उपरोक्त आख्या के अनुसार निगम शासनादेश दिनांक 13.08.2015 में दी गयी द्वितीय शर्त को पूर्ण नहीं करता है।
3. उपरोक्त विनियमितीकरण में सीजनल संग्रह अमीन/सीजनल अनुसेवक, उद्यान विभाग/कृषि विभाग/कृषि शिक्षा विभाग के अंतर्गत सीजनल कार्य हेतु लगाये गये कार्मिकों मनरेगा/आंगन बाडी/आशा बहू/होमगार्ड स्वयं सेवक/प्रांतीय रक्षक दल स्वयं सेवक/शिक्षा मित्र अथवा भारत सरकार/राज्य द्वारा संचालित योजनाओं के अधीन मानदेय या अन्य आधार पर रखे गये कर्मचारियों आदि को सम्मिलित नहीं माना जायेगा।	उ0प्र0 भूमि सुधार निगम द्वारा संचालित उ0प्र0 सोडिक लैण्ड रिक्लेमेशन तृतीय परियोजना के अंतर्गत निगम के नियमित कार्मिको के अतिरिक्त प्रतिनियुक्ति/संविदा/सेवा प्रदाय संस्था/क्षेत्रीय दर के आधार पर कार्मिक कार्यरत है। अतः इस संबंध में आख्या वांछित नहीं है।

14. Thus in the impugned order findings of fact have been recorded that since the year 1993 the respondent no.4 is carrying out projects assigned to it by the State Government/Central Government/World Bank and the burden of salary of employees is born from the amount available under the project. In the year 2007, the U.P. Sodic Land Reclamation 2nd Project was completed and consequently leaving small number of employees, all the employees on deputation or on contract basis engaged by the respondent no.4, were disengaged. Consequently, during the year 2007 to 2009 except little number of employees, no employees were working in the respondent no.4, Nigam. The U.P. Sodic Land Reclamation - 3rd Project was again started in September 2009 and the date fixed for its completion is 29.12.2017. The respondent no.4 Nigam is not receiving any grant-in-aid from the State Government. The respondent no.4, Nigam is not able to bear additional burden from its own resources on regularisation being insisted.

15. The aforenoted findings of fact recorded in the impugned order, have not been disputed by the petitioners in the writ petition. Rather the averments made in the writ petition particularly in paragraphs 7,8, and 9 supports the findings.

16. Thus the fact that the respondent no.4, Nigam do not receive any grant-in-aid from the Government and it executes projects funded by the World Bank or the Government and

only from that fund the expences are met. The finding in the impugned order that respondent no.4 is not able to bear additional financial burden on account of regularisation being insisted by contractual employees, is wholly undisputed. The aforenoted two Government orders are conditional and one of the important condition is that regularisation shall be done only if the Nigam is able to bear additional financial burden from its own resources without any additional assistance from the State Government. Under the circumstances the impugned order is in conformity and well within four corners of the aforesaid two Government orders. It does not suffer from any infirmity.

17. In the case of **Secretary, State of Karnataka and others Vs. Uma Devi (3) and others, (2006) 4 SCC 1** the Constitution Bench of Hon'ble Supreme Court considered the question of regularisation of daily wager/contracted employees and held as under:-

" 2. Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme.

3. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

4. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the back door or on daily wages, approaching Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional

scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution of India. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

5. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority

of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. ***Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. 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.* ***High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme****. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required.* ***The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.***

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. ***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 eyes open****. 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 of India.

47. ***When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees.*** *It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.*

51. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of

such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. ***In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court.*** *The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.*

52. ***Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons.*** *At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that* ***a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent****.*

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

(emphasis supplied by me)

18. The law laid down by the constitution Bench of Hon'ble Supreme Court in the case of Umadevi (supra) has been consistently followed.

19. Admittedly, the petitioners were not appointed in terms of the relevant rules or in adherence to Article 14 and 16 of the Constitution of India. This Courts cannot encourage appointments which are made outside the constitutional scheme. The respondents are bound to comply with the constitutional requirements as enumerated in Article 14 and 16 of the Constitution

of India. To allow the prayer of the petitioners would mean to permit them to be recruited through back door which this Court cannot do.

20. The appointments in bodies which are state within the meaning of Article 12 of the Constitution of India should be made after issuing proper advertisement for inviting applications from eligible candidates in accordance with the relevant statutory provisions or the Government orders. Selection should be held as provided under the relevant statutes and after compliance of the provisions of Article 14 and 16 of the Constitution of India. The selection should be fair and impartial through a written examination or interview or some other rational criteria in judging inter-se merit of candidates who apply pursuant to the advertisement. In some cases applications may be invited from the employment exchange where eligible candidates get their name registered. The selection should be such in which eligible candidates get a fair chance to compete.

21. Equal opportunity is the basic feature of the constitution of India. Public employment is repository of the state power. The framers of the constitution clearly intended and shown strong desire and constitutional philosophy to implement principle of equality in the true sense in the matter of public employment in view of unambiguous constitutional scheme as reflected from Article 14 and 16 and 309 of the Constitution of India. Under the circumstances, it would be wholly improper for this Court to give any direction for regularization of services of the petitioners, who were engaged on daily wage basis or as contractual employees and not appointed following due procedure of law.

22. The question of regularization of contractual employee and dailywager was also considered by Hon'ble Supreme Court in the case **of State of Urisa Vs. Chandra Sekhar Mishra, (2002) 10 SCC 583,** wherein Hon'ble Supreme Court held that relief of appointment as regular employee cannot be granted to a contractual employee. In the case of **Surender Prasad Tiwari Vs. U.P. Rajya Krishi Utpadan Mandi Parisad and others (2006) 7 SCC 684**, Hon'ble Supreme Court considered the scheme of the Constitution and held that dismissal of writ petitions by the High Court of the contractual employees seeking directions for regularization was wholly proper.

23. Petitioners got engagement as a contractual worker without any proper selection. Therefore they can not even invoke the theory of legitimate expectation for regularization as they knew the consequences of contractual appointment. Since the appointment of the petitioners was not consistent with the scheme for public employment, the same would not confer any right on the petitioners. Therefore, this Court under Article 226 of the Constitution of India can not issue direction for regularization.

24. In view of the aforesaid, I do not find any merit in this writ petition and as such the writ petition is dismissed. However, there shall be no order as to costs.

(2016) 9 ILRA 979
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No. 29063 Of 2016

Lakshman Singh **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for the Applicant:
Tarun Agrawal, Madan Mohan Chaurasisa, Vinayak Mithal

Counsel for the Opposite Party:
G.A.

Criminal law – FIR – final report – protest petition – complaint case – Section 2(d) CrPC – definition of complaint – no person named as accused – no request for taking action – irregularities committed by investigating officer – rejecting the final report – direction of proper investigation – ingredients required under Section 2(d) CrPC – erroneous and improper exercise of jurisdiction – without application of judicial mind – impugned order set aside – matter remanded – appropriate order in accordance with law.

On FIR lodged by applicant case crime no. 304/2011 under Section 380 and 457 IPC was registered in P.S. Mainather, Moradabad. After investigation in said case, the police has submitted final report. Thereafter protest petition dated 19.7.2016 was filed by applicant/complainant with prayer that final report no. 31/2012 dated 27.4.2012 aforesaid be quashed and direction be issued for proper investigation.(Para 2)

After hearing on this application, the Court of ACJM-IIIrd, Moradabad had passed order dated 2.5.2016, by which said protest petition was directed to be registered as complaint case. Against said order of trial court, criminal revision was preferred, which was dismissed by the order dated 26.7.2016 of Sessions Judge, Moradabad at the stage of admission. In this order, revisional court had held that there is no legal error in order passed by trial court.(Para 3)

Against the order of trial court, converting the protest petition as complaint case, present application under Section 482 CrPC has been preferred.(Para 4)

Held: (Para:-8-10)
1.In these circumstances, this contention is correct that protest petition of the petitioner dated 29.3.2013 was not complaint within the definition of section 2(d) of CrPC. Therefore, said petition could not be accepted as complaint case.

2.This contention of learned counsel for the applicant is correct and acceptable that when applicant's protest petition does not fulfill requirement of complaint and applicant has no knowledge of any person against whom prosecution should be initiated, then registering the said protest petition and ignoring the prayer made in it, is nothing but erroneous and improper exercise of its jurisdiction by trial court. It is found that the impugned

order is passed without appreciating the facts and without application of judicial mind. Unfortunately at the time of admission of criminal revision, these facts were neither considered nor contents of protest petition were appreciated by lower revisional court, which had summarily dismissed the complaint. These orders of trial court as well as revisional court are erroneous and are liable to be quashed.

3.In view of above, this application is **allowed**. The impugned order dated 2.5.2016 passed in case no. 184 of 2013 (Lakshman Singh Vs. unknown) relating to crime no. 384 of 2011, under Section 457, 384 IPC, P.S. Mainather, District Moradabad is set aside. The matter is remanded back to the trial court with direction to consider the fact of the protest petition and the legal position discussed in the body of this judgment and thereafter pass appropriate order on disposal of protest petition in accordance with law.

Case Law discussed:

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. On FIR lodged by applicant case crime no. 304/2011 under Section 380 and 457 IPC was registered in P.S. Mainather, Moradabad. After investigation in said case, the police has submitted final report. Thereafter protest petition dated 19.7.2016 was filed by applicant/complainant with prayer that final report no. 31/2012 dated 27.4.2012 aforesaid be quashed and direction be issued for proper investigation.

3. After hearing on this application, the Court of ACJM-IIIrd, Moradabad had passed order dated 2.5.2016, by which said protest petition was directed to be registered as complaint case. Against said order of trial court, criminal revision was preferred, which was dismissed by the order dated 26.7.2016 of Sessions Judge, Moradabad at the stage of admission. In this order, revisional court had held that there is no legal error in order passed by trial court.

4. Against the order of trial court, converting the protest petition as complaint case, present application under Section 482 CrPC has been preferred.

5. A complaint case can be registered only when a complaint is available before the Court. A protest petition can be registered as complaint case only when such petition contains contents of a complaint as mentioned in ***Section 2(d) CrPC***.

6. The definition of 'complaint' is given in Section 2(d) of CrPC which is as under:

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police a report.

Explanation:- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

7. In protest petition dated 19.7.2014 moved by applicant/complainant, no person was named as accused/ culprit and no request was made for taking action against any particular person for commission of any offence. In this protest petition, only irregularities committed by investigating officer were pointed out and prayer was made for rejecting the final report and for direction of proper investigation. This protest petition does not contain ingredients required under Section 2(d) CrPC for a complaint. Without considering these facts, learned Magistrate had passed order dated 2.5.2016, by which final report was rejected, but case was registered as complaint case.

8. In these circumstances, this contention is correct that protest petition of the petitioner dated 29.3.2013 was not complaint within the definition of section 2(d) of CrPC. Therefore, said petition could not be accepted as complaint case.

9. This contention of learned counsel for the applicant is correct and acceptable that when applicant's protest petition does not fulfill requirement of complaint and applicant has no knowledge of any person against whom prosecution should be initiated, then registering the said protest petition and ignoring the prayer made in it, is nothing but erroneous and improper exercise of its jurisdiction by trial court. It is found that the impugned order is passed without appreciating the facts and without application of judicial mind. Unfortunately at the time of admission of criminal revision, these facts were neither considered nor contents of protest petition were appreciated by lower revisional court, which had summarily dismissed the complaint. These orders of trial court as well as revisional court are erroneous and are liable to be quashed.

10. In view of above, this application is allowed. The impugned order dated 2.5.2016 passed in case no. 184 of 2013 (Lakshman Singh Vs. unknown) relating to crime no. 384 of 2011, under Section 457, 384 IPC, P.S. Mainather, District Moradabad is set aside. The matter is remanded back to the trial court with direction to consider the fact of the protest petition and the legal position discussed in the body of this judgment and thereafter pass appropriate order on disposal of protest petition in accordance with law.

(2016) 9 ILRA 982
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 29064 Of 2016

Jauhari & Anr. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Rajesh Kumar Dubey l

Counsel for the Opposite Parties:
G.A.

Criminal law – order of cognizance and summoning – application under section 245(2) Cr.P.C. – discharge – revision – dismissed in limine – revisional jurisdiction – memorandum of revision – miscellaneous case – registered after passing of order – clerical job – no illegality, irregularity or impropriety – inherent jurisdiction – application dismissed – surrender before trial court – bail – disposed of expeditiously.

The order of cognizance and summoning dated 24.11.2012 had become final which was passed on factual aspect and on the basis of evidence available before trial court. Thereafter accused applicant had moved application under section 245(2) Cr.P.C. for his discharge and with prayer to quash order of summoning dated 24.11.2012.(Para 2)

After affording opportunity of hearing to parties in concerned Complaint Case No.
1203 of 2012 (Mahesh Chandra Vs. Jauhari & others), the Judicial Magistrate, Hathras had rejected said application under section 245(2) Cr.P.C. by its order dated 25.7.2016 with observation that order of summoning has been confirmed even by revisional court and have become final, and legally said order of summoning cannot be interfered by Magistrate. (Para 3)

Against said order of trial court, memo of revision was preferred before the Court of Sessions Judge, Hathras. Said revision was dismissed in limne at the time of admission, confirming the order of Magistrate; and thereafter it was directed to office to complete formality of registering said petition as miscellaneous case. Against order dated 5.9.2016 of Sessions Judge, Hathras, present application under section 482 Cr.P.C. has been preferred.(Para 4)

Held: (Para:-6-8)
1.Before passing of any order on memorandum/ petition for revision or any case or appeal etc., it is not known as to what order would be passed by Court. Said order may be passed for admitting any petition as regular revision, regular appeal or anything like that. Such order may be passed on defective or non-admitted petition for treating it miscelleneous case. Only after the consideration by court and its order in that regard, it

is known as to what should be the nature of such petition, for its nomenclature and for tracing it in future. Petitions are registered only after passing of the order of the court, and mentioning its number on any prticular register kept for the particular type of cases, which is only a clerical job to be performed by the office in accordance with directions of the Court.

2.In this matter when memorandum of revision was presented by applicant before the office of Sessions Court, but that petition was not admitted as any particular type of case. Office cannot, suo moto, register a petition/ memorandum as any particular type of case, unless it is specifically ordered by court. After considering it the court found that revisional court jurisdiction could not be exercised for admitting said memorandum as regular revision, therefore it had dismissed the said memorandum/ petition of criminal revision, but for convenience of court and for public, as well as in accordance with rules, it was obligatory on part of court and concerned office to register it at place from where it can be located in future for purposes of issuance of certified copies or inspection etc. Accordingly Sessions Court had directed the office to register the memorandum of revision mentioning its petition as miscellaneous case, so that certified copy may be issued. This was a proper order. There appears no illegality, irregularity or impropriety in the impugned order that may require exercise of inherent jurisdiction of this court. Therefore, this application is **dismissed**.

3.However, considering the alternative argument of counsel for the applicant, it is observed that when application is moved for bail then same may be disposed of expeditiously. The applicants are directed to surrender before trial court immediately.

Case Law discussed:

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard Sri Rajesh Kumar Dubey, counsel for the applicant, Sri Jitendra Pal Singh Jadaun, counsel for opposite party no.-2, AGA for State opposite party no.-1. The vakalatnama filed on behalf of opposite party no. 2 taken on record.

2. The order of cognizance and summoning dated 24.11.2012 had become final which was passed on factual aspect and on the basis of evidence available before trial court. Thereafter accused applicant had moved application under section 245(2) Cr.P.C. for his discharge and with prayer to quash order of summoning dated 24.11.2012.

3. After affording opportunity of hearing to parties in concerned Complaint Case No. 1203 of 2012 (Mahesh Chandra Vs. Jauhari & others), the Judicial Magistrate, Hathras had rejected said application under section 245(2) Cr.P.C. by its order dated 25.7.2016 with observation that order of summoning has been confirmed even by revisional court and have become final, and legally said order of summoning cannot be interfered by Magistrate.

4. Against said order of trial court, memo of revision was preferred before the Court of Sessions Judge, Hathras. Said revision was dismissed in limne at the time of admission, confirming the order of Magistrate; and thereafter it was directed to office to complete formality of registering said petition as miscellaneous case. Against order dated 5.9.2016 of Sessions Judge, Hathras, present application under section 482 Cr.P.C. has been preferred.

5. Learned counsel for the applicant contended that order of revisional court exercising revisional jurisdiction is erroneous, because at the time of exercising such jurisdiction under section 397 Cr.P.C., the petition cannot be registered as miscellaneous case. This contention of applicant side is unacceptable.

6. Before passing of any order on memorandum/ petition for revision or any case or appeal etc., it is not known as to what order would be passed by Court. Said order may be passed for admitting any petition as regular revision, regular appeal or anything like that. Such order may be passed on defective or non-admitted petition for treating it miscelleneous case. Only after the consideration by court and its order in that regard, it is known as to what should be the nature of such petition, for its nomenclature and for tracing it in future. Petitions are registered only after passing of the order of the court, and mentioning its number on any prticular register kept for the particular type of cases, which is only a clerical job to be performed by the office in accordance with directions of the Court.

7. In this matter when memorandum of revision was presented by applicant before the office of Sessions Court, but that petition was not admitted as any particular type of case. Office cannot, suo moto, register a petition/ memorandum as any particular type of case, unless it is specifically ordered by court. After considering it the court found that revisional court jurisdiction could not be exercised for admitting said memorandum as regular revision, therefore it had dismissed the said memorandum/ petition of criminal revision, but for convenience of court and for public, as well as in accordance with rules, it was obligatory on part of court and concerned office to register it at place from where it can be located in future for purposes of issuance of certified copies or inspection etc. Accordingly Sessions Court had directed the office to register the memorandum of revision mentioning its petition as miscellaneous case, so that certified copy may be issued. This was a proper order. There appears no illegality, irregularity or impropriety in the impugned order that may require exercise of inherent jurisdiction of this court. Therefore, this application is dismissed.

8. However, considering the alternative argument of counsel for the applicant, it is observed that when application is moved for bail then same may be disposed of expeditiously. The applicants are directed to surrender before trial court immediately.

(2016) 9 ILRA 985
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 4146 Of 2016

Rajendra Sood @ Rajinder Paul & Ors. ...Applicants

Versus

State Of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Tarun Agrawal, Madan Mohan Chaurasisa, Vinayak Mithal

Counsel for the Opposite Parties:
G.A., Kamla Kant Dwivedi

Criminal law – complaint case – cruelty due to demand of dowry – general and vague allegations – reside separately – falsely implicated – no specific allegations – casual reference of names – matrimonial dispute – tendency to involve the entire family members – no active involvement – no justification for carrying out proceedings – proceedings quashed – application under section 482 Cr.P.C allowed.

Complaint Case No. 6549 of 2011 (Kanwaljeet Kaur Vs. Amit Sood & others) was filed by complainant/ opposite party no.-2 against her husband Amit Sood and his family members for alleged cruelty due to demand of dowry and using physical force against her. In said case CJM, Saharanpur has passed order of cognizance and summoning dated 14.5.2016. Apart from abovenamed Amit Suit his family members namely Rajendra Sood @ Rajinder paul, Mother Neeta Sood @ Neeta Rani and brother Kapil Sood were also summoned for prosecution of offence under section 498-A, 323 IPC and 3/4 D.P. Act. The proceedings of said complaint case has been challenged through present application under section 482 Cr.P.C by Rajendra Sood, Neeta Sood and Kapil Sood.(Para 1)

Counsel for the applicant contended that there has been general and vague allegations against applicants in complaint case, who reside separately from Amit Sood and complainant/O.P. no.-2, but they were falsely implicated in this matter without any reason. Therefore, proceedings against them should be quashed.(Para 2)

Counsel for the O.P. no.-2 contended that applicants are family members of the husband of complainant and it is their legal and moral duty to protect the applicants during altercation and dispute with her husband, but this duty was not discharged by them, therefore they should also be prosecuted
(Para 3)

Held: (Para:-5-8)
1.It is apparent that there are no allegations against applicants except casual reference of their names which have been included in the complaint. Mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family

members of the household in the domestic quarrel taking place in a matrimonial dispute especially if it happens soon after the wedding.

2.In light of aforesaid facts and circumstances, and considering uncontroverted affidavit of applicants relating to facts of the matter, it is found that there is no specific allegations against applicant regarding cruelty due to demand of dowry or alleged causing of injury or using foul words or any other overt act. The present applicants reside in separate house, away and unconcerned from house where complainant and her husband resided together at the time of incident. In these circumstances, there is no justification for carrying out proceedings against applicants for alleged cruelty due to demand of dowry, only on the ground that they are family members or near relatives of husband of complainant/O.P. no.-2.

3.In these circumstances, exercising inherent jurisdiction of this court, this application is **allowed**. The proceedings of complaint Case No. 6549 of 2011, Kanwaljet Kaur Vs. Amit Sood and others, under section 498-A, 323 IPC and section 3/4 of D.P. Act, police station Sadar Bazar, District Saharanpur, against applicants Rajendra Sood, Neeta Sood and Kapil Sood are hereby quashed. Let a copy of this order be communicated to the trial court.

Case Law discussed:

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Complaint Case No. 6549 of 2011 (Kanwaljeet Kaur Vs. Amit Sood & others) was filed by complainant/ opposite party no.-2 against her husband Amit Sood and his family members for alleged cruelty due to demand of dowry and using physical force against her. In said case CJM, Saharanpur has passed order of cognizance and summoning dated 14.5.2016. Apart from abovenamed Amit Suit his family members namely Rajendra Sood @ Rajinder paul, Mother Neeta Sood @ Neeta Rani and brother Kapil Sood were also summoned for prosecution of offence under section 498-A, 323 IPC and 3/4 D.P. Act. The proceedings of said complaint case has been challenged through present application under section 482 Cr.P.C by Rajendra Sood, Neeta Sood and Kapil Sood.

2. Counsel for the applicant contended that there has been general and vague allegations against applicants in complaint case, who reside separately from Amit Sood and complainant/O.P. no.-2, but they were falsely implicated in this matter without any reason. Therefore, proceedings against them should be quashed.

3. Counsel for the O.P. no.-2 contended that applicants are family members of the husband of complainant and it is their legal and moral duty to protect the applicants during altercation and dispute with her husband, but this duty was not discharged by them, therefore they should also be prosecuted.

4. From perusal of the complaint, it is found that much before the institution of complaint case under challenge, O.P. no.-2 Kanwaljeet Kaur (complainant) had started residing with her husband Amit Sood in separate house. The alleged incident of 29.9.2011, for which complaint was filed, had also happened in the house of complainant/ O.P. no.-2 and not in the house of her

husband or other in laws (applicants). The alleged specific act of causing injuries and attempt of strangulation and using foul words were allegedly committed by complainant's husband Amit Sood in the house of complainant. The averments in this regard by affidavit on behalf of applicants are not denied and uncontroverted, hence are acceptable.

5. It is apparent that there are no allegations against applicants except casual reference of their names which have been included in the complaint. Mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute especially if it happens soon after the wedding.

6. In light of aforesaid facts and circumstances, and considering uncontroverted affidavit of applicants relating to facts of the matter, it is found that there is no specific allegations against applicant regarding cruelty due to demand of dowry or alleged causing of injury or using foul words or any other overt act. The present applicants reside in separate house, away and unconcerned from house where complainant and her husband resided together at the time of incident. In these circumstances, there is no justification for carrying out proceedings against applicants for alleged cruelty due to demand of dowry, only on the ground that they are family members or near relatives of husband of complainant/O.P. no.-2.

7. In these circumstances, exercising inherent jurisdiction of this court, this application is allowed. The proceedings of complaint Case No. 6549 of 2011, Kanwaljet Kaur Vs. Amit Sood and others, under section 498-A, 323 IPC and section 3/4 of D.P. Act, police station Sadar Bazar, District Saharanpur, against applicants Rajendra Sood, Neeta Sood and Kapil Sood are hereby quashed.

8. Let a copy of this order be communicated to the trial court.

(2016) 9 ILRA 988
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.09.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Civil Revision No.- 152 Of 2016

National Insurance Co. Ltd., Thru. Regional Office, Lucknow ...Revisionist
Versus
Motor Accident Claim Tribunal/A.D.J.,Ct.No.4,Lucknow ...Opposite Party

Counsel for the Revisionist:
Surendra Pal Singh

Counsel for the Opposite Party:

Motor Accident Claims Tribunal—Order XVI Rule 6 C.P.C.—"summons to produce document"—"production of document"—"driving licence"—"renewed licence"—"original licence"—"verification"—Section 160 Motor Vehicles Act—"duty to furnish particulars"—Rule 150 Central Motor Vehicles Rules—"Form 54"—"registering authority"—"refusal"—"application"—"summoning of document"—"beneficial legislation"—"summary procedure"—"interest of justice"—"valid defence"—Article 227—"interference"—"impugned order set aside"—"revision allowed".

The present revision has been filed against an order passed by the Motor Accident Claims Tribunal on a misc. application. This Court has already held in the case of Virendra Yadav versus Ramesh and another rendered in Civil Revision No. 120 of 2016 that the jurisdiction of this Court under Article 227 of the Constitution of India can be invoked against the orders passed by the Motor Accident Claims Tribunal on misc. applications before deciding the claim petition finally.(Para 2)

Held: (Para-17-23)

(1).In this view of the matter, once the provision under Order XVI Rule 6 is applicable to the proceedings before the Motor Accident Claims Tribunal, an application for summoning such a document which has raised a doubt in relation to a claim ought to have been dealt with by the Tribunal in a just and fair manner so as to uphold the majesty and purpose of law. Having extracted the relevant provisions of statute herein above, it is clear beyond doubt that the Tribunal is empowered to summon the relevant documents but in certain situations like the one at hand, it may cause difficulty in terms of expenditure and otherwise. In the instant case, the revisionist (insurer) has himself in the application so filed before the Tribunal made a prayer for summoning of the document at his expense, therefore, even the expenditure was not a difficulty before the Tribunal to overcome.

(2).In light of legal position discussed above, once the Tribunal was bound by the procedure as prescribed under Order XVI Rule 6 of the Civil Procedure Code, 1908, there was no reason as to why such an application may not be entertained particularly when it has a bearing on the merit of the case.

(3).It must be understood by the adjudicating authorities that the interest of justice is of course supreme and suffering of a claimant cannot be compromised on technicalities but truthfulness of a valid defence is an equal duty of the Tribunal to explore so as to justify its judgements based on law. Once a genuine defence has been set up and a doubt has cropped up, the duty underlying Order XVI Rule 6 cannot be sidelined. The renewed licence, in view of the legal provisions discussed above, not being sacrosanct, calls for exercise of jurisdiction by the Tribunal at the Court of revisionist petitioner.
(4).In my humble opinion, the impugned order is a fit case where interference under Article 227 of the Constitution of India deserves to be exercised and is accordingly exercised.
(5).For the reasons recorded above, the impugned order dated 15.07.2016 passed by the Motor Accident Claims Tribunal is hereby set aside and the Tribunal is directed to consider the prayer of the revisionist petitioner to summon the relevant document or its verification expeditiously at their cost. Necessary cost may be directed to be deposited before the Tribunal within a period of ten days from the date of filing of a certified copy of this judgement. [The Senior Registrar / Registrar Listing is directed to forward a copy of this judgement to the concerned Tribunal and all the District Judges for circulation to the Motor Accident Claims Tribunal through website or otherwise]
(6).Steps to summon the relevant document-verification from the registering authority at Kolkatta are expedited and measures through official website or otherwise be taken forthwith and the whole exercise of verification be completed not later than a period of three months from the date of filing of this order before the tribunal. The proceedings in the claim petition may go on, however, the final decision may be rendered only after obtaining the necessary verification of the driving licence from the authority concerned.
(7).The revision is accordingly allowed.

Case Law discussed:

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Ashish Jaiswal, learned Counsel holding brief of Sri Surendra Pal Singh, learned Counsel for the revisionist. Learned Standing Counsel Shri Adnan Ahmad and Ajay Shukla took due interest and Shri R.C. Sharma, learned Counsel also assisted the Court.

2. The present revision has been filed against an order passed by the Motor Accident Claims Tribunal on a misc. application. This Court has already held in the case of ***Virendra Yadav versus Ramesh and another rendered in Civil Revision No. 120 of 2016*** that the jurisdiction of this Court under Article 227 of the Constitution of India can be invoked against the orders passed by the Motor Accident Claims Tribunal on misc. applications before deciding the claim petition finally.

3. The application on which the impugned order has been passed can be said to be an application filed under Order XVI Rule 6 of the Code of Civil Procedure, 1908. Order XVI Rule 6 C.P.C. by virtue of Rule 221 of the Uttar Pradesh Motor Vehicles Rules, 1998 is applicable in respect of the proceedings before the Motor Accident Claims Tribunal. For ready reference Order XVI Rule 6 C.P.C. is extracted below:-

*"**6. Summons to produce document**. - Any person may be summoned to produce a document, without being summoned to give evidence, and any person summoned merely to produce*

a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same."

4. Order XVI Rule 6 C.P.C. Clearly empowers and provides for summoning of documents which may be necessary for the adjudication of claims filed before the claim Tribunal.

5. The Full Bench judgement of this Court in the case reported in ***2015 (33) LCD Page 2295 (United India Insurance Company Ltd. Versus Smt. Shashi Prabha Sharma & Others)*** has already held that the right of defence available to insurer under Section 149 (2) of the Motor Vehicles Act, 1988 is fully available once the insurer is called upon by the Tribunal under Section 170 of the Motor Vehicles Act, 1988 to contest the claim. In the instant case, the insurance company has raised a doubt about the original driving licence of the driver which was possessed by him while driving the offending vehicle no. U.P. 53 - 9790. The claim-petitioner has placed reliance upon the renewed licence issued at Mirzapur, U.P. which makes a reference to the original driving licence no. 223/CAL/ 75 issued on 27.01.1975 by the licensing authority at Calcutta.

6. Denial of a document placed reliance upon by the claimant in the nature of driving licence is within the scope of defence envisaged under Section 149 (2) of the Motor Vehicles Act, 1988 but seeking production of such a documents as per the procedure applicable to the Motor Accident Claims Tribunal is a question that has cropped up in the present proceedings.

7. Renewal of driving licence is regulated under Section 15 of the Motor Vehicles Act, 1988 which provides that any licensing authority on an application being made shall renew a driving licence issued under the provisions of this Act. The provisions of Section 15 of the Motor Vehicles Act, 1988 clearly apply for the renewal of a driving licence countrywide meaning thereby that a driving licence issued in one State can be renewed in another State by the competent authority. Once a driving licence is issued in one State and renewed in other State, the rules applicable in this behalf would be Central Rules framed by the Central Government. The Central Government has already framed the rules known as The Central Motor Vehicles Rules, 1989.

8. Rule 18 of the Central Rules, in its present form do not require any verification by the licensing authority for the purpose of renewal of the licence, therefore, renewed driving licence does not qualify the removal of doubt in respect of original licence within the scope of statute and its application.

9. Form 54 provided under the Central Rules when read in the light of Rule 150 does provide a clue for obtaining a copy of the documents in the nature of driving licence but the duty cast under the said rule is to the advantage of claimants. Rule 150 for ready reference of the Central Rules is extracted below:-

"150. Furnishing of copies of reports to Claims Tribunal.

(1) The police report referred to in sub-section (6) of section 158 shall be in Form 54.

(2) A registering authority or a police officer who is required to furnish the required information to the person eligible to claim compensation under section 160, shall furnish the information in Form 54, within seven days from the date of receipt of the request and on payment of a fee or rupees ten."

10. Section 160 of the Motor Vehicles Act, 1988, however, envisages a duty on the part of registering authority or the officer-in-charge of a police station, if so required by a person entitled to claim compensation or insurer on an application for information at the disposal of the said authority on payment of the prescribed fee to provide the requisite information. Section 160 of the Motor Vehicles Act, is reproduced below:-

*"**160. Duty to furnish particulars of vehicle involved in accident**.- A registering authority or the officer-in-charge of a police station shall, if so required by a person who alleges that he is entitled to claim compensation in respect of an accident arising out of the use of a motor vehicle, or if so required by an insurer against whom a claim has been made in respect of any motor vehicle, furnish to that person or to that insurer, as the case may be, on payment of the prescribed fee any information at the disposal of the said authority or the said police officer relating to the identification marks and other particulars of the vehicle and the name and address of the person who was using the vehicle at the time of the accident or was injured by it and the property, if any, damaged in such form and within such time as the Central Government may prescribe."*

11. Section 160 of the Motor Vehicles Act, 1988 read with Rule 150 of the Central Motor Vehicles Rules, 1989 when read together clearly postulate that it is the duty of the registering authority to supply a copy of the documents in connection with a vehicle involved in accident on an application being filed either by the person entitled to compensation or by the insurer etc.

12. The duty cast under the statute and rules framed thereunder on the registering authority is to provide such an information but there is no provision under the Act or the Central Rules under which production of a documents before the tribunal is provided for through the quasi judicial process except Rule 221 of U.P. Motor Vehicle Rules, 1998.

13. The revisionist (insurer) admittedly having invoked the benefit under Section 160 read with Rule 150 of the Central Rules made an application before the registering authority at Kolkatta for the verification of a copy of original licence issued vide no. 223/Cal/75 as was mentioned in the renewal licence. Since the verification of original document was necessary to defend a case, hence the application was filed.

14. The application so filed by the insurer was turned down by the licensing authority as is evident from the letter dated 07.09.2016 which reads as under :-

"Date 07.09.2016

Ref. No. PB/R/1423/028
Your Ref. No.

To,
The Manager,
National Insurance Co. Ltd.
C.R.O. - I.T.P. Hub,
Kalkata - 700 001

Sub : Verification of Driving Licence bearing No. 223/Cal/75

Dear Sir,

As instructed I have visited the office P.V.D. Kolkata several times for verification of aforesaid Driving Licence and to obtain the particulars of said Driving Licence. But I was told that they would not give any Driving Licence particulars about the Driving Licence which was expired and where computerised Number and/or Smart Card Number (i.e. Number prefix like WB - 01 year.....) has not been given.

Yesterday I finally went to P.V.D. And met with the Law Officer & State Public Information Officer he told me that they have closed to issue old Driving Licence particulars about any Driving Licence which was expired. They are issuing only computerised or Smart Card Number Driving Licence particulars.

The Law officer & S.P.I.O. had refused to give such information stating me verbally that there is no provision in the Motor Vehicle Act to supply the same.

I could not get any material reply from them as they opined that nothing could be disclosed untill or unless requires them by issuing SUMMONS TO WINTESS.

Thanking you.

Yours Truly,
S/d

15. It is in the back drop of the aforesaid letter that an application was filed before the Tribunal i.e. C-20 which has been rejected by the order impugned passed on 15.07.2016. Once an application filed under Section 160 is not responded, it would be a sufficient ground available to the aggrieved party to make an application under Order XVI Rule 6 for production of relevant documents through quasi judicial proceedings as the licensing authority under the statutory duty was bound to furnish such an information.

16. Motor Vehicles Act is a beneficial legislation and the proceedings for compensation are tried summarily. The object of summary procedure is to curtail delay and promote expediency. Though the revisionist or an aggrieved party has a remedy against the licensing authority or in-charge of police station refusing to provide a document applied for under Section 160 read with Rule 150 of the Central Rules but allowing the proceedings to multiply would certainly defeat the purpose of claims lodged under the Motor Vehicles Act, 1988.

17. In this view of the matter, once the provision under Order XVI Rule 6 is applicable to the proceedings before the Motor Accident Claims Tribunal, an application for summoning such a document which has raised a doubt in relation to a claim ought to have been dealt with by the Tribunal in a just and fair manner so as to uphold the majesty and purpose of law. Having extracted the relevant provisions of statute herein above, it is clear beyond doubt that the Tribunal is empowered to summon the relevant documents but in certain situations like the one at hand, it may cause difficulty in terms of expenditure and otherwise. In the instant case, the revisionist (insurer) has himself in the application so filed before the Tribunal made a prayer for summoning of the document at his expense, therefore, even the expenditure was not a difficulty before the Tribunal to overcome.

18. In light of legal position discussed above, once the Tribunal was bound by the procedure as prescribed under Order XVI Rule 6 of the Civil Procedure Code, 1908, there was no reason as to why such an application may not be entertained particularly when it has a bearing on the merit of the case.

19. It must be understood by the adjudicating authorities that the interest of justice is of course supreme and suffering of a claimant cannot be compromised on technicalities but truthfulness of a valid defence is an equal duty of the Tribunal to explore so as to justify its judgements based on law. Once a genuine defence has been set up and a doubt has cropped up, the duty underlying Order XVI Rule 6 cannot be sidelined. The renewed licence, in view of the legal provisions discussed above, not being sacrosanct, calls for exercise of jurisdiction by the Tribunal at the Court of revisionist petitioner.

20. In my humble opinion, the impugned order is a fit case where interference under Article 227 of the Constitution of India deserves to be exercised and is accordingly exercised.

21. For the reasons recorded above, the impugned order dated 15.07.2016 passed by the Motor Accident Claims Tribunal is hereby set aside and the Tribunal is directed to consider the prayer of the revisionist petitioner to summon the relevant document or its verification expeditiously at their cost. Necessary cost may be directed to be deposited before the Tribunal within a period of ten days from the date of filing of a certified copy of this judgement. [The Senior Registrar / Registrar Listing is directed to forward a copy of this judgement to the concerned Tribunal and all the District Judges for circulation to the Motor Accident Claims Tribunal through website or otherwise]

22. Steps to summon the relevant document-verification from the registering authority at Kolkatta are expedited and measures through official website or otherwise be taken forthwith and the whole exercise of verification be completed not later than a period of three months from the date of filing of this order before the tribunal. The proceedings in the claim petition may go on, however, the final decision may be rendered only after obtaining the necessary verification of the driving licence from the authority concerned.

23. The revision is accordingly allowed.

(2016) 9 ILRA 994
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 16067 Of 2015

Hariom @ Churrey **...Applicant**
Versus
State Of U.P **...Opposite Party**

Counsel for the Applicant:
Rajesh Kumar Srivastava, Gyanesh Kumar Mishra, Prem Chand Dwivedi

Counsel for the Opposite Party:
Govt. Advocate, Pankaj Dwivedi

Criminal Law –bail – no eyewitness account – incriminating recovery – co-accused – hot pursuit – assault – forced abduction – common intention – evidence – statement of witnesses – burden to explain – Section 106 of the Indian Evidence Act – presumption under Section 114 of the Indian Evidence Act – nature of offence – gravity – evidence in support – bail rejected**.**

This application has been filed seeking the release of the applicant on bail in Case Crime No. 78 of 2015 u/s 302 IPC, Police Station-Tajganj District- Agra. (Para 1)

Submission of learned counsel for the applicant is that there is no eyewitness account of the murder and, therefore, the applicant should be released on bail. Further submission is that incriminating recovery has also been effected from the possession of other co-accused and not from the applicant which makes his case distinguishable and is on better footing.(Para 4)

Learned AGA for the State and Sri Pankaj Dwivedi, learned counsel for the opposite party have opposed the prayer for bail and have pointed out that there is sufficient evidence to indicate that the applicant along with other co-accused was in hot pursuit of one Dal Chand and the telltale story has been given by the witnesses as to how the applicant reached in the search of Dal Chand, who hid himself behind the boundary wall, while the deceased opened the gate on which the accused-applicant along with other accused started making assault upon deceased Mahesh and started beating and accusing him for having managed the escape of Dal Chand. There is evidence to the effect that thereafter the applicant and other co-accused forced the deceased to sit on the motorcycle, which was driven by accused Santosh, while the deceased was sandwiched between co-accused Santosh and another co-accused Ranjeet, who was sitting on the pillion, while the applicant and other co-accused Awadhesh rode on another motorcycle and then all the accused taking along with them the deceased, fled away. Further submission is that this is a case of forced abduction and thereafter the deceased was murdered and his dead body was thrown away. Further submission is that even the statement of Dal Chand who initially himself was beaten up by the accused persons and who had got his duty changed because of some dispute and had come to a different place in order to save his life, is also very relevant, who has given details about the whole sequence of events. Further submission is that conspicuous nature of the facts

are sufficient to indicate that the applicant was a part and parcel of the whole group and the murder was executed in furtherance of the common intention of all and the deceased was in a dare devil manner abducted by force and taken away in front of the witnesses and then after killing him the dead body was thrown away. As to how the incident of actual murder has happened, the same has to be explained by the accused persons who themselves were having the especial knowledge about the subsequent post-abduction events. The accused, therefore, are under burden to explain the same under Section 106 of the Indian Evidence Act regarding which they have utterly failed. Even presumption under Section 114 of the Indian Evidence Act has to be drawn in such circumstances. There is no other reasonable inference to be drawn in such circumstances than the fact that accused persons had together executed the murder of the deceased in furtherance of their common intention. Further submission is that though the evidence collected by the investigation has also found the specific role played by the different accused but the totality of the circumstances are such that it will not be possible to segregate the intention of different accused, which was so obviously the same and common. The autopsy of deceased revealed multiple entry and exit wounds on his body.(Para 5)

Held: (Paras:-6-7)

1.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**.

2.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.

Case Law discussed:

(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. 78 of 2015 u/s 302 IPC, Police Station-Tajganj District- Agra.

2. Heard learned counsel for the applicant, learned counsel for the opposite party and learned A.G.A.

3. Perused the record.

4. Submission of learned counsel for the applicant is that there is no eyewitness account of the murder and, therefore, the applicant should be released on bail. Further submission is that incriminating recovery has also been effected from the possession of other co-accused and not from the applicant which makes his case distinguishable and is on better footing.

5. Learned AGA for the State and Sri Pankaj Dwivedi, learned counsel for the opposite party have opposed the prayer for bail and have pointed out that there is sufficient evidence to indicate that the applicant along with other co-accused was in hot pursuit of one Dal Chand and the telltale story has been given by the witnesses as to how the applicant reached in the search of Dal Chand, who hid himself behind the boundary wall, while the deceased opened the gate on which the accused-applicant along with other accused started making assault upon deceased Mahesh and

started beating and accusing him for having managed the escape of Dal Chand. There is evidence to the effect that thereafter the applicant and other co-accused forced the deceased to sit on the motorcycle, which was driven by accused Santosh, while the deceased was sandwiched between co-accused Santosh and another co-accused Ranjeet, who was sitting on the pillion, while the applicant and other co-accused Awadhesh rode on another motorcycle and then all the accused taking along with them the deceased, fled away. Further submission is that this is a case of forced abduction and thereafter the deceased was murdered and his dead body was thrown away. Further submission is that even the statement of Dal Chand who initially himself was beaten up by the accused persons and who had got his duty changed because of some dispute and had come to a different place in order to save his life, is also very relevant, who has given details about the whole sequence of events. Further submission is that conspicuous nature of the facts are sufficient to indicate that the applicant was a part and parcel of the whole group and the murder was executed in furtherance of the common intention of all and the deceased was in a dare devil manner abducted by force and taken away in front of the witnesses and then after killing him the dead body was thrown away. As to how the incident of actual murder has happened, the same has to be explained by the accused persons who themselves were having the especial knowledge about the subsequent post-abduction events. The accused, therefore, are under burden to explain the same under Section 106 of the Indian Evidence Act regarding which they have utterly failed. Even presumption under Section 114 of the Indian Evidence Act has to be drawn in such circumstances. There is no other reasonable inference to be drawn in such circumstances than the fact that accused persons had together executed the murder of the deceased in furtherance of their common intention. Further submission is that though the evidence collected by the investigation has also found the specific role played by the different accused but the totality of the circumstances are such that it will not be possible to segregate the intention of different accused, which was so obviously the same and common. The autopsy of deceased revealed multiple entry and exit wounds on his body.

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.

(2016) 9 ILRA 997
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 26388 Of 2015

Smt. Lata Maurya ...Applicant
Versus
State Of U.P ...Opposite Party

Counsel for the Applicant:
Syed Imran Ibrahim, Irshad Husain

Counsel for the Opposite Party:
Govt.Advocate, Dharmendra Singh

Criminal Law –bail – no eyewitness account – incriminating recovery – co-accused – hot pursuit – assault – forced abduction – common intention – evidence – statement of witnesses – burden to explain – Section 106 of the Indian Evidence Act – presumption under Section 114 of the Indian Evidence Act – nature of offence – gravity – evidence in support – bail rejected**.**

This application has been filed seeking the release of the applicant on bail in Case Crime No.185 of 2014, u/s 302, 120B, 328 I.P.C., Police Station Bahariya, District- Allahabad. (Para 3)

Submission of counsel for the applicant is that there is no eye witness of the occurrence and there is also no direct evidence to the effect that the applicant administered poison to the deceased. There is also no evidence to show that the applicant made any attempt to procure some kind of poison from anywhere or that at any stage she was found to be in possession of some poison which was consumed by the deceased resulting in his death. Further submission is that actually the marriage had taken place a few months before the incident and that the applicant was carrying on some affair with the co-accused Dilip Kumar Maurya which fact was discovered after marriage and which resulted in disillusionment and discord between them. Next submission is that there is also evidence collected by the investigating officer to the effect that the deceased was not happy with the wife because of her conduct and the matrimonial obligations were not being performed as ought to have been done by the applicant. Submission is that all these factors are such which are equally incompatible with the possibility that the deceased himself committed suicide and therefore, applicant should be released on bail.(Para 6)

Learned A.G.A. has opposed the prayer for bail and has submitted that the deceased died in the same room where the applicant was present during the night of occurrence. If the deceased consumed some poison because of some quarrel or disgruntlement, the same could not have remained undiscovered or unnoticed by the applicant and in that eventuality, she must have reported the matter to other family members. In fact, the evidence is to the effect that in the morning when the deceased did not wake up, the family members asked the applicant, who is the wife of deceased, to open up the door on which she gave prevaricating answers and pretended that the key of the channel has got lost and misplaced. It was on this that another key was

managed and the channel was somehow opened and then it was discovered that the deceased was lying dead on the bed. Submission is that the post incident conduct of the applicant is highly incriminating and unless she herself was complicit in the crime, the fact of not reporting the incident or the death of the deceased to any family members remains entirely unexplained. If the deceased had died after having consumed some poison then his death could not have remained mystery for the wife and then there was no reason for her not to take immediate steps to bring medical succour and manage treatment and take steps to save his life. Contention of A.G.A. is that actually milk was given to the deceased by the applicant and it was through it that some poison was administered and the viscera report has confirmed the presence of Alluminium Phosphide poison in the body of deceased. Further contention is that the statement of co-accused Dilip Kumar Maurya has also been recorded with whom the applicant was carrying on a liaison and the evidence has also been collected by the investigating officer to the effect that they were continuously talking to each other. Submission is that actually the applicant was badly infatuated with the aforesaid co-accused Dilip Kumar Maurya so much so that she simply wanted to get rid off the deceased and it was only in execution of a common plan which the applicant had nurtured along with the aforesaid co-accused that she in cold blood took extreme steps to eliminate the deceased from the scene in order to perpetuate her illegal illicit relationship. Contention is that post incident conduct of the applicant along with the evidence of her illicit relationship with the aforesaid co-accused Dilip Kumar Maurya and the very fact of not reporting the death of the deceased to any member of family even though he had died in the night, are all circumstances which irresistibly lead to the only inference that she was complicit in the commission of crime. (Para 7)

Held: (Paras:-8-9)

1.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.**

2.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.

Case Law discussed:

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

1. Rejoinder affidavit filed today is taken on record.

2. Case is taken up in the revised call. The applicant's counsel is present but the informant's counsel is not present. In the wake of heavy pendency of cases where dockets are already bursting on their seams, in such circumstances this Court does not see any justification to adjourn the case on the basis of non-appearance of counsel for the first informant and thinks it fit to proceed with the matter taking assistance of learned A.G.A., more so when the informant's counsel has chosen not to appear even in the revised call.

3. This application has been filed seeking the release of the applicant on bail in Case Crime No.185 of 2014, u/s 302, 120B, 328 I.P.C., Police Station- Bahariya, District- Allahabad.

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

5. Perused the record.

6. Submission of counsel for the applicant is that there is no eye witness of the occurrence and there is also no direct evidence to the effect that the applicant administered poison to the deceased. There is also no evidence to show that the applicant made any attempt to procure some kind of poison from anywhere or that at any stage she was found to be in possession of some poison which was consumed by the deceased resulting in his death. Further submission is that actually the marriage had taken place a few months before the incident and that the applicant was carrying on some affair with the co-accused Dilip Kumar Maurya which fact was discovered after marriage and which resulted in disillusionment and discord between them. Next submission is that there is also evidence collected by the investigating officer to the effect that the deceased was not happy with the wife because of her conduct and the matrimonial obligations were not being performed as ought to have been done by the applicant. Submission is that all these factors are such which are equally incompatible with the possibility that the deceased himself committed suicide and therefore, applicant should be released on bail.

7. Learned A.G.A. has opposed the prayer for bail and has submitted that the deceased died in the same room where the applicant was present during the night of occurrence. If the deceased consumed some poison because of some quarrel or disgruntlement, the same could not have remained undiscovered or unnoticed by the applicant and in that eventuality, she must have reported the matter to other family members. In fact, the evidence is to the effect that in the morning when the deceased did not wake up, the family members asked the applicant, who is the wife of deceased, to open up the door on which she gave prevaricating answers and pretended that the key of the channel has got lost and misplaced. It was on this that another key was managed and the channel was somehow opened and then it was discovered that the deceased was lying dead on the bed. Submission is that the post incident conduct of the applicant is highly incriminating and unless she herself was complicit in the crime, the fact of not reporting the incident or the death of the deceased to any family members remains entirely unexplained. If the deceased had died after having consumed some poison then his death could not have remained mystery for the wife and then there was no reason for her not to take immediate steps to bring medical succour and manage treatment and take steps to save his life. Contention of A.G.A. is that actually milk was given to the deceased by the applicant and it was through it that some poison was administered and the viscera report has confirmed the presence of Alluminium Phosphide poison in the body of deceased. Further contention is that the statement of co-accused Dilip Kumar Maurya has also been recorded with whom the applicant was carrying on a liaison and the evidence has also been collected by the investigating officer to the effect that they were continuously talking to each other. Submission is that actually the applicant was badly infatuated with the aforesaid co-accused Dilip Kumar Maurya so much so that she simply wanted to get rid off the deceased and it was only in execution of a common plan which the applicant had nurtured along with the aforesaid co-accused that she in cold blood took extreme steps to eliminate the deceased from the scene in order to perpetuate her illegal illicit relationship. Contention is that post incident conduct of the applicant along with the evidence of her illicit relationship with the aforesaid co-accused Dilip Kumar Maurya and the very fact of not reporting the death of the deceased to any member of family even though he had died in the night,

are all circumstances which irresistibly lead to the only inference that she was complicit in the commission of crime.

8. 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.

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.

(2016) 9 ILRA 1001
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.09.2016

BEFORE

THE HON'BLE DR. VIJAY LAXMI, J.

Criminal Appeal No.- 207 Of 1997

Pappoo alias Ram Kumar **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
S.S.Yadav, Raj Kumar Pandey

Counsel for the Respondent:
Govt. Advocate

Criminal Appeal—Penal Code—Section 376—"rape"—"sexual intercourse"—"without consent"—"against the will"—"consent"—"fear"—"knife"—"prosecutrix"—"testimony"—"reliable"—"corroboration"—"not sine qua non"—"delay in lodging FIR"—"explained"—"age of prosecutrix"—"16 to 17 years"—"18 years"—"medical evidence"—"radiological examination"—"margin of two years"—"consenting party"—"not accepted"—"absence of injuries"—"not decisive"—"conviction"—"sentence"—"reduction"—"adequate and special reasons" .

This appeal has been preferred by Pappoo alias Ram Kumar against the judgment and order dated 15.04.1997 passed by the learned Additional Sessions Judge, Court No.13, Lucknow in ST No.221 of 1995, State versus Pappoo alias Ram Kumar and another, in Case Crime No.35 of 1992, under Sections 363, 366 and 376 IPC, Police Station - Gosaiganj, District Lucknow, whereby he found the the appellant guilty under Section 376 IPC and sentenced him to 7 years RI along with fine of Rs.3,000/- and directed the appellant to undergo additional imprisonment for six months in default of payment of fine. The appellant has been acquitted for the charges under Sections 363 and 366 IPC. The co-accused Guddu @ Sangam has been acquitted for the charges under Sections 363, 366 and 376 IPC.(Para 1)

As per the prosecution, the FIR was lodged by the complainant Sant Ram, the father of the victim alleging that the daughter of the complainant Saroj Kumari aged about 14 years was enticed and taken away by the appellant, Pappoo alias Ram Kumar of his village and Guddu @ Sangam Lal son of Ramsumiran on 29.01.1992 at about 10.00 PM. The complainant failed to trace his daughter despite all efforts, thus he lodged a written report on 01.02.1992 in police station concerned and Case Crime No.35 of 1992, under Sections 363, 366 and 376 IPC was registered in Police Station - Gosaiganj, Lucknow. It was also stated in the FIR that the daughter of the complainant has taken silver ornaments of about ¼ Kg with her. The investigation was conducted by the investigating officer. The statements of witnesses were recorded. The spot inspection was made and the site plan was prepared. The victim was recovered after 12 days and was given in the custody of the complainant. The victim was got medically examined and after completing the investigation the charge sheet was ultimately submitted in the Court under Sections 363, 366 and 376 IPC.(Para 1)

The charge was framed against the accused under Sections 363, 366 and 376 IPC. The accused denied the charges and claimed to be tried. The prosecution in order to prove its case examined Sant Ram PW-1, Saroj Kumari PW-2. the victim, Sub-Inspector Amar Singh Gautam PW-3, the Investigating Officer, Dr. J.P. Gupta PW-4 and Dr. Manorama Bahuguna PW-5. The complainant Sant Ram PW-1 stated on oath that her daughter has gone out of house on the date of the incident i.e. 29.01.1992 at about 10.00 PM to give fodder (chara) to the cattle. When she did not come back, he made efforts to search her everywhere and with her relations but failed and thereafter the report was lodged on police station concerned. After 10 to 12 days of the incident when he was standing on the check post of village Gosainganj along with Sub-Inspector and two constables he saw his daughter coming from the northern side. The first information report was proved by the witnesses which is Ex. K-1 on record.(Para 3)

The victim Saroj Kumari PW-2 stated on oath that she was given allurement by Pappoo @ Ram Kumar of good food and good clothes and to marry thus she eloped with him on the date of the incident at about 10.00 PM. She was aged about 13 years of age at the time of the incident. Pappoo took her to Lucknow with the help of one Guddu on a cycle. They took her to Khurram Nagar where they resided in a rented room at the rate of Rs.150/- per month. The two rooms were taken on rent. Pappoo and victim stayed in one room and Guddu in another room. She stated that the accused Pappoo repeatedly committed rape on her forcibly on the point of knife without her consent during this period.(Para 4)

Held: (Paras -24-27,31-37)

1.In the instant case, the victim before me is 18 years of the age. She has clearly stated that she was subjected to sexual intercourse by the accused on the point of the knife. She was not a consenting party. She was put in fear by the accused. She further stated that the appellant accused locked the rented room from outside when he used to go out for his work. She was left with no opportunity to escape. The circumstantial evidence corroborates her in all material particulars.

2.I have found the testimony of prosecutrix PW2 trustworthy and unembellished. The prosecutrix has been subjected to lengthy crossexamination. The trial court has found the prosecutrix reliable. I too find no reason to disbelieve her testimony. A father would not ordinarily subscribe to a false story of sexual assault involving his own daughter and thereby putting at stake the reputation of the family and jeopardizing the married life of the daughter. I find the testimony of victim reliable and lending support to the narration of the incident by the victim.

3.It would be apt here to remind one of the observations of the supreme court in a case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat(1983) 3 SCC 217, where the supreme court said, 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. 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. She would face the risk of loosing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a reasonable or an acceptable family. In view of these similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. In this case, no reason has been proved, not even suggested during crossexamination of the witness why the victim or any member of her family would falsely implicate the accused roping him in false charge of rape.

4.It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject

matter being a criminal charge. Assurance, short of corroboration as understood in the context of an accomplice would do.

5.I find no force in the contention of Learned counsel of the appellant that the prosecutrix was a willing party to the sexual assault made by the accused. Upon an evaluation of evidence available on record I am satisfied to hold that the victim is a witness of truth. Her testimony inspires confidence. Other evidence available on record lends assurance to her testimony. The Trial Court had rightly held that sexual assault amounting to rape was committed on her by the accused-respondent. The Trial Court was justified in holding her to be not a consenting party to the sexual assault on her.

6.This takes me to the last argument about the quantum of sentence. The Court below has awarded 7 years of imprisonment and a fine of Rs.3,000/-. A reference to Section 376 of IPC shows that although the minimum sentence is prescribed, the Court is empowered to award lesser punishment for adequate and special reasons to be recorded in the judgment. The proviso to Section 376(1), Indian Penal Code, as it stood prior to its amendment in the year 2013 expressly states that the Court may impose a sentence of imprisonment for a term of less than seven years in an offence under Section 376(1), Indian Penal Code, "for adequate and special reasons to be mentioned in the judgment".

7.After giving my anxious consideration to the aforesaid facts and circumstances and arguments advanced on behalf of the accused by learned counsel Shri Raj Kumar Pandey and the arguments advanced by Shri V.K. Singh, learned A.G.A, I am convinced that this is a matter in which it would be appropriate to reduce the term of sentence from minimum seven to three years. The incident in this case took place in the year 1992. More than twenty four years have passed since then. This appeal itself is pending for last more than nineteen years. The evidence that has come on record clearly shows that the prosecutrix had willingly accompanied the appellant, left her home and spent more than 11 days in his Company. The prosecutrix was eighteen years old when she eloped with the appellant taking silver ornaments from her home.

8.The appellant was a young man of about 20 years when this incident took place, who was unmatured and first offender. He according to the version of the victim herself took the victim back to her village after 12 days when she intended to go back to her parents.

9.The reasons mentioned above, specially the fact which persuades me to take a lenient view in the matter of sentence and awarding less than the minimum prescribed sentence of seven years is that prosecutrix aged 18 years had willingly left her parents' house to be with the appellant taking silver ornaments, which is more than evident from the facts of the case. I am inclined to accept that this and other reasons stated in detail above are sufficient and can be said to be adequate and special reasons for awarding lesser sentence for the offence punishable under Section 376 of IPC.

10.I am, therefore, inclined to allow the appeal partly by reducing the sentence for offense punishable under Section 376 of IPC from RI of seven years to RI of three years. The sentence of fine is however, confirmed. One copy of this order be sent to learned trial court. Order accordingly

Case Law discussed:

1.State of Punjab v. Gurmeet Singh, (1996) 2 SCC 384 — para 14
2. Karenel Singh v. State of M.P., (1995) 5 SCC 518 — para 16
3.Jaya Mala v. Home Secretary, Government of J&K, AIR 1982 SC 1297 — para 17
4. Harendra Narayan Singh v. State of Bihar, AIR 1991 SC 1842 — para 19
5.State of U.P. v. Chhotey Lal, (2011) 2 SCC 550 — para 23
6.Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217 — paras 26, 28
7. Rafiq v. State of U.P., AIR 1989 SC 96 — para 29

8.State of Rajasthan v. Vinod Kumar, Criminal Appeal No. 1887 of 2008 (Judgment dated 18.05.2012) — para 32

(Delivered by Hon'ble Dr. Vijay Laxmi, J.)

1. This appeal has been preferred by Pappoo alias Ram Kumar against the judgment and order dated 15.04.1997 passed by the learned Additional Sessions Judge, Court No.13, Lucknow in ST No.221 of 1995, State versus Pappoo alias Ram Kumar and another, in Case Crime No.35 of 1992, under Sections 363, 366 and 376 IPC, Police Station - Gosaiganj, District Lucknow, whereby he found the the appellant guilty under Section 376 IPC and sentenced him to 7 years RI along with fine of Rs.3,000/- and directed the appellant to undergo additional imprisonment for six months in default of payment of fine. The appellant has been acquitted for the charges under Sections 363 and 366 IPC. The co-accused Guddu @ Sangam has been acquitted for the charges under Sections 363, 366 and 376 IPC.

2. As per the prosecution, the FIR was lodged by the complainant Sant Ram, the father of the victim alleging that the daughter of the complainant Saroj Kumari aged about 14 years was enticed and taken away by the appellant, Pappoo alias Ram Kumar of his village and Guddu @ Sangam Lal son of Ramsumiran on 29.01.1992 at about 10.00 PM. The complainant failed to trace his daughter despite all efforts, thus he lodged a written report on 01.02.1992 in police station concerned and Case Crime No.35 of 1992, under Sections 363, 366 and 376 IPC was registered in Police Station - Gosaiganj, Lucknow. It was also stated in the FIR that the daughter of the complainant has taken silver ornaments of about ¼ Kg with her. The investigation was conducted by the investigating officer. The statements of witnesses were recorded. The spot inspection was made and the site plan was prepared. The victim was recovered after 12 days and was given in the custody of the complainant. The victim was got medically examined and after completing the investigation the charge sheet was ultimately submitted in the Court under Sections 363, 366 and 376 IPC.

3. The charge was framed against the accused under Sections 363, 366 and 376 IPC. The accused denied the charges and claimed to be tried. The prosecution in order to prove its case examined Sant Ram PW-1, Saroj Kumari PW-2. the victim, Sub-Inspector Amar Singh Gautam PW-3, the Investigating Officer, Dr. J.P. Gupta PW-4 and Dr. Manorama Bahuguna PW-5. The complainant Sant Ram PW-1 stated on oath that her daughter has gone out of house on the date of the incident i.e. 29.01.1992 at about 10.00 PM to give fodder (chara) to the cattle. When she did not come back, he made efforts to search her everywhere and with her relations but failed and thereafter the report was lodged on police station concerned. After 10 to 12 days of the incident when he was standing on the check post of village Gosainganj along with Sub-Inspector and two constables he saw his daughter coming from the northern side. The first information report was proved by the witnesses which is Ex. K-1 on record.

4. The victim Saroj Kumari PW-2 stated on oath that she was given allurement by Pappoo @ Ram Kumar of good food and good clothes and to marry thus she eloped with him on the date of

the incident at about 10.00 PM. She was aged about 13 years of age at the time of the incident. Pappoo took her to Lucknow with the help of one Guddu on a cycle. They took her to Khurram Nagar where they resided in a rented room at the rate of Rs.150/- per month. The two rooms were taken on rent. Pappoo and victim stayed in one room and Guddu in another room. She stated that the accused Pappoo repeatedly committed rape on her forcibly on the point of knife without her consent during this period.

5. The investigating officer, Amar Singh Gautam PW-3 stated on oath that he made spot inspection, prepared site plan and recovery memo which are Ex. K-2 to K-3 respectively. This witness also proved charge sheet, chik report and GD which are Ex. K-5 to K-7 respectively.

6. Dr. J.P. Gupta, Radiologist, Mahila Hospital was also examined, who prepared X-ray report of the victim and proved it which is Ex. K-8 on record.

7. Dr. Manorama Bahuguna, PW-5 stated on oath that she was posted in Lucknow Woman Hospital as Medical Officer on 10.2.2012. On that date the victim was brought to the Hospital by constable, Shakila Shaukat for medical examination. The length of the girl was 56 inches and she was having 14 X 14 teeth. There was no injury on private parts or anywhere on the person of the prosecutrix. The age of the victim was found to be between 16 to 17 years of age.

8. The accused was examined under Section 313 CrPC who stated that he was falsely implicated in this case. No evidence was produced by the accused in his defence.

9. The Learned Trial Court has held on the basis of the evidence of the prosexutrix, as corroborated by the other evidences that there was not only a sexual intercourse between the accused and the prosecuterix, but the same was without the consent and against the will of the prosecutrix. The prosecutrix was held to be 18 years of age on the date of the incident. Though there was delay in lodging the FIR but it was satisfactorily explained. Accordingly, the accused-respondent was found guilty of the offence punishable under Section 376 IPC and sentenced as above. As against this, an appeal came to be filed before this Court.

10. I have heard Shri Raj Kumar Pandey, learned counsel for the appellant, Shri V.K. Singh, learned A.G.A for the State and gone through the record.

11. Learned Counsel appearing on behalf of the Appellant vehemently argued that the case was not proved by the prosecution beyond reasonable doubt. Though the factum of accused-appellant having committed sexual intercourse with the victim was proved but the absence of injuries on the person of the victim was a material fact not excluding the possibility of the victim having been a consenting party. The delay in lodging the FIR was not satisfactorily explained. The delay coupled with the medical report rendered the prosecution case doubtful.

12. Learned Counsel for the Appellant further pointed out that the whole prosecution story was extremely unnatural and weak. The Learned Counsel pointed out that the prosecutrix was

undoubtedly a grown up girl and though as per the prosecution case, she was raped for about 12 days, but she kept quiet. The Learned Counsel argued that the delay in lodging the FIR was fatal and further suggested that there was an element of "consent" on the part of the prosecutrix, and as such, there was no question of any rape. The Learned Counsel further suggested that even otherwise, the absence of any injury on the person of the prosecuterix suggests that the prosecutrix engaged herself in the intercourse as per her will, and Trial Court has failed to consider this important aspect. Lastly, The Learned Counsel suggested that there was in fact, no sexual intercourse, muchless, against the consent of the prosecutrix and the accused was falsely implicated in this case.

13. The learned counsel for the respondent-State has vehemently opposed the contentions raised by learned counsel of the accused-appellant and submitted that none of them was sustainable and none could be a reason for doubting the prosecution case in the given facts and circumstances and hence the conviction was liable to be confirmed.

14. Having heard the learned counsel for the parties, I am of the opinion that the trial Court was fully justified in passing order of the conviction of the appellant. It is true that the golden thread which runs throughout the cob-web of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prawl for easy preys, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. It would be appropriate to remind ourselves of what Supreme Court has said through Dr. A.S. Anand, J., as His Lordship then was, in State of Punjab Vs. Gurmeet Singh & Ors., 1996 (2) SCC 384.

..A rapist not only violates the victims privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. 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.

15. The questions arising for consideration before me are: Whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been a victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the F.I.R.?

16. I may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The Court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the Court it cannot be counted against the prosecution. So are the observations made by Supreme Court in Karenel Singh Vs. State of M.P. (1995) 5 SCC 518 repelling the defence contention based on delay in lodging the FIR. In the present case, in our opinion the delay in lodging the F.I.R. has been satisfactorily explained. The case of the complainant is that when her daughter did not come back after giving fodder (chara) to the cattle on the date of the incident, the complainant made every effort to search his daughter everywhere and also with his relations. When he failed, the report was lodged on 01.02.1992. Thus, the delay is fully explained and no inference can be drawn against the prosecution on the ground of delay in lodging the FIR.

17. Before holding a person guilty under Section 376 IPC, it is important to determine the age of the prosecutrix at the relevant time. In this case, the prosecution came with a case in FIR that the victim was 14 years of age. The victim stated her age to be 13 years but according to the defence case, the victim was major at the relevant time. According to medical evidence her age was found 16 to 17 years. The prosecution having failed to produce any documentary evidence regarding age of the victim, then the reliance has been placed on medical evidence to determine the age of the victim. Regarding the medical assessment based on the radiological observation judicial notice can also be taken giving margin of two years as has been held in the case of Jaya Mala v. Home Secretary, Government of J. and K. MANU/SC/0031/1982 : AIR 1982 SC 1297. In that case, it has been observed by the Hon'ble Apex Court that it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

18. It is also settled law that if two views are possible then the one favourable to the accused has to be adopted. In the case of Harendra Narayan Singh v. State of Bihar, MANU/SC/0416/1991 : AIR 1991 SC 1842, the Hon'ble Apex Court has observed that the basic rule of criminal jurisprudence is that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the latter view favourable to the accused. In the instant case, Dr. Manorama Bahuguna has mentioned the age of the victim as about 16 to 17 years. In the circumstances, the age of the victim can be taken to be 18 years at the relevant time and on this point the finding as recorded by the learned Trial Court is correct.

19. The contention of learned AGA that the girl was minor at the relevant time is therefore not tenable and cannot be accepted. Moreover, the co-accused Guddu @ Sangam has been

acquitted of all charges and the appellant has been aquitted of charges u/s 363 and 366 IPC by the learned Trial Court observing that the age of the victim was 18 years during the relevant period. No counter appeal has been filed by the State against the acquittal of the Guddu @ Sanga, thus, the findings of learned Trial Court have become final in this regard.

20. It is argued by learned counsel for the accused that the prosecutrix was major at the relevant period, who had willingly gone with the accused Pappoo alias Ram Kumar to Kurram Nagar, Lucknow. She lived with Pappoo for 12 days in a rented room and if they had any intercourse it was with her consent. Therefore, the prosecution has failed to establish any offence against the accused person. The girl being major, who took her own decision. Learned Trial Court has wrongly appreciated the evidence on record and has erred in concluding that the girl was not the consenting party and the accused committed the offence under Section 376 IPC. The facts and circumstances of the case amply show that she was consenting party. Learned Trial Court has wrongly convicted the accused under Section 376 IPC and he is entitled to be acquitted.

21. However, for the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. It may be recalled in that in view of section 114-A, Evidence Act inserted by Criminal Laws (Amendment), Act,1983, there has been effected radical change in law relating to rape so far as the evidence relating to rape is concerned. The law is now in view of Section 114-A, Evidence Act that if the fact of sexual intercourse is proved and the victim says that she did not consent to that act, the onus shifts to the accused to show that the accused was a consenting party.

22. In State of U P v. Chhotey Lal, 2011(2) SCC 550, the Supreme Court observed that 'Consenting' means consent of the will and submission under the influence of fear or terror cannot amount to real consent. To quote the relevant extract:

> This Court in a long line of cases has given wider meaning to the word `consent' in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (Second Edition), Volume 1 (1977) at page 422 the word `consent' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things--a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.
>
> 15. Stroud's Judicial Dictionary (Fourth Edition), Volume 1 (1971) at page 555 explains the expression `consent', inter alia, as under

…….. ……..

" "Consent," within Penal Law, ' 2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. People v. Pelvino, 214 N.Y.S. 577" …….. ……..

" "Consenting" as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. Hallmark v. State, 22 Okl. Cr. 422" . . . .

23. In the instant case, the victim before me is 18 years of the age. She has clearly stated that she was subjected to sexual intercourse by the accused on the point of the knife. She was not a consenting party. She was put in fear by the accused. She further stated that the appellant accused locked the rented room from outside when he used to go out for his work. She was left with no opportunity to escape. The circumstantial evidence corroborates her in all material particulars.

24. I have found the testimony of prosecutrix PW2 trustworthy and unembellished. The prosecutrix has been subjected to lengthy cross-examination. The trial court has found the prosecutrix reliable. I too find no reason to disbelieve her testimony. A father would not ordinarily subscribe to a false story of sexual assault involving his own daughter and thereby putting at stake the reputation of the family and jeopardizing the married life of the daughter. I find the testimony of victim reliable and lending support to the narration of the incident by the victim.

25. It would be apt here to remind one of the observations of the supreme court in a case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat(1983) 3 SCC 217, where the supreme court said, 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. 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. She would face the risk of loosing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a reasonable or an acceptable family. In view of these similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. In this case, no reason has been proved, not even suggested during cross-examination of the witness why the victim or any member of her family would falsely implicate the accused roping him in false charge of rape.

26. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. Assurance, short

of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions, some of which are Rameshwar 1952 SCR 377, Sidheshwar Ganguly AIR 1958 SC 143, Madhoram & Anr. (1973) 1 SCC 533, State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990) 1 SCC 550, Madam Gopal Kaddad (1992) 3 SCC 204 Shri Narayan AIR 1992 (3) SCC 615, Karnel Singh 1995 (5) SCC 518, Bodhisattwa Gautam 1996 (1) SCC 490 & Gurmit Singh (supra). I may quote from the last of the above said decisions where the rule for appreciating the evidence of the prosecutrix in such cases has been succinctly summed up in the following words :-

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.

27. The observations made in the case of Bharwada Bhoginbhai Hirjibhai (Supra) deserve special mention which must be kept in mind invariably while dealing with a rape case. The Supreme 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.

28. It is further argued by learned counsel for the appellant that the medical report does not support the prosecution case where no injury was found on the private parts or anywhere else on the person of the victim. The victim herself admitted during her cross-examination that she had gone with Pappoo @ Ram Kumar voluntarily. It is argued that statement of the victim that she did not get any opportunity to raise outcry and to escape from the rented room was not reliable. She stayed with him in the rented room for 10 to 11 days which was situated by the side of road and there was also window opening towards road. Thus it is argued that the victim was having full opportunity to raise the outcry and to seek help of the passerby to escape from his custody. She never made an effort to escape or to protest. She was a consenting party and no rape was committed on her. However, the contention is not sustainable since it is settled principle that in the same set of

circumstances, the reaction of different individuals may be different. In Rafiq v. State of U.P. AIR 1989 SC 96, the supreme court made the following observations in this regard:

Indeed, from place to place, from age to age. from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed.

29. It is also argued by learned counsel for the accused that no statement of the victim was recorded under Section 164 CrPC. The evidence of prosecutrix suffered from infirmities. The conviction was based on such evidence which was not sustainable. The contradictions in the statement of the father of the victim and the victim herself created doubt about the correctness of prosecution version. There was sole testimony of victim. The father of the victim stated during cross-examination that he was not aware about the venue of residence of Pappoo @ Ram Kumar while victim stated during cross-examination that the Pappoo was her neighbour whose house was situated about 4 to 5 houses away from her house. However, the alleged contradictions are minor and negligible. The evidence of a victim of a sex offence is entitled to great weight. But corroboration is not the sine qua non for a conviction of rape. The totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the appellant and this court has no hesitation in accepting her evidence.

30. I find no force in the contention of Learned counsel of the appellant that the prosecutrix was a willing party to the sexual assault made by the accused. Upon an evaluation of evidence available on record I am satisfied to hold that the victim is a witness of truth. Her testimony inspires confidence. Other evidence available on record lends assurance to her testimony. The Trial Court had rightly held that sexual assault amounting to rape was committed on her by the accused-respondent. The Trial Court was justified in holding her to be not a consenting party to the sexual assault on her.

31. This takes me to the last argument about the quantum of sentence. The Court below has awarded 7 years of imprisonment and a fine of Rs.3,000/-. A reference to Section 376 of IPC shows that although the minimum sentence is prescribed, the Court is empowered to award lesser punishment for adequate and special reasons to be recorded in the judgment. The proviso to Section 376(1), Indian Penal Code, as it stood prior to its amendment in the year 2013 expressly states that the Court may impose a sentence of imprisonment for a term of less than seven years in an offence under Section 376(1), Indian Penal Code, "for adequate and special reasons to be mentioned in the judgment". It will be appropriate here to quote the relevant extract of the ruling of Supreme Court in State of Rajasthan v.Vinod Kumar, Cri.Appeal No. 1887 of 2008, Judgement dt.18.05.2012 in this regard:

20. Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/ commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age

of the sexually assaulted victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation. The legislature introduced the imposition of minimum sentence by amendment in the IPC w.e.f. 25.12.1983, therefore, the courts are bound to bear in mind the effect thereof.

The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straight jacket formula can be laid down.

32. After giving my anxious consideration to the aforesaid facts and circumstances and arguments advanced on behalf of the accused by learned counsel Shri Raj Kumar Pandey and the arguments advanced by Shri V.K. Singh, learned A.G.A, I am convinced that this is a matter in which it would be appropriate to reduce the term of sentence from minimum seven to three years. The incident in this case took place in the year 1992. More than twenty four years have passed since then. This appeal itself is pending for last more than nineteen years. The evidence that has come on record clearly shows that the prosecutrix had willingly accompanied the appellant, left her home and spent more than 11 days in his Company. The prosecutrix was eighteen years old when she eloped with the appellant taking silver ornaments from her home.

33. The appellant was a young man of about 20 years when this incident took place, who was unmatured and first offender. He according to the version of the victim herself took the victim back to her village after 12 days when she intended to go back to her parents. To quote the relevant extract of statement of prosecutrix:-

जब मुझे अपने माँ-बाप की याद आने लगी और मैंने पप्पू से कहा तो उसने कहा कि मैं घर पहुंचा दूँगा।

34. The reasons mentioned above, specially the fact which persuades me to take a lenient view in the matter of sentence and awarding less than the minimum prescribed sentence of seven years is that prosecutrix aged 18 years had willingly left her parents' house to be with the appellant taking silver ornaments, which is more than evident from the facts of the case. I am inclined to accept that this and other reasons stated in detail above are sufficient and can be said to be adequate and special reasons for awarding lesser sentence for the offence punishable under Section 376 of IPC.

35. I am, therefore, inclined to allow the appeal partly by reducing the sentence for offense punishable under Section 376 of IPC from RI of seven years to RI of three years. The sentence of fine is however, confirmed. One copy of this order be sent to learned trial court.

Order accordingly.

(2016) 9 ILRA 1013
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 393 Of 1996

Bansh Raj & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellants:
R.Murtaza, Alok Singh, Ashok Singh, M.A. Khan, Mohd Altaf Mansoor

Counsel for the Respondent:
Govt. Advocate

Criminal Appeal–First information report – prompt – chances of false implication – very remote – occurrence – report lodged – no delay – prompt – motive – proved on record – series of litigations – inimical – related and interested witnesses – father and son – injured witness – presence not doubtful – minor contradictions – natural – do not strike at the root – all the accused assaulted – lathi – injuries – could not state which accused caused the fatal blow – cross cases – injuries on the person of the accused – not explained – non-explanation – manifest defect – genesis of the occurrence – suppressed – injuries simple and superficial – right of private defence – exercising of right – both the parties hurling lathies – not a pre planned crime – spur of the moment – conviction upheld – sentence reduced – rigorous imprisonment reduced – fine – appeal partly allowed. .

Challenge in this appeal is to the judgment and order dated 20.08.1996, passed by Vth Additional Sessions Judge, Faizabad, in Sessions Trial No. 291 of 1991 (State vs. Bansh Raj and others), under Sections 147, 304/149 and 323 I.P.C., Police Station Pura Kalandar, District Faizabad, whereby the appellants Ram Saware, Heera Lal, Jhurai, Nathu, Raja Ram and Raj Karan were acquitted for the charges under Sections 147, 304/149 and 323 I.P.C., whereas appellants Bansh Raj, Brij Lal, Jag Mohan, Hirdai Ram and Ram Nihor were acquitted for the charge under Section 323 I.P.C. but further each of the appellants were convicted and sentenced to 1 year rigorous imprisonment under Section 147 I.P.C. and 7 years rigorous imprisonment along with fine of Rs. 2000/- under Section 304(2)/149 I.P.C. with default stipulation.(Para 1)

Filtering out unnecessary details, the prosecution case in brief is that on 20.05.1987, a first information report was lodged by the informant Hari Prasad, the brother of the deceased stating that he has a grove towards west of the village being grove no. 667 669, the lease of which was given to Ram Saware. There was various litigations between the family of the informant and Ram Saware due to the above mentioned property, both the parties were inimical towards each other. Proceedings under Section 107/16 were also pending between the parties. On 20.05.1987 at 10:00 A.M., the son of the informant namely Ram Shankar went with the buffaloes to the field to enable the buffaloes to graze in the grove. Bansh Raj Son of Ram Saware went to the spot and abused the son of the informant and hit him with a stick. At this the son of the informant raised hue and cry. Bansh Raj also raised hue and cry at which Ram Saware, Jag Mohan, Heera Lal, Jhurai, Nathu, Hirdai, Ram Nihore, Brij Lal, Ram Karan, Balbhadra, Ram Nath armed with lathi, danda reached the grove. On seeing

the accused persons, the son of the informant ran towards his house. Shiv Prasad Patel, Shatrughan, Devi Prasad of the family of the informant coupled with Shiv Bahadur also reached the spot. All the accused persons assaulted the family members of the informant who all sustained injuries. The informant did not intervene due to fear. Shiv Prasad sustained injuries on his head and became unconscious. Some people on the side of the accused also sustained injuries which were caused by the family members and companions of the informant in self-defence, hence, the first information report was lodged.(Para 2)

Held: (Paras -38-44)

1.The facts of this case are akin to the facts of the instant case. In Kashmiri Lal & Others v. State of Punjab, (1996) 10 SCC 471, this court held that "a person who is unlawfully attacked has every right to counteract and attack upon his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat."

2.Thus, on the basis of evidence on record and taking into the view of statements of Mata Deen PW-2, it has specifically stated that both the parties were hurling lathies on each other. I think It was not a pre planned crime but the incident took place at the spur of the moment.

3.Counsel for the appellant has lastly submitted that the occurrence took place in the year 1987. About 29 years have passed. Since the incident took place. Presently the surviving appellants Bansh Raj is more than 55 years of age, the appellant Hirdai Ram is more than 71 years of age and appellant Brij Lal is more than 61 years of age. At this juncture of age, keeping in view the totality of the circumstances, the appellants should not be sent to jail and the sentences should be reduced.

4.However, the conviction of the appellants is liable to be upheld but the sentence is liable to be reduced from 7 years rigorous imprisonment, under Section 304 part II read with Section 149 I.P.C. to a fine of Rs. 25,000/- each. The further sentence of one year rigorous imprisonment under Section 147 I.P.C. is reduced to a fine of Rs. 1,000/- each.

5.Accordingly, the appeal is **partly allowed**.

6.The accused appellants Bansh Raj, Hirdai Ram and Brij Lal are sentenced to fine of Rs. 25,000/- under Section 304 part II read with Section 149 I.P.C. and Rs. 1,000/- under Section 147 I.P.C. which they should deposit within two months from the date of delivery of judgment. In default, they shall undergo rigorous imprisonment for 7 years under Section 304 part II read with Section 149 I.P.C. and 1 year rigorous imprisonment under Section 147 I.P.C. 50% of the fine, deposited, shall be paid to the legal representative of the deceased Shiv Prasad. The time for deposition of fine shall not be extended on any ground whatsoever.Let the copy of this judgment be sent to the trial court concerned for compliance

Case Law discussed:

1.Jai Lal (dead) and others v. State of U.P., 2001 (1) JIC 9143 Allahabad — para 20
2.Dalip Singh and others v. State of Punjab, AIR 1953 SC 364 — para 24
3.Masalti and others v. State of U.P., AIR 1965 SC 202 — para 25
4.Guli Chand and others v. State of Rajasthan, (1974) 3 SCC 698 — para 26
5.Vadivelu Thevar v. State of Madras, AIR 1975 SC 614 — para 26
6.Israr v. State of U.P., 2005 (51) ACC 113 — para 26
7.Galivenkataiah v. State of A.P., 2008 (60) ACC 370 — para 27
8.Mohd. Khalil Chisti v. State of Rajasthan, 2013 (80) ACC 622 — para 31
9.Lakshmi Singh and others v. State of Bihar, (1976) 4 SCC 394 — para 31
10.Puran Singh and others v. State of Punjab, (1975) 4 SCC 518 — para 36
11.Bhagwan Swaroop v. State of Madhya Pradesh, (1992) 2 SCC 406 — para 37
12.Kashmiri Lal and others v. State of Punjab, (1996) 10 SCC 471 — para 38

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

1. Challenge in this appeal is to the judgment and order dated 20.08.1996, passed by Vth Additional Sessions Judge, Faizabad, in Sessions Trial No. 291 of 1991 (State vs. Bansh Raj and others), under Sections 147, 304/149 and 323 I.P.C., Police Station Pura Kalandar, District Faizabad, whereby the appellants Ram Saware, Heera Lal, Jhurai, Nathu, Raja Ram and Raj Karan were acquitted for the charges under Sections 147, 304/149 and 323 I.P.C., whereas appellants Bansh Raj, Brij Lal, Jag Mohan, Hirdai Ram and Ram Nihor were acquitted for the charge under Section 323 I.P.C. but further each of the appellants were convicted and sentenced to 1 year rigorous imprisonment under Section 147 I.P.C. and 7 years rigorous imprisonment along with fine of Rs. 2000/- under Section 304(2)/149 I.P.C. with default stipulation.

2. Filtering out unnecessary details, the prosecution case in brief is that on 20.05.1987, a first information report was lodged by the informant Hari Prasad, the brother of the deceased stating that he has a grove towards west of the village being grove no. 667 669, the lease of which was given to Ram Saware. There was various litigations between the family of the informant and Ram Saware due to the above mentioned property, both the parties were inimical towards each other. Proceedings under Section 107/16 were also pending between the parties. On 20.05.1987 at 10:00 A.M., the son of the informant namely Ram Shankar went with the buffaloes to the field to enable the buffaloes to graze in the grove. Bansh Raj Son of Ram Saware went to the spot and abused the son of the informant and hit him with a stick. At this the son of the informant raised hue and cry. Bansh Raj also raised hue and cry at which Ram Saware, Jag Mohan, Heera Lal, Jhurai, Nathu, Hirdai, Ram Nihore, Brij Lal, Ram Karan, Balbhadra, Ram Nath armed with lathi, danda reached the grove. On seeing the accused persons, the son of the informant ran towards his house. Shiv Prasad Patel, Shatrughan, Devi Prasad of the family of the informant coupled with Shiv Bahadur also reached the spot. All the accused persons assaulted the family members of the informant who all sustained injuries. The informant did not intervene due to fear. Shiv Prasad sustained injuries on his head and became unconscious. Some people on the side of the accused also sustained injuries which were caused by the family members and companions of the informant in self-defence, hence, the first information report was lodged.

3. On the basis of the written report, chik report was scribed by Constable Babu Ram who copied the details in the G.D. The Chik report and the G.D. were proved by PW-5 S.I. Hemraj as Exhibits Ka-7 and Ka-8. Investigation was conducted by PW-5 S.I. Hemraj. On that date i.e. 20.05.1987, the investigation of Case Crime No. 124A of 1987 under Sections 147, 323, 308 I.P.C. was entrusted to him. He recorded the statement of Hari Prasad and inspected the spot, prepared the site plan which was proved by this witness as Exhibit Ka-3. He collected blood stained and ordinary earth from the spot and prepared its memo which was proved by this witness as Exhibit Ka-4. He also took into possession the blood stained clothes of Shiv Bahadur and Devi Prasad and prepared its memo which was proved by this witness as Exhibit Ka-5. On 20.05.1987, he recorded the statements of Devi Prasad, Shatrughan and Shiv Bahadur. On 21.05.1987, he recorded the statements of Ram Shankar and injury report was received. After investigation, he submitted charge

sheet against the accused persons which was proved by this witness as Exhibit Ka-6. PW-6 is Dr. R. P. Pandey who examined Shiv Prasad Pandey and found the following injuries on his body:-

1. Lacerated wound with blood clot 3 cm. X 1 cm. X 1 cm. X bone deep. 7 cm. above the left ear, X-ray was advised.

2. Lacerated wound with blood clot ½ cm. X 0.3 cm. X 0.3 cm. on the outer aspect of left thumb.

3. Lacerated wound with blood clot 4 cm. X 1 cm. X bone deep on the head. 7 cm. above the right ear, X-ray was advised.

4. He also examined Ram Sundar Pandey on the same day and found the following injuries on his body:-

1. Swelling caused by injury. 4 cm. X 2 cm. on inner aspect of right ankle.

The injury report were proved As Exhibits Ka-9 and Ka-10 respectively.

5. PW-7 is Dr. K.U. Ahmad, who medically examined Devi Prasad on whose body the following injuries were found:-

1. Lacerated wound 4 cm. X 1 cm. X bone deep, in the right of the front side of the head, kept under observation and advised for X-ray.

6. Further he examined the injuries of Shatrughan Pandey on whose body the following injuries were found:-

1. Reddish contusion, 7 cm. X 1.5 cm., in the front of middle of the right forearm.

2. Reddish contusion, 6 cm. X 0.5 cm., on the outer margin of the 1/3rd upper part of the right forearm.

7. He also examined Shiv Bahadur on whose body the following injuries were found:-

1. Reddish contusion 10 cm. X 1 cm. on the middle of the back.

2. Superficial abrasion 4 cm. X 3 cm. on right scapular region.

3. Superficial abrasion 3 cm. X 3 cm., at 2 cm. from injury no. 2 on inner side.

4. Contusion with swelling 4 cm. X 3 cm. on the back of the right head, at the lower part of small finger. Kept under observation and X-ray was advised.

All the injury report were proved by this witness as Exhibits Ka-11, Ka-12 and Ka-13 respectively.

8. PW-4 Dr. Vijay Kumar Kannaujia has conducted autopsy on the body of the deceased Shiv Prasad on 22.05.1987. He noted the following ante-mortem injuries on the person of the deceased.

1. Lacerated wound 3 cm. X 1 cm. X bone deep on left scalp, 7 cm. above the left ear.

2. Lacerated wound 0.5 cm. X 0.3 cm. X 0.3 cm. on the left thumb on the outer aspect, bone was fractured.

3. Lacerated wound 4 cm. X 1 cm. X bone deep,on right side of scalp, 7 cm. above the right ear, bone of lower part was fractured.

4. Abrasion 6 cm. X 4 cm. on the right side of peluise, 7 cm. below the peluic bone.

9. On internal examination the parietal bone of the skull was found fractured. The membrances of the brain were ruptured. The right chamber of heart was full of blood and left chamber was empty. The deceased died due to shook as a result of ante-mortem injuries.

10. Besides these, witnesses, the prosecution also examined PW-1 Hari Prasad Pandey, the informant who is also an eye witness of the occurrence. He proved the first information report as Exhibit Ka-1. PW-2 is Ram Shankar who is also said to be an injured witness and he is also a witness of the incident and the son of the informant. PW-3 is Mata Deen who is said to be a witness of the incident.

11. Further the prosecution filed 24 documents which were marked by the trial court as Exhibits Ka-15 to Ka-38.

12. After the prosecution evidence was closed, the statements of the accused persons were recorded under Section 313 Cr.P.C. in which they have denied the occurrence. The accused have sated that Ram Shankar abused Bansh Raj and started beating him. When Bansh Raj raised alarm, his family members came who were also beaten by the son of the informant. In defence the family members of Bansh Raj snatched the lathi from the family members of the informant and defended themselves due to which the injured sustained injuries. However, no evidence in defence was adduced.

13. After perusal of all the evidences available on record and hearing the counsel for the parties, the learned trial court has passed the impugned judgment as specified in para one of the judgment.

14. Feeling aggrieved, the accused persons have come up in this present appeal.

15. I have heard Sri R. Murtaza, learned counsel for the appellants, Sri Pawan Kr. Yadav, learned A.G.A. and perused the material available on record.

16. During the pendency of this appeal appellants Jag Mohan and Ram Nihor have died, hence, the appeal in context of appellants Jag Mohan and Ram Nihor stands abated.

17. Counsel for the appellants while castigating the judgment has stated that the trial court has imposed a harsh and excessive sentence on the accused persons. The injuries were caused in exercising right to private defence, hence the appeal is liable to be allowed.

18. Per contra learned A.G.A. has submitted that the findings of the fact recorded by the trial court is based on evidence available on record. He has further contended that there was nothing to falsely implicate the accused and the appeal is liable to be dismissed.

19. As far as the first information report is concerned in cases of prompt first information report, the chances of false implication of the accused are very remote.

20. In ***2001 (1) JIC 9143 Allahabad, [Jai Lal (dead) and others vs. State of U.P.],*** it has been held that if the first information report is prompt, eye-witnesses are named in the first information report and vivid account of incident is given, then it is sufficient for the prosecution.

21. Perusal of the chik report makes it clear that as per the prosecution case, the occurrence took place on 20.05.1987 at 10:00 A.M. whereas the report was lodged on the same day at 12:40 P.M. The police station being 6 kms. Away from the place of occurrence, thus keeping in view the number of injured persons, nature of injuries, there is no delay in lodging the first information report which is prompt.

22. As far as the motive for committing the offence is concerned, it is proved on record that there was a series of litigations between both the parties. Even in the first information report, motive has been assigned. Motive has also been proved by the witnesses, hence the prosecution has been able to establish the motive. Even in the statements of the accused recorded under Section 313 Cr.P.C., differences between both the parties have been admitted by the accused.

23. Counsel for the appellants has further submitted that the witnesses examined by the prosecution namely PW-1 Hari Prasad and PW-2 Ram Shankar are father and son. They are related and interested witnesses, hence, they cannot be relied upon.

24. As far as related and interested witnesses is concerned, in the case of ***Dalip Singh and others vs. State of Punjab, (AIR 1953 SC 364)***, it has been laid down as under by the Hon'ble Apex Court:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts."

25. Observations of the Hon'ble Apex Court ***Masalti and others vs. State of U.P., A.I.R. 1965 SC 202***, are worth mentioning:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence, but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

26. The above decision has been followed in ***Guli Chand and others vs. State of Rajasthan, 1974 (3) SCC 698***, in which ***Vadivelu Thevar vs. State of Madras, AIR 1975 SC 614*** was also relied upon. The following observations were made by the Hon'ble Apex Court in ***Israr vs. State of U.P., [2005(51) ACC 113]*** in para-12 of the judgement are also important:-

".... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."

27. The above position has been highlighted again in the case of ***Galivenkataiah vs. State of A.P., 2008 (60) ACC 370***, in which reference has been made to some other cases also.

28. No doubt, PW-1 and PW-2 are father and son but PW-2 being an injured witness, his presence at the place of occurrence is not doubtful and PW-1 Hari Prasad, his presence is also not doubted because his reaching the place of occurrence on hearing the shrieks of his son is not unnatural.

29. PW-1 has categorically stated that all the accused persons assaulted Devi Prasad, Ram Shankar, Shatrughan, Shiv Bahadur and Shiv Prasad. Although, there are minor contradictions in the statements of PW-1 Hari Prasad and PW-2 Ram Shankar but these minor contradictions are natural and do not strike at the root of the case. He was subjected to a lengthy cross-examination in which besides proving motive, he has stated that all the accused were beating his brother by lathi.

The deceased sustained three or four visible lathi injury but he could not state as to which accused caused the fatal blow on the skull. He was fair enough in admitting that from the side of the informant Shiv Bahadur, Shatrughan, Ram Shankar were armed with lathi.

30. PW-2 is Ram Shankar, although in the injury report his name has been mentioned to be Ram Sundar, but as far as the incident is concerned, he has categorically stated that all the accused caused injuries to the deceased and other injured persons but he could not see particularly as to which accused cause the blow on the skull. PW-3 Mata Deen has also stated that the deceased and the injured persons were beaten by the accused persons. Thus, it is proved that the accused persons did cause injuries to the deceased and the injured persons.

31. It has been submitted on behalf of the appellants that there were cross cases and the injuries on the person of the accused have not been satisfactorily explained by the prosecution.

32. In this regard, counsel for the appellant has placed reliance upon ***2013 (80) ACC page 622, (Mohd. Khalil Chisti vs. State of Rajasthan),*** in which relying upon the case of ***Lakshmi Singh and others vs. State of Bihar, (1976) 4 SCC 394***, the Hon'ble Apex Court has observed as under :-

"...It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence....."

33. It is clear that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

"(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

34. It is further clear that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of

interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. However, there may be cases where the non- explanation of the injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.

35. In the above ruling, itself it has been held that if the injuries of the accused are superficial and minor, it out-raises the effect of omission, on the part of the prosecution to explain the injuries.

36. In the present case, learned A.G.A. has submitted that the injuries caused to the accused were caused by the informant and his family members in exercising of right of private defence. In the first information report itself it has been mentioned that the informant also caused injuries to the accused. Even crime no. mentioned in the chik report is 124A of 1987, under Sections 147, 323, 308 I.P.C. which was altered vide report no. 20 of 18:20 hrs. On 20.05.1987 into Section 304 I.P.C. This itself is indicative of the fact that earlier a case was lodged by the accused persons which was registered at crime no. 124 of 1987. Although the defence has failed to bring on record anything pertaining to case crime no. 124 of 1987. But since the prosecution has itself come up with a case that during the incident the accused also sustained injuries. The injuries on the body of the accused were simple and superficial.

37. In ***Puran Singh & Others v. The State of Punjab, (1975) 4 SCC 518*** this court observed that in the following circumstances right of private defence can be exercised :-

i. There is no sufficient time for recourse to the public authorities.

ii. There must be a reasonable apprehension of death or grievous hurt to the person or danger to the property concerned.

iii. More harm than necessary should not have been caused.

38. In ***Bhagwan Swaroop v. State of Madhya Pradesh, (1992) 2 SCC 406*** this court had held as under:-

"It is established on the record that Ramswaroop was being given lathi blows by the complainant party and it was at that time that gun-shot was fired by Bhagwan Swaroop to save his father from further blows. A lathi is capable of causing a simple as well as a fatal injury. Whether in fact the injuries actually caused were simple or grievous is of no consequence. It is the scenario of a father being given lathi blows which has to be kept in mind and we are of the view that in such a situation a son could reasonably apprehend danger to the life of his father and his firing a gun-shot at that point of time in defence of his father is justified."

39. The facts of this case are akin to the facts of the instant case. In ***Kashmiri Lal & Others v. State of Punjab, (1996) 10 SCC 471***, this court held that "a person who is unlawfully attacked has every right to counteract and attack upon his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat."

40. Thus, on the basis of evidence on record and taking into the view of statements of Mata Deen PW-2, it has specifically stated that both the parties were hurling lathies on each other. I think It was not a pre planned crime but the incident took place at the spur of the moment.

41. Counsel for the appellant has lastly submitted that the occurrence took place in the year 1987. About 29 years have passed. Since the incident took place. Presently the surviving appellants Bansh Raj is more than 55 years of age, the appellant Hirdai Ram is more than 71 years of age and appellant Brij Lal is more than 61 years of age. At this juncture of age, keeping in view the totality of the circumstances, the appellants should not be sent to jail and the sentences should be reduced.

42. However, the conviction of the appellants is liable to be upheld but the sentence is liable to be reduced from 7 years rigorous imprisonment, under Section 304 part II read with Section 149 I.P.C. to a fine of Rs. 25,000/- each. The further sentence of one year rigorous imprisonment under Section 147 I.P.C. is reduced to a fine of Rs. 1,000/- each.

43. Accordingly, the appeal is partly allowed.

44. The accused appellants Bansh Raj, Hirdai Ram and Brij Lal are sentenced to fine of Rs. 25,000/- under Section 304 part II read with Section 149 I.P.C. and Rs. 1,000/- under Section 147 I.P.C. which they should deposit within two months from the date of delivery of judgment. In default, they shall undergo rigorous imprisonment for 7 years under Section 304 part II read with Section 149 I.P.C. and 1 year rigorous imprisonment under Section 147 I.P.C. 50% of the fine, deposited, shall be paid to the legal representative of the deceased Shiv Prasad. The time for deposition of fine shall not be extended on any ground whatsoever.

45. Let the copy of this judgment be sent to the trial court concerned for compliance.

(2016) 9 ILRA 1023
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 526 Of 1996

Satyendra Age 35 Yrs & Ors. ...Appellants
Versus
State Of U.P. ...Respondent

Counsel for the Appellants:
K.N.Misra, Dharmendra Kumar Singh, Manjusha Kapil, Rajeev Verma

Counsel for the Respondent:
Govt. Advocate

Criminal Appeal–First information report – previous enmity – accused armed with lathi – country-made rifle – gun – fired with intention to kill – beating with lathis – injured eye-witness – medical examination – lacerated wound – firearm pellet injury – falsely implicated – conviction not pressed – confession of the offence – lenient view – sentence harsh and excessive – awarding proper sentence – undue sympathy – public confidence – appropriate punishment – society's cry for justice – nature and gravity of the crime – sentencing system – proportional to the gravity of the offence – custodial sentence reduced – period already undergone – fine – appeal partly allowed – conviction confirmed – sentence reduced.

Challenge in this appeal is to the judgment and order dated 30.11.1996 passed by First Additional Sessions Judge, Hardoi in ST No. 242 of 1993 (State Vs. Sunder Lal and others) arising out of Crime No. 189 of 1992 under Sections 307/34, 324/34, 325/34 IPC, Police Station Kasimpur, District Hardoi whereby accused were found guilty and sentenced to six months' rigorous imprisonment under Section 323/34 IPC and fine of Rs.500/- each with default stipulation. Accused persons, however, were acquitted under Section 307/34 IPC.(Para 1)

Prosecution case in brief is that a written report was lodged by the informant Jaswant on 03.10.1992 stating that his mother had got a sale deed executed in her favour due to this a case was pending under Section 145 Cr.P.C., which was finally decided in favour of the mother of informant. It has been further alleged that the informant had sown crops in the fields. When the crops were ripe, the informant, his brother Laljeet and his nephew Siyaram were harvesting the crops. Due to previous enmity accused persons namely Sunder Lal armed with lathi, Satyendra armed with country-made rifle, Jitendra armed with gun and Guddu armed with Lathi came on spot at 8:30 AM. Satyendra asked his companions to kill the informant, at which Satyendra fired at the informant with intention to kill him. The informant fell down on the spot at which the accused persons came to the injured and started beating them with Lathis. Shailendra and many villagers came to the spot who saved the informant, after which the first information report was lodged.(Para 2)

Held: (Paras -22-25)

1.Learned counsel for the appellants has also submitted that appellant No. 1, Satyendra, was detained in jail from 19.10.1992 to 10.12.1992. Appellant No. 2, Jitendra, was detained in jail from 19.10.1992 to 11.12.1992 and appellant No. 3, Guddu, was detained in jail from 29.10.1992 to 10.12.1992. The period of detention of accused appellants has not been disputed by the learned AGA. Thus, in the facts and circumstances of the case, I think the end of justice would be met if the custodial sentence of each accused under Section 323 read with Section 34 IPC is reduced to 15 days simple imprisonment and the custodial sentence of each accused under Section 325/34 IPC is reduced to the period already undergone i.e. 40 days simple imprisonment each coupled with a fine of Rs.5000/- each. In case of default in payment of fine each accused shall undergo simple imprisonment for one month.

2.In view of the above, the appeal is partly allowed. Conviction of the appellants under Section 323/34, 325/34 IPC is confirmed. But the sentence of six months' rigorous imprisonment under Section 323/34 each and three years' rigorous imprisonment and Rs.500/- fine each under Section 325/34 IPC is reduced to one month's simple imprisonment under Section 323/34 IPC and 40 days' simple imprisonment and Rs.5,000/- each under Section 325 read with Section 34 IPC. In event, the fine stipulated above if not paid, each accused shall further undergo imprisonment for one month.

3.The appellants have already undergone the custodial sentence. They shall deposit the fine aforesaid within two months from the date of release. Time for deposit of fine shall not be extended on any ground whatsoever. Let a copy of this judgment be sent to the Court concerned for immediate compliance.

Case Law discussed:
1.Sevaka Perumal etc. v. State of Tamil Nadu, AIR 1991 SC 1463 — para 17
2.Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220 — para 18
3.Ravji v. State of Rajasthan, (1996) 2 SCC 175 — para 19
4.Ahmed Hussein Vali Mohammed Saiyed and another v. State of Gujarat,(2009) 7 SCC 254—para 20
5.Jameel v. State of Uttar Pradesh, (2010) 12 SCC 532 — para 21

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

1. Challenge in this appeal is to the judgment and order dated 30.11.1996 passed by First Additional Sessions Judge, Hardoi in ST No. 242 of 1993 (State Vs. Sunder Lal and others) arising out of Crime No. 189 of 1992 under Sections 307/34, 324/34, 325/34 IPC, Police Station Kasimpur, District Hardoi whereby accused were found guilty and sentenced to six months' rigorous imprisonment under Section 323/34 IPC and fine of Rs.500/- each with default stipulation. Accused persons, however, were acquitted under Section 307/34 IPC.

2. Prosecution case in brief is that a written report was lodged by the informant Jaswant on 03.10.1992 stating that his mother had got a sale deed executed in her favour due to this a case was pending under Section 145 Cr.P.C., which was finally decided in favour of the mother of informant. It has been further alleged that the informant had sown crops in the fields. When the crops were ripe, the informant, his brother Laljeet and his nephew Siyaram were harvesting the crops. Due to previous enmity accused persons namely Sunder Lal armed with lathi, Satyendra armed with country-made rifle, Jitendra armed with gun and Guddu armed with Lathi came on spot at 8:30 AM. Satyendra asked his companions to kill the informant, at which Satyendra fired at the informant with intention to kill him. The informant fell down on the spot at which the accused

persons came to the injured and started beating them with Lathis. Shailendra and many villagers came to the spot who saved the informant, after which the first information report was lodged.

3. On the basis of the aforesaid report chik report was prepared and proved by PW-5, Head Constable Ram Nath Yadav as Ext. Ka-8. This witness further scribed the details of the case in the G.D., copy of which was proved by him as Ext. Ka-9. PW-4 Dr. Bindeshwari Prasad examined injured Siya Ram and found the following injuries on his body:-

(a) Swelling and pain 3 cms x 3.5 cms on base of middle finger on dorsum of left hand.

(b) Abrasion 1 cms x 1 cms on outer aspect of left thigh 10 cms above the left knee joint.

4. He proved the injury report as Ext. Ka-7. This witness also examined the injuries on the person of Jaswant and proved the injury report as Ext. Ka- 3. The following injuries were found on his person:-

(a) Lacerated wound 3.5 cms. x 0.5 cms x skin deep on top of head 9 cms above and away to left ear's Anna.

(b) Abrasion 2.5 cms. x 1 cms on right of head, 3 cms. above and away to right ear's Anna.

(c) Lacerated wound 2 cms. x 1 cm x muscle deep on post aspect of left upper arm, 4 cms above to the left elbow joint.

(d) Swelling and pain on dorsum of right hand of right arm.

(e) A single firearm pellet injury size 0.3 cms x 0.3 cms on post aspect of left forearm 10 cms below to the left elbow joint. No debug done. No blackening and tattooing.

(f) Complaining of pain all over to both shoulders and back.

5. Lal Jeet was also examined medically by this witness and the injury report was proved by this witness as Ext. Ka-5. On the person of Lal Jeet the following injuries were found:-

(a) Contusion 8 cms x 4 cms on left shoulder, injury is contusion and abrasion minimal.

(b) Contusion 29 cms x 4 cms on middle back (left side) 12 cms. below to contusion injury No. 1.

(c) Lacerated wound 1.5 cm x 0.5 cm x muscle deep, post aspect left forearm, 12.5 cms below to left elbow joint.

(d) Swelling 13 cms x 7 cms on whole dorsum of left hand.

(e) Lacerated wound 2 cms. X 0.5 cms x skin deep on post aspect of right fore-arm, 9 cms below to the right elbow joint.

(f) Complaining of pain all over left shoulder and left arm.

6. Supplementary reports of injured Jaswant and Laljeet were prepared by this witness which were proved by this witness as Ext. Ka-4 and Ka-6. The prosecution proceeded to examine injured Jaswant, PW-1 who is also an eye-witness. PW-2, Laljeet who is also an injured eye-witness. PW-3 is Shailendra who is also an eye witness.

7. Investigation was entrusted to Narendra Singh Yadav, SI, PW-6 on 3.10.1992. He copied the chik report and GD coupled with injury report of the injured persons in the Case Diary. He recorded the statement of injured Jaswant at Police Station and proceeded to the place of incident. He prepared the site-plan as pointed by the informant which was proved by this witness as Ext. Ka-10. After that he recorded the statement of Sunil Kumar and Jai Singh. On 04.10.1992 he recorded the statement of Anil Kumar and Shailendra. He took the clothes of informant in possession and prepared the recovery memo which was proved by him as Ext. Ka-2.

8. On 13.10.1992 Investigating Officer took into possession the copy of sale deed executed in favour of the mother of informant and received supplementary reports of the injured which were noted in the Case Diary, on the basis of which addition of Section 325 IPC was made. Investigation by this witness ended into a charge sheet which was proved by him as Ext. Ka-11.

9. After close of the prosecution evidence, statements of accused appellants were recorded under Section 313 Cr.P.C., who denied the occurrence and stated that they had been falsely implicated due to rivalry of election of village Pradhan and two documents were produced by the defence.

10. The learned Trial Court after having heard the arguments of the learned counsel for the parties has proceeded to convict the accused appellants as narrated in para - 1 of the judgment.

11. Being aggrieved with the impugned judgment and order passed by the learned Trial Court, the appellants have come up in appeal before this Court.

12. I have heard the learned counsel for accused appellants, learned AGA appearing for the State and perused the record.

13. The learned counsel for the accused appellants has submitted that the impugned judgment and order under appeal has been passed by the learned Trial Court and without appreciating the evidence on record in its correct perspective.

14. Per contra, the learned AGA has submitted that the impugned judgment and order of conviction and sentence is sustainable in the eyes of law and the appeal lacks merit and is liable to be dismissed.

15. During the course of hearing the learned counsel for appellants has stated that she does not want to press the appeal as regards the conviction of the appellants under Sections 323/34, 325/34 IPC is concerned, but she wants to make submissions before the Court only on the quantum of sentence. She has vehemently submitted that sentence of six months' rigorous imprisonment under Sections 323/34 and three years' rigorous imprisonment and fine of Rs.500/- each under Section 325/34 IPC is very harsh and excessive. It has further been submitted that the occurrence took place about 24 years back. The age of accused persons is advancing, hence a lenient view may be taken in the matter.

16. Not pressing the criminal appeal after the conviction of the accused by the court below is like the confession of the offence by the accused. The Courts generally take lenient view in the matter of awarding sentence to an accused in criminal trial, where he voluntarily confesses his guilt, unless the facts of the case warrants severe sentence.

17. In the case of **Sevaka Perumal etc. Vs. State of Tamil Nadu, AIR 1991 SC 1463**, the Hon'ble Apex Court in the matter of awarding proper sentence to the accused in a criminal trial has cautioned the Courts as under:

"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

18. In the case of ***Dhananjoy Chatterjee Vs. State of W. B., [1994] 2 SCC 220***, the Hon'ble Supreme Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

19. Similar view has also been expressed in ***Ravji v. State of Rajasthan, [1996] 2 SCC 175***. It has been held in the said case that it is the nature and gravity of the crime but not the criminal,

which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

20. This position was reiterated by a three-Judge Bench of the Hon'ble Apex Court in **Ahmed Hussein Vali Mohammed Saiyed and Anr. vs. State of Gujarat, (2009) 7 SCC 254,** wherein it was observed as follows:-

"99.....The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.

The court must not only keep in view the rights of the victim of the crime but the society at large also while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

21. In **Jameel vs. State of Uttar Pradesh (2010) 12 SCC 532**, this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus: -

"15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

16. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

22. Learned counsel for the appellants has also submitted that appellant No. 1, Satyendra, was detained in jail from 19.10.1992 to 10.12.1992. Appellant No. 2, Jitendra, was detained in jail from 19.10.1992 to 11.12.1992 and appellant No. 3, Guddu, was detained in jail from 29.10.1992 to 10.12.1992. The period of detention of accused appellants has not been disputed by the learned AGA. Thus, in the facts and circumstances of the case, I think the end of justice would be met if the custodial sentence of each accused under Section 323 read with Section 34 IPC is reduced to 15 days simple imprisonment and the custodial sentence of each accused under Section 325/34 IPC is reduced to the period already undergone i.e. 40 days simple imprisonment each coupled with a fine of Rs.5000/- each. In case of default in payment of fine each accused shall undergo simple imprisonment for one month.

23. In view of the above, the appeal is **partly allowed**. Conviction of the appellants under Section 323/34, 325/34 IPC is confirmed. But the sentence of six months' rigorous imprisonment under Section 323/34 each and three years' rigorous imprisonment and Rs.500/- fine each under Section 325/34 IPC is reduced to one month's simple imprisonment under Section 323/34 IPC and 40 days' simple imprisonment and Rs.5,000/- each under Section 325 read with Section 34 IPC. In event, the fine stipulated above if not paid, each accused shall further undergo imprisonment for one month.

24. The appellants have already undergone the custodial sentence. They shall deposit the fine aforesaid within two months from the date of release. Time for deposit of fine shall not be extended on any ground whatsoever.

25. Let a copy of this judgment be sent to the Court concerned for immediate compliance.

(2016) 9 ILRA 1030
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 537 Of 1994

Amrit Lal & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellants:
Rajeev Saxena, Amit Srivastava, Neeraj Sahu, S.H. Ibrahim

Counsel for the Respondent:
Govt. Advocate

Criminal Appeal–First information report – delay in lodging – delay not explained – casts a shadow of doubt – dowry death – demand of Rs.10,000/-, watch and ring – cruelty or harassment – soon before her death – not proved – contradictions – prosecution witnesses – not in consonance – unnatural death – matrimonial home – seven years of marriage – burden of proof – Section 106 Evidence Act – initial burden – prosecution failed – conviction cannot be sustained – appeal allowed – acquittal.

Challenge in this appeal is to the judgment and order dated 02.12.1994 passed by the Special Judge, Unnao in ST No. 386 of 1991 (State Vs. Amrit Lal and others) under Sections 498-A, 304 B
IPC, Police Station Morawana, District Unnao by which accused Bachchu Lal and Saroj were acquitted for the charges levelled against them. Whereas accused Amrit Lal, Smt. Rajrani and Chilbil were found guilty and convicted for two years' rigorous imprisonment and fine of Rs.1,000/- each under Section 498-A IPC and 10 years' rigorous imprisonment each under Section 304-B IPC with default stipulation.(Para 1)

Brief facts of the case are that informant Shiv Kumari lodged a written report on 14.02.1990 stating that her daughter Rakhi was married to Chilbil, son of accused Amrit Lal. She has given sufficient dowry in the marriage. On 11.01.1990 when the deceased came to her maternal house, she told to her parents that she was compelled to bring Rs.10,000/-, failing which she would be murdered. She also told her mother that the demand for one watch and a ring was also made. On 11.02.1990, the girl was taken away by her father-in-law. On 13.02.1990 at 4:00 PM all the in-laws of the deceased closed the door of room, sprinkled kerosene oil on her and done her to death. Husband of the deceased went to Kanpur, met Phool Chand Gupta and requested him to save him. Hence, the report was lodged. On the basis of this written report PW-6, Brij Kishore Bajpai scribed chik report which was proved by this witness as Ext. Ka-2. Further this witness proved the copy of GD as Ext. Ka-3. PW-5, Constable Ram Dularey carried corpse of the deceased for post-mortem. The Investigating Officer was not produced in evidence. However, four witnesses of fact were produced by the prosecution.(Para 2)

Held: (Paras -22-26)

1.I am aware that it is the duty of the accused to bring the facts which are exclusively in their knowledge before the Court as to how the deceased died unnatural death in her matrimonial house. Whereas the offence like murder or dowry death is committed in secrecy inside the house, undoubtedly the initial burden to establish the case would be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same decree as is required in other cases of circumstantial evidence. The burden would be comparative of a lighter character. In view of Section 106 of the Indian Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution. Perhaps keeping the above factors in mind, the Legislature very intelligently has provided for presumption of "dowry death" and not "dowry murder" or as is commonly spoken in Hindi as "Dahej Hatya".

2.But in the present case since the prosecution has miserably failed to prove the initial primary burden, hence the absence of cogent explanation about the commission of crime could not have led the Trial Court to draw an inference about her dowry death. As such, in absence of proof of ingredients No. (iii) and (iv), the appellants could not have been convicted under Section 498-A and Section 304-B IPC. Although the evidence of DW-1 Ajay Kumar is of no consequence, but the charges levelled against the accused have not been proved, hence the conviction on all counts cannot be sustained and the appeal is liable to be allowed.

3.In view of the facts and circumstances of the case discussed above, the **appeal is allowed**. The impugned judgment and order is set aside. The appellants are acquitted of the charges levelled upon them.

4.The appellants are on bail. Their bail bonds are cancelled and sureties are discharges. However, the provisions of Section 437-A Cr.P.C. shall be complied with. Let a copy of this judgment be sent to the concerned Court.

Case Law discussed:

1.Prem Kanwar v. State of Rajasthan, 2009 (1) JT 197 — para 16
2.Pawan Kumar and others v. State of Haryana, (1998) 3 SCC 309 — para 8

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

1. Challenge in this appeal is to the judgment and order dated 02.12.1994 passed by the Special Judge, Unnao in ST No. 386 of 1991 (State Vs. Amrit Lal and others) under Sections 498-A, 304 B IPC, Police Station Morawana, District Unnao by which accused Bachchu Lal and Saroj were acquitted for the charges levelled against them. Whereas accused Amrit Lal, Smt. Rajrani and Chilbil were found guilty and convicted for two years' rigorous imprisonment and fine of Rs.1,000/- each under Section 498-A IPC and 10 years' rigorous imprisonment each under Section 304-B IPC with default stipulation.

2. Brief facts of the case are that informant Shiv Kumari lodged a written report on 14.02.1990 stating that her daughter Rakhi was married to Chilbil, son of accused Amrit Lal. She has given sufficient dowry in the marriage. On 11.01.1990 when the deceased came to her maternal house, she told to her parents that she was compelled to bring Rs.10,000/-, failing which she would be murdered. She also told her mother that the demand for one watch and a ring was also made. On 11.02.1990, the girl was taken away by her father-in-law. On 13.02.1990 at 4:00 PM all the in-laws

of the deceased closed the door of room, sprinkled kerosene oil on her and done her to death. Husband of the deceased went to Kanpur, met Phool Chand Gupta and requested him to save him. Hence, the report was lodged. On the basis of this written report PW-6, Brij Kishore Bajpai scribed chik report which was proved by this witness as Ext. Ka-2. Further this witness proved the copy of GD as Ext. Ka-3. PW-5, Constable Ram Dularey carried corpse of the deceased for post-mortem. The Investigating Officer was not produced in evidence. However, four witnesses of fact were produced by the prosecution.

3. PW-1 is Shiv Kumari who proved the written report, which was marked as Ext. Ka-1.

4. PW-2 is Munnu Singh, who is neighbour of the informant. PW-3 is Phool Chand, cousin of the deceased and PW-4 is Rajjan Babu Gupta, brother of the deceased and son of the informant. Since the defence admitted the genuineness of the papers, hence the report of SI was marked as Ext. Ka-5, Ka-6, Ka-7. The inquest report was exhibited as Ka-8. The copy of GD entry relating to the death of deceased made on 13.02.1990 was marked as Ext. Ka-9. The letter by RI was marked as Ext. Ka-10. Photo of corpse was marked as Ext. Ka-11 and the post-mortem report was marked as Ext. Ka-12. After the prosecution evidence was closed, the statement of accused was recorded under Section 313 Cr.P.C. The surviving appellant Chilbil denied the occurrence and stated that at the time of occurrence he had gone to Kanpur to purchase clothes. Accused DW-1 was examined. He stated that the deceased committed suicide. He further stated that surviving appellant Chilbil was not present at the scene of the occurrence.

5. After hearing the arguments advanced by the parties and going through the material available on record, the learned Trial Court convicted and sentenced the accused appellants as narrated in para - 1 of the judgment.

6. Feeling aggrieved with the impugned judgment and order of the learned Trial Court, the convicted accused appellants, namely, Chilbil, Rajrani and Amrit Lal preferred appeal before this Court. Smt. Rajrani and Amrit Lal died during the pendency of the appeal, hence the appeal in their context has abated.

7. I have heard the learned counsel for accused appellants, learned AGA appearing for the State and perused the Trial Court record.

8. The learned counsel for the accused appellants has submitted that the judgment and order under appeal is bad in the eye of law and is, therefore, liable to be set aside.

9. Learned counsel for the accused appellants has further submitted that prosecution has miserably failed to prove the ingredients of Section 498-A IPC and Section 304-B IPC and the learned Trial Court has committed grave illegality in convicting the accused appellants.

10. Per contra, the learned AGA appearing for the State supported the impugned judgment and order under appeal and has submitted that the appeal has no merit and is liable to be set aside.

He has also submitted that the conviction is based on evidence available on record and the appeal merits rejection.

11. Then, the learned counsel for accused appellants has submitted that there is inordinate delay in lodging the FIR, hence the prosecution case becomes doubtful.

12. Perusal of the chik report shows that the occurrence in question has taken place on 13.02.1990 at about 4:00 PM, whereas the report was lodged on the next day at 16:40 hours, the place of occurrence being five kilometers away from the police station.

13. In this regard, the learned AGA appearing for the State has submitted that the mother of the deceased came to her house and when she came to know about the incident, then, she lodged the report, hence the alleged delay in lodging the report has been satisfactorily explained. Thus, the delay in lodging the first information report is not fatal for the prosecution.

14. In the aforesaid backdrop the statements of the prosecution witnesses has to be referred.

15. PW-1 is Shiv Kumari, the informant, who has stated that Phool Chand told her that some mishappening had occurred with her daughter. In cross-examination she has admitted that last rites of the deceased were performed by the accused persons at Ganga Ghat in the presence of her husband and son. Munnu Singh, PW-2, has specifically stated in this regard that at 07:00 PM he had got the news of the incident. The inquest of deceased was prepared in the presence of this witness. Further, he has stated that when he went to the matrimonial house of the deceased, the parents and family members of the deceased also accompanied him. The informant was present with the dead body of the deceased. Phool Chand is cousin of the deceased who has stated that he went to the police station along with the dead body. Even the real brother of the deceased, PW-4 namely Rajjan Babu stated that he was informed by his brother-in-law on 14.02.1990 about the incident. Thus, it is clear that the mother of the deceased had come to know about the incident. Even if she was busy in the last rites of the deceased, which were performed, what prevented her from lodging the report, is not clear from the record. Thus, there is a delay in lodging the FIR, which casts a shadow of doubt on the prosecution case.

16. Before I proceed to evaluate the evidence on record led by the prosecution in support of the charges framed against the accused, it is necessary to examine the law relating to 'dowry death'. The Hon'ble Supreme Court has highlighted all the aspects of law relating to 'dowry demand' and 'dowry death' in recent case of **Prem Kanwar Vs. State of Rajasthan- 2009(1) JT 197**. Paras 6 to 12 of the reports are as under:-

"6. In order to attract Section 304-B IPC, the following ingredients are to be satisfied:

i) The death of a woman must have been caused by burns or bodily injury or otherwise that under normal circumstances

ii) Such death must have been occurred within 7 years of the marriage;

iii) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

iv) Such cruelty or harassment must be in connection with the demand of dowry.

Section 304-B and Section 498-A reads as follows:-

"304-B Dowry death- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than normal circumstances within Seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.

***Explanation**- For the purpose of this sub-section, 'dowry' shall have 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."

498-A: Husband or relative of husband of a woman subjecting her to cruelty- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

***Explanation**- For the purpose of this section cruelty means-*

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman: where harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

7. The term "dowry" has been defined in Section 2 of the Dowry Prohibition Act, 1961 (in short "dowry Act") as under:-

"Section 2. Definition of 'dowry'- In this Act, "dowry' means any property or valuable security given or agreed to be given either directly or indirectly."

(a) by one party to a marriage to the other party of the marriage; or

(b) by the parents of either party to a marriage or to any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mehr in the case of person whom the Muslim Personal Law (Shariat) applies.

***Explanation I**- For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section unless they are made as consideration for the marriage of the said parties.*

***Explanation II**- The expression "valuable security" has the same meaning in Section 30 of the Indian Penal Code(45 of 1861).*

*8. Explanation of Section 304-B refers to "dowry" as having the same meaning as in section 2 of the Act', the question "what is the periphery of the dowry as defined therein? The argument is, there has to be an agreement at the time of the marriage in view of the words "agreed to be given" occurring herein, and in the absence of any such evidence it would not constitute to be dowry. It is noticeable, as this definition by amendment includes not only the period before and at the marriage but also the period subsequent to the marriage. This position was highlighted in **Pawan Kumar and others vs State of Haryana (1998 (3) SCC 309)**.*

9. The offence alleged against the accused is under Section 304-B IPC which makes "demand of dowry" itself punishable. Demand neither conceives no would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved; hardly any offenders would come under the clutches of law. When section 304-B refers to "demand of dowry", it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. The argument that there is no demand of dowry, in the present case, has no force. In cases of dowry death and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence that could be either direct on indirect. Is is significant that section 4 of the Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The work "agreement" referred to in Section 2 has to be inferred on the facts and circumstances of each case. The interpretation that the accused seek, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provisions of the Act including section 3, which refers to giving or taking dowry an Section 4 which deals with a penalty for demanding dowry; under the Act and the IPC. His makes it clear that even demand of dowry on other

ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry.

10. Section 113-B of the Evidence Act is also relevant for the case at hand. Both Sections 304-B IPC and Section 113-B of the Evidence Act were inserted as noted earlier by the dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry death. Section 113-B as follows:-

"113-B: Presumption as to dowry death- When the question is whether as 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 persons has caused the dowry death.

***Explanation**- For the purposes of this section' dowry death" shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 196)."*

11. The necessity for insertion of the two provisions has been amply analyzed by the Law Commission of India in its 21st Report dated 10th August, 1988 on "Dowry Deaths and Law Reform" Keeping in view the impediment in the per-existing law in securing evidence to prove dowry related death, legislature through it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113-B in the Evidence Act has been inserted. As per the definition of 'Dowry death; in section 304-B IPC and the wording in the presumptive section 113-B of the Evidence Act, one of the essential ingredients, amongst other, in both the provisions in that the concerned woman must have been "soon before her death" subjected to cruelty or harassment for or in connection with demand of dowry" Presumption under section 113-B is a presumption of law. On proof of the essentials mentioned there in, it becomes obligatory on the Court to raises a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

(1) The question before the Court must be whether the accused committed the dowry death of a woman (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

12. A conjoint of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be materials to show that soon before the death the victim was subjected to cruelty

or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances." The expression 'soon before' is very relevant where Section 113-B if the Evidence Act and Section 304-B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and would depend upon the circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in section 114-B Illustration (a) of the Evidence Act is relevant. It is lays down that Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not be disturb mental equilibrium of the woman concerned, it would be of no consequence."

17. Now, I proceed to consider the four ingredients which are essential to establish a case for the offence punishable under section 304-B IPC.

18. As regards the ingredient No. (i) is concerned, a perusal of the inquest report Ext. Ka-8 and post-mortem report Ext. Ka-12 would show that the whole body of the deceased was burnt and smell of kerosene oil was present on the body of deceased. A perusal of the post-mortem report reveals that the doctor did not find any ante-mortem injuries on the body of the deceased at the time of autopsy. The prosecution witnesses have also proved that the deceased died unnatural death. Thus, the ingredient No. (i) stands proved. As far as ingredient No. (ii) is concerned, there is no quarrel on the fact that unnatural death of the deceased took place in her matrimonial home within seven years of her marriage. Thus, the ingredient No. (ii) also stands established.

19. As far as ingredients No. 3 and 4 are concerned, a perusal of the lower Court record reveals that initially after investigation, the Investigating Officer submitted a final report against all the accused persons. On 04.06.1990 the Court while rejecting the final reports summoned the accused persons to face trial. PW-1, the mother of the victim, has stated that accused demanded a sum of Rs.10,000/- from her son Rajjan Babu. I would like to revert back to the first information report in which it has been stated that demand of Rs.10,000/-, one watch and a ring was made. The first information report is silent as to who demanded the dowry although in the first information

report it has been mentioned that all the five accused burnt the deceased to death. PW-1, Shiv Kumari, has stated that her daughter told her that Rs.10,000/- and a ring should be given, otherwise she would not be sent to her matrimonial home. This witness had to undergo the test of cross-examination in which she has admitted that she gave a statement to the Investigating Officer as follows :

"शादी में दहेज के लेन-देन का कोई झगड़ा नहीं हुआ था। मैंने जो दे दिया था उन लोगों ने वह ले लिया था। कुछ मांग नहीं किया था।" **Further she has admitted that she stated to the investigating officer that** "मेरी लड़की ने हमलोगों से अपनी सास ससुर जेठ जेठानी या अपने पति के विरूद्ध कोई शिकायत किसी किस्म का नहीं किया था। उसने दहेज मांगने या उत्पीडित करने की कोई शिकायत नहीं किया था।"

20. She stated that this was a correct statement given by her to the Investigating Officer. A twist came in her statement when she said that dowry was demanded two days prior to the death of the deceased when her father-in-law Amrit Lal came to take her back to her matrimonial home. The real brother of the deceased is Rajjan Babu who has stated that on 12.01.1990 he went to the matrimonial house of his sister where Amrit Lal, Raj Rani, Bachchu, his wife and children demanded Rs.10,000/-, a ring and a watch. This is not in consonance with the statement of PW-1 because as per the statement of PW-1, Shiv Kumari, dowry was demanded for the first time when co-accused Amrit Lal took her back to the matrimonial home. Munnu singh is the neighbour of the deceased. Initially, in the first information report his name was written as the scribe which was scored out and scribe was mentioned to be Pancham. Thus, Munnu Singh, PW-2, contradicting Shiv Kumari, PW-1 and Rajjan Babu, PW-4, has stated that when for the first time the deceased came to her parental house, then, she stated that her in-laws demanded a ring and ten thousand of rupees and she also stated that they would murder her if she does not give them ring and cash. Phool Chand, PW-3, has stated nothing about the alleged demand of dowry.

21. The prosecution witnesses have stated that after the incident, the sole surviving appellant Chilbil went to Kailash Chand and asked Kailash Chand to save him. This is not palatable and digestible in as much as the occurrence is said to have taken place on 13.02.1990 at about 4:00 PM where as there is a GD entry on record bearing Ext. No. Ka-9 dated 13.02.1990 entered at 20:10 hours stating that Kailash Chand Gupta gave an information at the police station about suicidal death of the deceased. It cannot be anticipated that Kailash Chand Gupta who is not shown to be interested in anybody, would go to the police station to get the GD entry done in anticipation of lodging the first information report. This is not a case which was tried for the offence punishable under Section 302 IPC. The prosecution has failed to prove that soon before her death, the deceased was subjected to cruelty and harassment by her husband or any relative of her husband and such cruelty or harassment was in connection with demand of dowry. Thus, neither demand for dowry has been proved beyond reasonable doubt nor the dowry death has been proved beyond the reasonable doubt by the prosecution.

22. I am aware that it is the duty of the accused to bring the facts which are exclusively in their knowledge before the Court as to how the deceased died unnatural death in her matrimonial house. Whereas the offence like murder or dowry death is committed in secrecy inside the house,

undoubtedly the initial burden to establish the case would be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same decree as is required in other cases of circumstantial evidence. The burden would be comparative of a lighter character. In view of Section 106 of the Indian Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution. Perhaps keeping the above factors in mind, the Legislature very intelligently has provided for presumption of "dowry death" and not "dowry murder" or as is commonly spoken in Hindi as "Dahej Hatya".

23. But in the present case since the prosecution has miserably failed to prove the initial primary burden, hence the absence of cogent explanation about the commission of crime could not have led the Trial Court to draw an inference about her dowry death. As such, in absence of proof of ingredients No. (iii) and (iv), the appellants could not have been convicted under Section 498-A and Section 304-B IPC. Although the evidence of DW-1 Ajay Kumar is of no consequence, but the charges levelled against the accused have not been proved, hence the conviction on all counts cannot be sustained and the appeal is liable to be allowed.

24. In view of the facts and circumstances of the case discussed above, the appeal is allowed. The impugned judgment and order is set aside. The appellants are acquitted of the charges levelled upon them.

25. The appellants are on bail. Their bail bonds are cancelled and sureties are discharges. However, the provisions of Section 437-A Cr.P.C. shall be complied with.

26. Let a copy of this judgment be sent to the concerned Court.

(2016) 9 ILRA 1040
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 780 Of 2005

Ram Niwas & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellants:
Saurabh Gour, Dileep Kumar, K C Yadav, R.P.Singh, Rajeev Gupta, Sanjay Kumar Pandey, Suresh Gaur, Uma Nath Pandey

Counsel for the Respondent:
Govt. Advocate

Criminal Law –Criminal Appeal –conviction and sentence – rigorous imprisonment for life – acid – poured on the body – mid night – delay in lodging the FIR – no satisfactory explanation – concocted and fabricated – civil litigation – enmity – motive – interested witnesses – natural witnesses – no source of light – child witness – statement under Section 161 Cr.P.C. – names of the accused not disclosed – material improvement – evidence not reliable and trustworthy – false implication – benefit of doubt – judgment and order set aside – appeal allowed – released forthwith.

This appeal is directed against the judgment and order dated 14.2.2005 passed by Session Judge, Basti in ST No. 29/2001 (State Vs. Ram Niwas and 2 others) whereby the appellants have been convicted and sentenced to undergo rigorous imprisonment for life together with fine of Rs. 2000/- under Section 302/34 IPC, three years rigorous imprisonment and fine of Rs. 1000/- each under Section 326/34 IPC and one year rigorous imprisonment and fine of Rs.500/- each under Section 452/34 IPC. In case of default in the payment of fine, appellants were required to go additional simple imprisonment of six months, learned Session Judge directed that all the sentences shall run concurrently.(Para 2)

3. The facts and circumstances giving rise to this appeal are as under :

(a) In the night of 10/11.10.2000 while Sukaie Prasad (deceased) and his daughter Km. Nisha aged about six years were sleeping in the vberandah of their house in Village Parari Kunwar, District Basti and the complainant Somaie Prsad PW1 was on the roof of the same house after taking his meal, at about about 12 O' clock he saw Ram Niwas and Chhedi Lal of Village Parari Kunwar entering into the verandah of his house where his brother Sukaie Prasad was sleeping and thereafter accused Ram Dutt and Chhedi Lal pulled off the Tahmat by which his brother had covered himself while sleeping and Ram Niwas who was carrying with him a container of acid, poured the same on the body of his brother Sukaie Prasad and his daughter Km. Nisha whereupon they raised an alarm on which PW1 Somaie Prasad, his elder brother Ram Jas and neighbours Sukhram and Moti rushed to the spot along with several other villagers on which the accused started running away from the spot. They were chased by the witnesses but the accused could not be apprehended by them.

Both the injured were taken by the PW1 Somaie Prasad to Faizabad for treatment. The doctor after giving medical aid to Sukaie Prasad referred him for treatment to Lucknow and while PW1 was making arrangement for taking Sukaie Prasad to Lucknow he died in Faizabad outside the hospital premises. The complainant PW1 then took the dead body of the Sukaie Prasad to the police station and handed over the same to the police along with the written report of the occurrence Ex. Ka9.

(b).On the basis of Ex. Ka9 case was registered at crime no.304/2000, under Sections 304, 326 and 452 IPC vide report no. 30 at 16:10 hours on 11.10.2004, chek FIR Ex. Ka10 was prepared and the case was entered into the GD. The carbon copy of the relevant GD entry has been brought on record as Ex. Ka11. Enmity emanating from civil litigation between the parties which was pending for the last four years was stated to be the motive behind the commission of murder of Sokaie Prasad by the appellants.

(c).The Investigating Officer of the case Sri Harish Chandra, PW8, SO Sonhar, District Basti took the cadaver of the deceased in his custody and after holding the inquest he prepared inquest report Ex. Ka12 and sent the dead body of Sukaie Prasad for post mortem along with relevant papers, namely letters addressed to CMO and RI, photo nash and sample of seal etc. The Investigating Officer PW8 prepared the site plan of the place of occurrence which is Ex. Ka23 and collected the prescriptions relating to the treatment of deceased Sukaie Prasad from Faizabad Hospital where he was admitted for treatment immediately after the occurrence which have been brought on record as Ex. Ka13, Ka Ex. Ka18, Ex. K20 and Ex. Ka21 and his injury report Ex. Ka15. The Investigating Officer collected the prescription of Km. Nisha from District Hospital, Faizabad which is Ex. Ka19. The Investigating Officer also took into his possession the burnt and semi burnt clothes of the deceased and the injured person and prepared recovery memo Ex. Ka25. After completing the investigation, he submitted charge sheet against all the accused under Sections 302/34 IPC, 326/34 and 452/34 IPC before the CJM, Basti.

(d).Since the offence under Section 302 IPC mentioned in the charge sheet against the appellants was triable exclusively by the Court of Session, he committed the case for the trial of the accused to Session Court where it was registered as ST No. 29/2001 (State Vs. Ram Niwas and 2 others).

(e).Learned Session Judge, Basti framed charge
against the appellants under Section 302/34, 326/34 and 452/34 IPC. The accused denied the charges framed against them and claimed trial.

(f).The prosecution in order to prove its case againstthe accused examined as many as eight witnesses, of whom complainant Somaie Prasad PW1 injured witness Km. Nisha PW2 are witnesses of fact while the remaining witnesses PW3 Keshav Prasad, PW4 K.M. Gupta, PW5 Dr. S.P. Rai PW6 Dr. Ramesh Chandra, PW7 Dr. R. Dwivedi and PW8 Harish Chandra formal witnesses. The documentary evidence adduced by the prosecution has been referred to in the impugned judgment and the same need not be reproduced again. (g) All the three accused in their statements recorded under Section 313 Cr.P.C. denied the prosecution case and alleged false implication due to civil dispute between the parties. The defence examined Sukhram and Moti as DW1 and DW2.(Para 3)

Held :(Para 12-13)

1.In the present case the incident had taken place at mid night inside the verandah of the house of the deceased where he was sleeping with his daughter and his brother Somaie Prasad was on the roof of his house. Hence the only natural witness who could be present to see the assault were the persons present in the house. At that time no outsider can be expected to have come because attack was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness unless he had some animus with the accused. In the present case considering the previous enmity between the complainant and the appellants between whom civil litigation was pending is admitted to PW1. Thus it cannot be said that PW1

had neither any animus with the accused nor he had direct interest in seeing the appellants who were litigating with him and his family members before the Civil Court are convicted. Moreover his presence at the time of the incident does not appear to be natural. Even if he was present at the time of the incident in the house of the deceased the occurrence which had taken place in the verandah of the house could not have been witnessed by him from it's roof. The aforesaid fact stands corroborated from the site plan of the place of occurrence Ex. Ka11. For ascertaining the material fact whether PW1 Somaie Prasad was present in the house at the time of the incident, we consider it proper to analyse the evidence of PW2 Km. Nisha. PW2 has admitted in her evidence that there was no source of light available at the time of the incident. PW2 however in her examination in Chief stated that she had
recognized the accused as appellants in the moon light. PW2 on page 31 of the paper book in her crossexamination she deposed that PW1 Somale Chacha has got a fertilizer shop at Bharatiya crossing and he also performs worship on Krishna Janamashthami by installing statue of Lord Krishna on the said crossing. On the date of the incident worship of Lord Krishna was organized at Bhararіya crossing and her elder sister etc., had gone to participate in the worship and rest of the family members had stayed back. She then hastened to add that Shiv Shankar and Ram Jas(bade dada) were also in the house along with PW1 and her father w hile rest of her family members had gone to see the fair. She further deposed on the same page that Shiv Shankar and Ram Jas had taken her and her father after the occurrence for treatment to Faizabad. Somaie chacha PW1 had also reached at Faizabad Hospital.

2.The facts stated by PW2 in her cross-examination clearly indicate that although Somaie Pal was not present in the deceased's house at the time of the incident and was performing some pooja at the Bhararіya crossing where he had his own fertilizer shop and upon coming to know about the incident he had rushed to the District Hospital Faizabad, where PW2 and her father had been taken by Shiv Shankar and Ram Jas for treatment. Thus the Claim of PW1 regarding his presence at the place of the incident at the time of occurrence and his having taken PW2 and her injured father Sokaie Prasad to the hospital stands falsified from the evidence of PW2 and hence no reliance can be placed on his evidence. Now we are left the evidence of PW2 Km. Nisha alone who had received acid burn injuries in the incident and whose presence at the place of incident cannot be doubted. Although she is a child witness but she was found by the trial Court competent to depose and hence her evidence can be relied on as basis of conviction provided her evidence is found to be reliable and there is no likelihood of her being tutored. It has been argued by the learned counsel for the appellants that the statement of PW2 cannot be relied upon for the purpose of convicting the appellants because PW2 had failed to nominate the appellants as accused before the Investigating Officer in her statement recorded under Section 161 Cr.P.C., and her act of nominating the appellants as the persons who had committed the offence for the first time in her evidence recorded before the trial Court was clearly a material improvement made by her in her evidence tendered before the trial Court and also on the ground that it was not possible for her to have recognized the accused as there was no source of light available at place of occurrence at the time of the incident. It is true that PW2 did not disclose the names of the persons who had committed the offence to the Investigating Officer when her statement was recorded by him under Section 161 Cr.P.C., however when she was confronted with her statement recorded under Section 161 Cr.P.C., in her cross-examination she deposed that she had disclosed the names of all the three accused to Daroga Ji and no one had informed her that Daroga Ji had not mentioned the names of the accused in her statement. The suggestion given by the defence cousel to her that she was naming the appellants as accused on being instructed to do was denied by her and she stated that all the three accused were known to her since before the incident and she had nominated them as accused not on account of any tutoring or prompting. The Investigating Officer of this case PW8 Harish Chandra however categorically stated in his cross-examination on page 50 of the paper book that PW2 Km. Nisha had not disclosed to him the names of the accused in her statement recorded under Section 161 Cr.P.C. We do not find any reason to disbelieve the statement of PW8 Harish Chandra on the aforesaid point. More so when he had mentioned the names of the appellants as accused in the statement of PW1 recorded by him under Section 161 Cr.P.C. There is no suggestion on behalf of the prosecution that the Investigating Officer was either biased or had not

investigated the matter fairly. Thus we do not find any reason to accept the statement made by PW2 in her cross examination that although she had disclosed the names of the appellants as accused to the Investigating Officer he did not mention the same in her statement.

While examining the issue whether evidence of a witness is liable to be rejected merely on account of the fact that accused was not named in the statement made before the police under Section 161 Cr.P.C., the Apex Court in the case of Ashok Debbarma@Achak Debbarma(supra) has observed as hereunder:

"the mere fact that the appellant was not named in the statement made before the police under Section 161 Cr.P.C., and due to this omission, the evidence of PW10 and PW13 tendered in the Court is unreliable, cannot be sustained. Statements made to the police during investigation were not substantive piece of evidence and the statements recorded under Section 161 Cr.P.C., can be used only for the purpose of contradiction and not for corroboration. In our view, if the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded under Section 161 Cr.PC. The police officer recorded statements of witnesses in an incident where 15 persons lost their lives, 23 houses were set ablaze and large number of persons were injured. PW10 lost his real brother and PW13 lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who were all the miscreants and their names. The witnesses may be knowing the persons by face, not their names. Therefore, the mere fact that they had not named the accused persons in Section 161 statement, at that time,that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy.

The legal proposition enunciated by the Apex Court in the case of Ashok Debbarma@Achak Debbarma(supra) that "mere fact that accused is not named in the statement made before the police under Section 161 Cr.P.C., will not render the evidence of such witness unreliable provided his evidence is found to be reliable and creditworthy", cannot be disputed but whether under the facts and circumstances of the present case can the evidence of PW2 be termed as unblemished. It is proved from the evidence of PW1 that there was enemity between the complainant and his family members and the appellants arising out a land dispute with regard to which the parties were litigating before the Civil and Revenue Courts and the possibility of the PW1 falsely implicating the appellants in the present case with the object of gaining an upper hand in the civil litigation and as such his having a direct interest in seeing that the appellants are convicted cannot be ruled out. The inordinate delay in lodging the FIR which the prosecution has failed to explain satisfactorily is another circumstance which gives rise to an inference that the prosecution case as spelt out in the FIR was concocted after due deliberations with the object of falsely implicating the appellants. The claim of PW1, as we have already noted, of his being the eye witness of the occurrence stood falsified from the evidence of PW2 itself and hence no reliance can be placed on the FIR version which is the brain child of PW1 and as far as PW2 is concerned there is no dispute about the fact that she had failed to take the names of the appellants as the person who had assaulted her and her father in her statement recorded under Section 161 Cr.P.C. This fact was corroborated by PW8 Harish Chandra, Investigating Offcer of this case and his cross-examination and in the absense of source of any light at the place of the incident at the time of the occurrence and the facts deposed by her in her evidence recorded before trial Court to the effect that before the occurrences she was sleeping , it was not possible for her to have either seen the appellants entering into varandah and pouring acid on her and her father as she would have woken up only after few drops of acid had fallen on her. In the background of the aforesaid facts the possibility of the statement made by PW2 that the offence of pouring acid on her and her father was committed by the appellants, for the first time in her evidence tendered before the trial Court being tutored cannot be ruled out. The FIR was lodged by PW1 nominating the appellants with whom he had animosity as accused whose testimony does not inspire any confidence. PW2 did not disclose the names of the appellants as accused to the Investigating Officer apparently because she had not been able to recognize the assailants due to darkness. The possibility of PW2 being tutored by PW1, who was in a position to dominate and influence her, being her real uncle, to name the appellants as accused when she came to give her evidence before the trial Court cannot be ruuled out. In view of the above, we do not find the evidence of PW2 reliable and trustworthy.

Thus in view of the foregoing discussion, we are unable to uphold the judgment and order dated 14.2.2005 passed by Session Judge, Basti convicting and sentencing the appellants, under Sections 302/34, 326/34 and 452/34 IPC. This appeal accordingly succeeds and is **allowed**. The impugned judgment and order is hereby set aside. The appellants are in jail. They shall be released forthwith from the jail unless they are wanted in any other case.

However, keeping in view the provisions of Section 437-A Cr.P.C., appellants are directed to forthwith furnish a personal bond in the sum of Rs. One lakh and two reliable sureties in the like amount before the trial Court, (which shall be effective for a period of six months) to the effect that in the event of filing of Special Leave Petition against the Instant Judgment or for grant of leave, the appellants on receipt of notice thereof shall appear berfore the Hon'ble Supreme Court.

Case Law discussed:

1.Mst. Dalbir Kaur v. State of Punjab, 1976 Cri LJ 418 (SC) — paras 10–11
2.Ashok Debbarma @ Achak Debbarma v. State of Tripura, (2014) 4 SCC 747 — para 13

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. Heard Sri V.K. Sharma Advocate assisted by Sri K.C. Yadav, learned counsel for the appellants and Sri Saghir Ahmad and J.K. Upadhyay, learned AGAs in opposition.

2. This appeal is directed against the judgment and order dated 14.2.2005 passed by Session Judge, Basti in ST No. 29/2001 (State Vs. Ram Niwas and 2 others) whereby the appellants have been convicted and sentenced to undergo rigorous imprisonment for life together with fine of Rs. 2000/- under Section 302/34 IPC, three years rigorous imprisonment and fine of Rs. 1000/- each under Section 326/34 IPC and one year rigorous imprisonment and fine of Rs.500/- each under Section 452/34 IPC. In case of default in the payment of fine, appellants were required to go additional simple imprisonment of six months, learned Session Judge directed that all the sentences shall run concurrently.

3. The facts and circumstances giving rise to this appeal are as under :

(a) In the night of 10/11.10.2000 while Sukaie Prasad (deceased) and his daughter Km. Nisha aged about six years were sleeping in the vberandah of their house in Village Parari Kunwar, District Basti and the complainant Somaie Prsad PW1 was on the roof of the same house after taking his meal, at about about 12 O' clock he saw Ram Niwas and Chhedi Lal of Village Parari Kunwar entering into the verandah of his house where his brother Sukaie Prasad was sleeping and thereafter accused Ram Dutt and Chhedi Lal pulled off the Tahmat by which his brother had covered himself while sleeping and Ram Niwas who was carrying with him a container of acid, poured the same on the body of his brother Sukaie Prasad and his daughter Km. Nisha whereupon they raised an alarm on which PW1 Somaie Prasad, his elder brother Ram Jas and neighbours Sukhram and Moti rushed to the spot along with several other villagers on which the accused started running away from the spot. They were chased by the witnesses but the accused could not be apprehended by them. Both the injured were taken by the PW1 Somaie Prasad to Faizabad for treatment. The doctor after giving medical aid to Sukaie Prasad referred him for treatment to Lucknow and while PW1 was making arrangement for taking Sukaie Prasad to

Lucknow he died in Faizabad outside the hospital premises. The complainant PW1 then took the dead body of the Sukaie Prasad to the police station and handed over the same to the police along with the written report of the occurrence Ex. Ka9.

(b) On the basis of Ex. Ka9 case was registered at crime no. 304/2000, under Sections 304, 326 and 452 IPC vide report no. 30 at 16:10 hours on 11.10.2004, chek FIR Ex. Ka10 was prepared and the case was entered into the GD. The carbon copy of the relevant GD entry has been brought on record as Ex. Ka11. Enmity emanating from civil litigation between the parties which was pending for the last four years was stated to be the motive behind the commission of murder of Sokaie Prasad by the appellants.

(c) The Investigating Officer of the case Sri Harish Chandra, PW8, SO Sonhar, District Basti took the cadaver of the deceased in his custody and after holding the inquest he prepared inquest report Ex. Ka12 and sent the dead body of Sukaie Prasad for post mortem along with relevant papers, namely letters addressed to CMO and RI, photo nash and sample of seal etc. The Investigating Officer PW8 prepared the site plan of the place of occurrence which is Ex. Ka23 and collected the prescriptions relating to the treatment of deceased Sukaie Prasad from Faizabad Hospital where he was admitted for treatment immediately after the occurrence which have been brought on record as Ex. Ka13, Ka Ex. Ka18, Ex. K20 and Ex. Ka21 and his injury report Ex. Ka15. The Investigating Officer collected the prescription of Km. Nisha from District Hospital, Faizabad which is Ex. Ka19. The Investigating Officer also took into his possession the burnt and semi burnt clothes of the deceased and the injured person and prepared recovery memo Ex. Ka25. After completing the investigation, he submitted charge sheet against all the accused under Sections 302/34 IPC, 326/34 and 452/34 IPC before the CJM, Basti.

(d) Since the offence under Section 302 IPC mentioned in the charge sheet against the appellants was triable exclusively by the Court of Session, he committed the case for the trial of the accused to Session Court where it was registered as ST No. 29/2001 (State Vs. Ram Niwas and 2 others).

(e) Learned Session Judge, Basti framed charge against the appellants under Section 302/34, 326/34 and 452/34 IPC. The accused denied the charges framed against them and claimed trial.

(f) The prosecution in order to prove its case against the accused examined as many as eight witnesses, of whom complainant Somaie Prasad PW1 injured witness Km. Nisha PW2 are witnesses of fact while the remaining witnesses PW3 Keshav Prasad, PW4 K.M. Gupta, PW5 Dr. S.P. Rai PW6 Dr. Ramesh Chandra, PW7 Dr. R. Dwivedi and PW8 Harish Chandra formal witnesses. The documentary evidence adduced by the prosecution has been referred to in the impugned judgment and the same need not be reproduced again.

(g) All the three accused in their statements recorded under Section 313 Cr.P.C. denied the prosecution case and alleged false implication due to civil dispute between the parties. The defence examined Sukhram and Moti as DW1 and DW2.

4. The learned Session Judge, Basti after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, both oral as well as documentary, convicted the appellants and awarded aforesaid sentences to them.

5. Sri VK Sharma, learned counsel for the appellants submitted that the incident having been taken place at mid night and admittedly there being no source of any light at the place of occurrence and lodging of the FIR after an inordinate and unexplained delay of sixteen hours and ten minutes leads to only one inference that the prosecution case as spelt out in the FIR was concocted and fabricated by the prosecution after due deliberations and consultation with the object of falsely implicating the appellants in this case due to previous enmity between the parties which emanated from a civil dispute between them. He also submitted that of the two eye witnesses examined by the prosecution for proving the complicity of the appellants in the commission of the crime in question, the presence of PW1 complainant Somaie Prasad at the place of incident is highly doubtful from the perusal of evidence of the PW2 itself. Even if it assumed for the sake of arguments that PW1 was present in the house of the deceased, it was impossible for him either to have witnessed the accused entering into the verandah where deceased was sleeping with his daughter or their pouring acid on them, from the place on the roof of the house where he according to his own evidence was present at the time of the incident. Learned counsel for the appellants has referred to the site plan of the incident as Ex. Ka23 in support of his aforesaid argument.

6. He next submitted that as far as the evidence of PW2 Km. Nisha on the point of her having seen and recognized the accused who had entered into the verandah where she was sleeping with her father and had after removing the tahmat of the deceased with which he had covered himself while was sleeping poured acid on them, as the appellants is concerned, the same amounts to a material improvement made by her in her statement recorded before the trial Court as she had not disclosed the names of the appleants as accused in her statement recorded under section 161 Cr.P.C. to the investigating Officer and this fact has been admitted by the investigating Officer also in his cross-examination on page 51 of the paper book and hence the evidence of PW2 is also liable to be excluded from consideration for the purpose of convicting the appellants. He next submitted that there was absolutely no occasion for appellants nos. 1 and 2 Ram Niwas and Chhedi Lal who are the real brothers and residents of village Deorahiya which is at a distance of about 10 kms from the place of the incident to be present at the place of incident at the time of the occurrence and they have being implicated by the complainant in the present case on the basis of absolutely false and concocted allegations with the object of gaining an upper hand in the civil litigation which is pending between the appellant nos. 1 and 2 and the complainant's family pertaining to land. He also submitted that although according to the FIR version itself, upon hearing the noise raised by the victims large number of villagers including the neighbours of the deceased, Sukhram and Moti had arrived at the place of incident and seen the accused running away from the place of incident but the prosecution failed to produce even a single independent witnesses and produced PW1 and PW2

alone to prove the prosecution case, who are the real brother and daughter of the deceased hence highly interested and partisan and no reliance can be placed on their evidence for the purpose of upholding the appellants' conviction. He lastly submitted that such being the state of evidence, the recorded conviction of the appellants and the sentences awarded to them by the trial Court cannot be sustained and are liable to be set aside.

7. Per Contra Sri Sageer Ahmad, learned AGA submitted that the delay of about sixteen hours and ten minutes in lodging the FIR has been satisfactorily explained by PW1 in the FIR as well as in his testimony recorded before the trial Court. Both the prosecution witnesses have fully corroborated the prosecution Case on all material aspects. The failure of the investigating Officer to mention the names of the appellants as accused in the statement of PW2 recorded by him under Section 161 Cr.P.C., would not render her testimony unreliable or untrustworthy in view of the fact that she in her cross-examination on page 32 of the paper book has categorically deposed that she had disclosed the names of all the three accused to the Investigating Officer but no one had informed her that their names were not mentioned by him in her statement. Sri Sageer Ahmad next submitted if even for the sake of arguments it is presumed that PW1 could not have seen the incident, considering the place on the roof of the house where he claimed himself to be present at the time of the Occurrence but his evidence on the point his having seen the accused retreating from the place of the incident cannot be doubted. Sri Sageer Ahmad went a step further and submitted that even if the contention of learned counsel for the appellants that PW1 was not present at all at the time of occurrence is accepted, even then there is unimpeachable and sterling evidence of PW1, who had received injury in the occurrence and whose presence at the place of occurrence cannot be doubted at all, incriminating the appellants and providing their complicity in the commission of the crime in question. The finding of guilt recorded by learned Session Judge in the impugned judgment against the appellants is based on cogent and reliable evidence and the sentences awarded to them are supported by relevant considerations. The impugned judgment and order do not suffer from any illegality or infirmity warranting any interference by the Court.

8. We have very carefully heard learned counsel for the parties and scanned the entire lower Court record.

9.FIR: As per the prosecution story the incident had taken place in the mid night of 10/11/10.2000. The written report of the incident Ex. Ka9 was sribed by one Ram Dheeraj on the dictation of Somale Prasad and given at police station Parashuram Pur, District Basti on 11.10.2000 at about 16:10 hours. It has been deposed by PW1 in his examination in Chief recorded before the trial Court that since the condition of his brother and daughter Km. Nisha had become very serious he had taken both of them for treatment to Faizabad Hospital and had got them admitted there. The doctor had adviced him to take his brother for treatment to Lucknow but before he could be transported to Lucknow he died in Faizabad Hospital. Thereafter he had taken the dead body of his brother to the police station Parashuram Pur and had got the report of the incident scribed by his brother Ram Dheeraj on the paper purchased by him from a shop in Parasnath Bazar. The written report was given by him at police station Parashuram Pur on the basis of which case was registered against the accused. On Page 25 of the paper book PW1 in his cross-examination he has deposed

that the doctors had referred his brother for treatment to Lucknow between 8am-9am but before he could arrange necessary transport for taking his brother to Lucknow he died at about 12 noon.

He denied the suggestion given to him by the defence that the doctors had adviced him to take his brother to Lucknow between 4am-5am and at that time his brother was fully consious and was loudly proclaiming that the complainant and his brother Shiv Shanker had poured acid on him.

Although there is no material on record indicating the distance between village Parashuram Pur and District Hospital Faizabad but on the persual of the testimony of PW1 it transpires that the explanation for delay in lodging the FIR furnished by him is absolutely vague and according to his own showing the doctor had advised him between 8am-9am to take his brother to Lucknow. There is no satisfactory explanation for the delay of about 8 hours on the part of the complainant in lodging the FIR of the incident after the doctor who had treated his brother at District Hospital Faizabad had referred him for further treatment to Lucknow between 8am-9am on 11.10.2000. The vague explanation furnished by PW1 in his evidence for the delay in lodging the FIR that while he was making arrangements for transporting his brother to Lucknow he died at about 12 noon, does not appear to be convincing and moreover there is no whisper of any explanation for his not lodging the FIR thereafter till 4:10 PM. There is further no explanation for the failure of the other two brothers of the deceased, Shiv Shanker and Ram Jas who according to the prosecution case were also present at the place of incident and had accompanied both the injured to the hospital, for having not intimated the police about the incident promptly. Under the facts and circumstances of the present case, we find that the prosecution has not been able to come up with any satisfactorily explanation for the inordinate delay in lodging the FIR. Delay in lodging the FIR has deprived the FIR of the advantage of spontaneity and the possibility of the prosecution utilizing the intervening period for concocting and embellishing the prosecution case cannot be ruled out. It is true that in the normal course of human conduct where in an incident two members of a family have received serious acid burn injuries the first priority of the family members would be to secure best medical treatment for them so that their lives are saved rather than immediately rushing to the police station for lodging the FIR. Even if some latitude is given to the prosecution considering the fact that two persons of the complainant's family had received burn injuries in the incident, naturally his first priority was to provide medical treatment to them promptly, even in that case delay of almost 8 hours from the time at which the doctors at Faizabad had referred the brother of the deceased for treatment to Lucknow on the part of the complainant and his other brothers in lodging the FIR is not justified.

As far as the **issue of motive** in this case is concerned, there is documentary evidence on record showing that civil litigation was pending between complainant's family and the appellants arising from a land dispute before the Civil Court for the last four years preceding the date of the incident. PW1 claimed that on account of the aforesaid civil litigation the appellants were inimical towards him and his family members and with the object of gaining an upper hand in the civil litigation the appellants had committed the murder of his brother. For proving the existence of civil litigation between the parties the prosecution has brought on record certified copy of the

plaint of the suit no. 1025/1992 filed by Ram Dutt, appellant no. 3 against the brother of the complainant for cancellation of the sale deed, written statement filed by the complainant and his brother in the aforesaid suit Ex. Ka5 and the judgment passed in suit no. 1025/1992 by which the aforesaid suit was dismissed, the sale deed executed by Sumarin in favour of the complainant and his brother, copy of the sale deed executed by Sumarin in favour of the accused, certified copy of the mutation application, certified copy of the objection in mutation application, order of dismissal of the mutation application and written report submitted in the mutation case. All the aforesaid documents were proved by PW1 as Ex. Ka3, Ex. Ka4, Ex. Ka5, Ex. Ka6. Ex.Ka7, Ex. Ka8, and Ex. Ka9. Thus as far as the motive in this case is concerned it can safely be presumed that both the sides were inmical towards each other due to the civil litigation between them and had motive to harm each other either by eliminating the opponents or falsly implicating them in a criminal case, as enimity is a double edged sword. However motive looses significance in a case of direct evidence and if the prosecution is able to prove it's case by eye witnesses account of which is trustworthy, unimpeachable, reliable and inspires confidence, the failure of the prosecution to prove motive will not render the prosecution case liable to be disbelieved.

As far as the issue **relating to the tim**e at and the **manner in which the assault** was made are concerned, the same have not been challanged by learned counsel for the appellants. The only issue raised by him is that although the offence was committed by someone else the appellants have been falsly implicated in this case.

The next issue which arises for our consideration is with regard to the **credibility of the prosecution witnesses**. Learned counsel for the appellants has castigated the reliability of the two eye witnesses produced by the prosecution at the trial on the ground that both are highly interested and partisan witnesses being the real brother and the daughter of the deceased, PW2 further being a child witness vulnerable to tutoring and hence no reliance can be placed on their testimony for the purpose of convicting the appellants. Learned counsel for the appellants has also argued that the incident having taken place in the darkness of night and there being no source of any light at or near the place of the incident it was not possible either for the PW1 or PW2 to have recognized the assailants. The fact that PW2 had not been able to identify the perpetrators of the crime is evident from the fact she had failed to disclose the names of the appellants as the persons who had poured acid on her and her father in her statement recorded under Section 161 Cr.P.C., and had nominated the appellants as accused for the first time in her statement recorded during the trial. As regards PW1, learned counsel for the appellants has submitted that from the persual of the evidence of PW2 itself, it transpires that PW1 was not present at place of the incident and even if he was present in the house of the deceased, considering the fact that he was on the roof of the house in the verandah whereof the occurrence had taken place, it was not possible for him to have witnessed the same.

Sri Sageer Ahmad, learned AGA submitted that mere fact that the appellants were not named in the statement made by PW2 before the police officer under Section 161 Cr.P.C., the evidence of PW2 tendered in the Court cannot be termed as unreliable. In support of his aforessaid

submission he has placed reliance upon the paragraph 22 of the Apex Court Judgmenet reported in ***(2014) 4 Supreme Court Cases 747 (Ashok Debbarma @ Achak Debbarma.***

10. Before proceeding to test the veracity of the facts stated by the two eye-witness and their credibility on the touch stone of the submissions made by the learned counsel for the appellants, we consider it proper to examine the law on the issue of interested witnesses:

In ***Mst. Dalbir Kaur v. State of Punjab 1976 Cr LJ 418(SC)*** following observations were made:

(i) Interested witness:- Relatives who are natural witnesses are not interested witnesses and their testimony can be relied upon.

(i)The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused is somehow or the other is convicted either because he had some animus with the accused or the some other reason. In the reported case the incident took place at mid night inside the house, the only natural witnesses who could be present to see the assault were the persons present in the house at that time. No outsider can be expected to have come at that time because the attack was sudden. Moreover a close relative who is very natural witness cannot be regarded as an interested witness.

Thus what follows from the reading of the aforesaid authorities is that the evidence of a relative cannot be discarded merely on account of his being interested or related with the deceased.

11. As regards interested witness the Hon'ble Apex Court in the case of ***Mst. Dalbir Kaur v. State of Punjab 1976 Cr. LJ 418 (SC)*** has held that relatives who are the natural witnesses are not interested witnesses and their testimony can be relied upon by the Apex Court and the same judgment observed that the term interested "postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other is convicted either because he had some animus with the accused or for some other reason".

12. In the present case the incident had taken place at mid night inside the verandah of the house of the deceased where he was sleeping with his daughter and his brother Somaie Prasad was on the roof of his house. Hence the only natural witness who could be present to see the assault were the persons present in the house. At that time no outsider can be expected to have come because attack was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness unless he had some animus with the accused. In the present case considering the previous enmity between the complainant and the appellants between whom civil litigation was pending is admitted to PW1. Thus it cannot be said that PW1 had neither any animus with the accused nor he had direct interest in seeing the appellants who were litigating with him and his family members before the Civil Court are convicted. Moreover his presence at the time of the incident does not appear to be natural. Even if he was present at the time of the incident in the house of the deceased the occurrence which had taken place in the verandah of the house could not

have been witnessed by him from it's roof. The aforesaid fact stands corroborated from the site plan of the place of occurrence Ex. Ka11. For ascertaining the material fact whether PW1 Somaie Prasad was present in the house at the time of the incident, we consider it proper to analyse the evidence of PW2 Km. Nisha. PW2 has admitted in her evidence that there was no source of light available at the time of the incident. PW2 however in her examination in Chief stated that she had recognized the accused as appellants in the moon light. PW2 on page 31 of the paper book in her cross-examination she deposed that PW1 Somale Chacha has got a fertilizer shop at Bharatiya crossing and he also performs worship on Krishna Janamashthami by installing statue of Lord Krishna on the said crossing. On the date of the incident worship of Lord Krishna was organized at Bharariya crossing and her elder sister etc., had gone to participate in the worship and rest of the family members had stayed back. She then hastened to add that Shiv Shankar and Ram Jas(bade dada) were also in the house along with PW1 and her father while rest of her family members had gone to see the fair. She further deposed on the same page that Shiv Shankar and Ram Jas had taken her and her father after the occurrence for treatment to Faizabad. Somaie chacha PW1 had also reached at Faizabad Hospital.

13. The facts stated by PW2 in her cross-examination clearly indicate that although Somaie Pal was not present in the deceased's house at the time of the incident and was performing some pooja at the Bharariya crossing where he had his own fertilizer shop and upon coming to know about the incident he had rushed to the District Hospital Faizabad, where PW2 and her father had been taken by Shiv Shankar and Ram Jas for treatment. Thus the Claim of PW1 regarding his presence at the place of the incident at the time of occurrence and his having taken PW2 and her injured father Sokaie Prasad to the hospital stands falsified from the evidence of PW2 and hence no reliance can be placed on his evidence. Now we are left the evidence of PW2 Km. Nisha alone who had received acid burn injuries in the incident and whose presence at the place of incident cannot be doubted. Although she is a child witness but she was found by the trial Court competent to depose and hence her evidence can be relied on as basis of conviction provided her evidence is found to be reliable and there is no likelihood of her being tutored. It has been argued by the learned counsel for the appellants that the statement of PW2 cannot be relied upon for the purpose of convicting the appellants because PW2 had failed to nominate the appellants as accused before the Investigating Officer in her statement recorded under Section 161 Cr.P.C., and her act of nominating the appellants as the persons who had committed the offence for the first time in her evidence recorded before the trial Court was clearly a material improvement made by her in her evidence tendered before the trial Court and also on the ground that it was not possible for her to have recognized the accused as there was no source of light available at place of occurrence at the time of the incident. It is true that PW2 did not disclose the names of the persons who had committed the offence to the Investigating Officer when her statement was recorded by him under Section 161 Cr.P.C., however when she was confronted with her statement recorded under Section 161 Cr.P.C., in her cross-examination she deposed that she had disclosed the names of all the three accused to Daroga Ji and no one had informed her that Daroga Ji had not mentioned the names of the accused in her statement. The suggestion given by the defence cousel to her that she was naming the appellants as accused on being instructed to do was denied by her and she stated that all the three accused were known to her since before the incident and she had nominated them as accused not on account of

any tutoring or prompting. The Investigating Officer of this case PW8 Harish Chandra however categorically stated in his cross-examination on page 50 of the paper book that PW2 Km. Nisha had not disclosed to him the names of the accused in her statement recorded under Section 161 Cr.P.C. We do not find any reason to disbelieve the statement of PW8 Harish Chandra on the aforesaid point. More so when he had mentioned the names of the appellants as accused in the statement of PW1 recorded by him under Section 161 Cr.P.C. There is no suggestion on behalf of the prosecution that the Investigating Officer was either biased or had not investigated the matter fairly. Thus we do not find any reason to accept the statement made by PW2 in her cross examination that although she had disclosed the names of the appellants as accused to the Investigating Officer he did not mention the same in her statement.

While examining the issue whether evidence of a witness is liable to be rejected merely on account of the fact that accused was not named in the statement made before the police under Section 161 Cr.P.C., the Apex Court in the case of ***Ashok Debbarma@Achak Debbarma(supra)*** has observed as hereunder:

"the mere fact that the appellant was not named in the statement made before the police under Section 161 Cr.P.C., and due to this omission, the evidence of PW10 and PW13 tendered in the Court is unreliable, cannot be sustained. Statements made to the police during investigation were not substantive piece of evidence and the statements recorded under Section 161 Cr.P.C., can be used only for the purpose of contradiction and not for corroboration. In our view, if the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded under Section 161 Cr.PC. The police officer recorded statements of witnesses in an incident where 15 persons lost their lives, 23 houses were set ablaze and large number of persons were injured. PW10 lost his real brother and PW13 lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who were all the miscreants and their names. The witnesses may be knowing the persons by face, not their names. Therefore, the mere fact that they had not named the accused persons in Section 161 statement, at that time,that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy.

The legal proposition enunciated by the Apex Court in the case of ***Ashok Debbarma@Achak Debbarma(supra)*** that "mere fact that accused is not named in the statement made before the police under Section 161 Cr.P.C., will not render the evidence of such witness unreliable provided his evidence is found to be reliable and creditworthy", cannot be disputed but whether under the facts and circumstances of the present case can the evidence of PW2 be termed as unblemished. It is proved from the evidence of PW1 that there was enemity between the complainant and his family members and the appellants arising out a land dispute with regard to which the parties were litigating before the Civil and Revenue Courts and the possibility of the PW1 falsely implicating the appellants in the present case with the object of gaining an upper hand in the civil litigation and as such his having a direct interest in seeing that the appellants are convicted cannot be ruled out. The inordinate delay in lodging the FIR which the prosecution has

failed to explain satisfactorily is another circumstance which gives rise to an inference that the prosecution case as spelt out in the FIR was concocted after due deliberations with the object of falsely implicating the appellants. The claim of PW1, as we have already noted, of his being the eye witness of the occurrence stood falsified from the evidence of PW2 itself and hence no reliance can be placed on the FIR version which is the brain child of PW1 and as far as PW2 is concerned there is no dispute about the fact that she had failed to take the names of the appellants as the person who had assaulted her and her father in her statement recorded under Section 161 Cr.P.C. This fact was corroborated by PW8 Harish Chandra, Investigating Offcer of this case and his cross-examination and in the absense of source of any light at the place of the incident at the time of the occurrence amd the facts deposed by her in her evidence recorded before trial Court to the effect that before the occurrences she was sleeping , it was not possible for her to have either seen the appellants entering into varandah and pouring acid on her and her father as she would have woken up only after few drops of acid had fallen on her. In the background of the aforesaid facts the possibility of the statement made by PW2 that the offence of pouring acid on her and her father was committed by the appellants, for the first time in her evidence tendered before the trial Court being tutored cannot be ruled out. The FIR was lodged by PW1 nominating the appellants with whom he had animosity as accused whose testimony does not inspire any confidence. PW2 did not disclose the names of the appellants as accused to the Investigating Officer apparently because she had not been able to recognize the assailants due to darkness. The possibility of PW2 being tutored by PW1, who was in a position to dominate and influence her, being her real uncle, to name the appellants as accused when she came to give her evidence before the trial Court cannot be ruuled out. In view of the above, we do not find the evidence of PW2 reliable and trustworthy.

Thus in view of the foregoing discussion, we are unable to uphold the judgment and order dated 14.2.2005 passed by Session Judge, Basti convicting and sentencing the appellants, under Sections 302/34, 326/34 and 452/34 IPC. This appeal accordingly succeeds and is allowed. The impugned judgment and order is hereby set aside. The appellants are in jail. They shall be released forthwith from the jail unless they are wanted in any other case.

However, keeping in view the provisions of Section 437-A Cr.P.C., appellants are directed to forthwith furnish a personal bond in the sum of Rs. One lakh and two reliable sureties in the like amount before the trial Court, (which shall be effective for a period of six months) to the effect that in the event of filing of Special Leave Petition against the Instant Judgment or for grant of leave, the appellants on receipt of notice thereof shall appear berfore the Hon'ble Supreme Court.

(2016) 9 ILRA 1054
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal No.- 1496 Of 2014
&
Criminal Appeal No.- 1542 Of 2014

Shamsad Ali & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellants:
K.K. Tewari, Anoop Kumar Mishra, Nagendra Mohan, Ram Naresh Singh Chauhan

Counsel for the Respondent:
Govt. Advocate

Criminal Appeal–First information report – prompt – not ante-time – injured eye witness – firearm injuries – medico legal examination – postmortem – no overlapping – two type of weapons – ocular evidence and medical evidence – minor contradictions – not material – enmity – double edged weapon – related and interested witnesses – injured witness – presence established – non-examination of independent witness – not fatal – defect in investigation – no benefit to accused – right of private defence – not proved – unlawful assembly – common object – Section 149 I.P.C. – vicarious liability – participation proved – conviction confirmed – appeal dismissed.

Since the above two appeals have arisen from the same judgment, hence, both of them have been heard together and are being decided by this common judgment and order. (Para 1)

The aforementioned two appeals have been preferred against the judgment and order dated 3.11.2014 passed by learned Additional Sessions Judge, Court No.4, Sitapur in Sessions Trial No.653/99 arising out of Case Crime No.136 of 1999 under Sections 147,148,149,307,302,504,506 I.P.C., P.S.Tambour, District Sitapur.(Para 2)

Initially, ten accused persons were facing trial out of which accused Abid Ali, son of Sharafat Ali; accused Hafiz Ali, son of Liaqat Ali and accused Shaukat Ali, son of Badal died during pendency of trial and their cases abated. Further during pendency of appeal, appellant no.4 Mustakeem, son of Bakreedi also died and his appeal stood abated vide order dated 8.9.2016 passed by this Court.(Para 3)

Learned trial court has convicted and sentenced the accused-appellants (1) Sharafat Ali, son of Liaqat Ali; (2) Shamsad Ali; son of Liyaqat Ali; (3) Israr, son of Sujat Ali; (4) Abdul Maliq, son of Mohd. Umar; (5) Mustakeem, son of Bakreedi; (6) Asfaq Ali; son of Buniyad Ali; and (7)
Amin, son of Mohd.Bux as under :-

(a)under Section 302 I.P.C. read with 149 I.P.C. imprisonment for life and fine of Rs.8000/- each, in default two years' imprisonment;
(b)under Section 307 I.P.C. read with 149 I.P.C. rigorous imprisonment for ten years and fine of Rs.5000/- each, in default one years' imprisonment.
(c)under Section 148 I.P.C. rigorous imprisonment for two years and fine of Rs.2000/- each, in default four months' imprisonment.(Para 4)

Held: (Paras -66-69)
1.In the present case in the first information report PW-1 Naseem has named all the accused armed with firearms in the first information report. In the evidence also PW-1 Naseem and PW-2 Nisar, who were also injured in the incident, named all the accused and assigned them the role of firing. As has been held in the earlier part of the judgment defence version of self defence has failed, prosecution has successfully established the specific role of all the accused who have formed an unlawful assembly at the place of occurrence. It is proved by the evidence of PW-1 Naseem and PW-2 Nisar that accused have formed unlawful assembly near the place of occurrence. They all were present there. When the deceased Dunna came he was assaulted by the firearms by the accused in furtherance of the common object of the unlawful assembly.
2.Hence, we are of the considered view that the learned trial court has rightly held the accused guilty for the offence of committing murder of Dunna and causing injuries to Naseem and Nisar. Prosecution has successfully proved the charges against the accused appellants.

3.We are of the considered view that appeals are devoid of merit and are liable to be dismissed and are accordingly **dismissed**. Impugned judgment and order of conviction and sentence is confirmed. Accused appellants are in jail. They shall serve out the sentence as imposed by the learned trial court.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.

Case Law discussed:
1.Gangabhavani v. Rayapati Venkat Reddy, 2013 Cri LJ 4618 (SC) — para 20
2.Laxmibai (Dead) through L.Rs. v. Bhagwantbuva, AIR 2013 SC 1204 — para 20
3.Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181 — para 20
4.Gian Chand v. State of Haryana, JT 2013 (10) SC 515 — para 20
5.Sadhu Saran Singh v. State of U.P., 2016 Cri LJ 1908 — paras 22, 40, 51
6.Darbara Singh v. State of Punjab, (2012) 10 SCC 476 — para 22
7.Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450 — para 25
8.Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422 — para 34
9.Upendra Pradhan v. State of Orissa, (2015) 11 SCC 124 — para 47
10.State of Rajasthan v. Manoj Kumar, (2014) 5 SCC 744 — para 43
11.Bhanwar Singh v. State of M.P., 2010 (4) SCC (Cri) 378 — para 44
12.State of Maharashtra v. Ram Lal Devappa Rathod, (2016) 2 SCC (Cri) 638 — para 62
13.State of U.P. v. Kishanpal, (2008) 16 SCC 73 — para 62
14.Amerika Rai v. State of Bihar, (2011) 4 SCC 677 — para 62
15.Masalti v. State of U.P., AIR 1965 SC 202 — para 62
16.Susanta Das v. State of Orissa, (2016) 4 SCC 371 — paras 64–65
17.Ajit Savant Majagvai v. State of Karnataka, (1997) 7 SCC 110 — para 64
18.Rajendran v. State of Tamil Nadu, (2004) 10 SCC 689 — para 64
19.Bishna v. State of West Bengal, (2005) 12 SCC 657 — para 64

(Delivered by Hon'ble Anil Kumar Srivastava-II, J.)

(1) Since the above two appeals have arisen from the same judgment, hence, both of them have been heard together and are being decided by this common judgment and order.

(2) The aforementioned two appeals have been preferred against the judgment and order dated 3.11.2014 passed by learned Additional Sessions Judge, Court No.4, Sitapur in Sessions Trial No.653/99 arising out of Case Crime No.136 of 1999 under Sections 147,148,149,307,302,504,506 I.P.C., P.S.Tambour, District Sitapur.

(3) Initially, ten accused persons were facing trial out of which accused Abid Ali, son of Sharafat Ali; accused Hafiz Ali, son of Liaqat Ali and accused Shaukat Ali, son of Badal died during pendency of trial and their cases abated. Further during pendency of appeal, appellant no.4 Mustakeem, son of Bakreedi also died and his appeal stood abated vide order dated 8.9.2016 passed by this Court.

(4) Learned trial court has convicted and sentenced the accused-appellants (1) Sharafat Ali, son of Liaqat Ali; (2) Shamsad Ali; son of Liyaqat Ali; (3) Israr, son of Sujat Ali; (4) Abdul Maliq, son of Mohd. Umar; (5) Mustakeem, son of Bakreedi; (6) Asfaq Ali; son of Buniyad Ali; and (7) Amin, son of Mohd.Bux as under :-

a. under Section 302 I.P.C. read with 149 I.P.C. imprisonment for life and fine of Rs.8000/- each, in default two years' imprisonment;

b. under Section 307 I.P.C. read with 149 I.P.C. rigorous imprisonment for ten years and fine of Rs.5000/- each, in default one years' imprisonment.

c. under Section 148 I.P.C. rigorous imprisonment for two years and fine of Rs.2000/- each, in default four months' imprisonment.

(5) All the sentences were directed to run concurrently.

(6) According to the prosecution version, on 14.7.1999, Dunna, who was uncle of complainant Mohd. Naseem, was coming to his Village from Tambour. At about 7:30 a.m. when he reached near the house of Mohd. Husain, son of Anwar, then accused Sharafat Ali, armed with licensed gun; Hafiz Ali; Shaukat Ali; Israr; Shamsad Ali; Abdul Maliq; Mustakeem Abid Ali, Asfaq Ali; Amin and three-four unknown persons who were armed with unlawful arms, 'Lathi' and 'Danda' started firing upon Dunna. On hearing fire arm sound, complainant Mohd. Naseem and his brother Nisar Ahmad reached at the spot. Then, accused also fired upon them. Dunna died on the spot due to fire arm injuries while complainant Naseem and his brother Nisar received fire arm injuries. There was an atmosphere of fear due to firing.

(7) First information report of the incident was lodged by complainant Naseem on 14.7.1999 at 8:30 a.m. at P.S. Tambour which was registered at case crime no.199/1999 under Sections 147, 148, 149, 307, 302 I.P.C. and 7 Criminal Law Amendment Act. Investigation was

handed over to Station House Officer V.K.Misra. Later on, a letter for medico-legal examination ('Chitthi Mazroobi) was handed over to Mohd. Naseem and Nisar who were medically examined at C.H.C. Tambour. Inquest proceedings were conducted on 14.7.1999 at 10:30 a.m. Dead body was sealed and sent for postmortem. Site plan was prepared. Blood stained and plain earth was collected from the spot. Statements of witnesses were recorded. Postmortem of the body of deceased Dunna was conducted on 15.7.1999 at 2:30 p.m. The recovered articles were sent to Forensic Science Laboratory. Subsequently, after investigation, charge sheet was submitted against the accused. Accused were charged for offences punishable under Sections 148, 302/149, 307/149 I.P.C., who denied the charges and claimed to be tried.

(8) In order to prove its case, prosecution has produced P.W.1 Mohd.Naseem (injured eye witness); P.W.2 Nisar Umar (injured eye witness); P.W.3 Dr. Anjani Kumar Dubey, who has conducted the medico-legal examination of the injured on 14.7.1999. According to Dr.Dubey, he has examined injured Nisar on 14.7.1999 at 8:00 a.m. and found the following injuries :

1. Firearm injuries on Rt. shoulder size 1/8 x 1/8 cm Margins inverted and Blackened.

2. Firearm wound of entry on Supra sternal Notch size1/8 cm x 1/8 cm Margins inverted and Blackened.

3. Oval wound of entry on right mid clavicular Sub costal margin size 1/8 cm x 1/9 cm margin inverted and Blackened.

4. Three wound of entry on right side below chest size 1/8cm x 1/8cm x cavity deep margins inverted and blackened 15cm below axilla.

5. Gun shot wound left over elbow size 1/8cm x1/8cm x depth not proved margins inverted blackening present.

6. Gun shot wound on right thigh interior aspect mid part margins inverted blackened size 1/8cm x 1/8cm.

7. Five wounds of entry on mid of left thigh in 15cm area size 1/8cm x 1/8cm x depth not proved. Margins inverted blackened.

8. Round wound of entry 1/8cm x 1/8cm at right leg x bone deep margin inverted.

Nature of injury kept under observation. Caused by firearm and fresh in duration.

(9) Injured complainant Naseem was examined by Dr.Dubey on 14.7.1999 at 8:45 a.m. and found the following injuries.

1. Oval wound of entry with margin inverted direction left to right side oblique entry size 1/8 cm x 1/9 cm x depth not probed (cavity deep) on Back left side at mid of Medial side of left scapula at distance of 2 cm Margin Blackened.

2. Two oblique wound of entry on lower end of right scapula lateral side size 1/8 cm x 1/9 cm x Margin blackened margin inverted.

3. Round wound on right arm of size of 1/8cm x 1/8 cm x muscle deep and blackened.

4. Two wounds of size 1/8cm x 1/8cm x muscle deep present on over back of right shoulder margin blackened.

5. Rounded wound over back of head over occiput of size 1/8cm x 1/8cm inverted and blackened margin such three wound present in area of 5cm around.

These all wounds are caused by firearm fresh in duration kept under observation.

(10) P.W. 4 is the Investigating Officer. P.W. 5 Dr.V.R.Saxena, who had conducted postmortem examination on body of the deceased on 15.7.1999 at 2.30 PM and found the following injuries:

1. Multiple fire arm wounds on right Rt. upper extremity in an area of 42 cm x 10 cm; 4.5 cm below Rt. shoulder joint (each size 0.3 cm x 0.3 c.m.);

2. Single fire arm wound on right side nose 2.5 above right ala of Nose (size 0.3 cm x 0.3 cm);

3.Multiple fire arm wounds right side chest in an area of 13.5 cm x 9.0 cm; 3.5 cm below right axilla;

4. Single fire arm wound on right side back 8 cm below right Iliac crest border. (size 0.3 cm x 0.3 cm)

(Two pellets recovered from right lung one from nose and one from right arm muscle)

(11) According to the doctor, duration of the death was one-and-a half day. Cause of death was shown as shock and haemorrhage as a result of ante-mortem fire arm wounds.

(12) In their statements under Section 313 Cr.P.C., accused have denied the allegations levelled against them and stated that the deceased was a hardened criminal. Due to enmity, somebody has caused injuries, resulting in death of Dunna. In defence, D.W.1 Mujeeb Ahmad was produced.

(13) After appreciating the evidence on record, the learned trial court has recorded finding of conviction against accused persons.

(14) We have heard Sri Nagendra Mohan, learned senior counsel for the appellants and Sri Umesh Verma, learned Additional Government Advocate for State at length.

(15) Learned counsel for the appellants submits that injured witnesses were not present at the scene of occurrence. They have not seen the incident and they are not eye witness. It is further submitted that the first information report is ante-time. It was lodged after medico-legal examination of P.W.2 Nisar. In order to elaborate his argument, learned counsel submits that medico-legal examination of Nisar was done at 8:00 a.m. while the first information report was lodged at 8:30 a.m. Further, in the inquest report, in the column where time of lodging of the F.I.R. is to be mentioned, it is mentioned that F.I.R. was lodged at 7:30 a.m. which shows that the first information report was not in existence at the time when the medico-legal examination of injured as well as inquest proceedings were conducted. It is further submitted that first information report was lodged after due consultation and deliberation with police authorities. It is further submitted that the injured persons have not received the injuries in the alleged incident, as claimed by the prosecution. It is stated that all the ten persons have fired upon the deceased and the injured persons Naseem and Nisar but the number and size of injuries does not corroborate this statement. It is also submitted that the place of occurrence could not be established by the prosecution. No independent witness was produced although it could have been produced by the prosecution. It is contended that the incident occurred on the road while the dead body of the deceased was found on a cot in front of his house. There is no explanation as to how the dead body reached in front of the house of complainant. It is further argued that the deceased and injured were hardened criminal. They could have got injuries during dark hours and accused have been falsely implicated.

(16) Per contra, learned A.G.A. submits that the first information report was lodged promptly. There is a mistake in mentioning time on the injury report of Nisar as doctor himself has admitted that accused Isfaq had also reached at the C.H.C., and he was treated prior to the injured persons. It is further submitted that time of lodging of F.I.R., as mentioned in the inquest report, is not challenged by the defence. No cross-examination was made on this point. Hence, this fact shall be treated as admitted. It was a clerical error. Two injured witnesses have been produced, who have received injuries in the same incident. It is further argued that defence itself has admitted the incident by giving a suggestion to P.W.1 that Ashfaq also received injuries in the same incident and an N.C.R. was lodged by accused Israr at the police station. It shows that presence of deceased as well as two injured witnesses have been admitted by the defence. It is further argued that there are minor contradictions which could not discredit the case of prosecution. It is further argued that the place of occurrence is fully established by the prosecution. If defence wanted to bring its case within the ambit of 'general exceptions', then, it was the burden of defence to produce evidence on the point. Even in the statement under Section 313 Cr.P.C., no case of self-defence has been taken, rather only a suggestion was given to P.W.1. In the statement under Section 313 Cr.P.C., accused have stated that they have been falsely implicated due to enmity. The defence is taking a false defence which itself shows its complicity in commission of crime.

(17) At the very outset, we would like to first deal with the medico legal aspect of the case, because, this is a case wherein according to the prosecution 10 persons have fired upon the deceased and two injured persons who have received total 17 injuries. One assailant was carrying the licensed gun while, according to P.W.1 Naseem, all other assailants were carrying single barrel country-made gun. Hence, at the very beginning, it is to be decided as to whether, the injuries

sustained by the injured as well as the deceased were caused by different firearms which were being carried by the accused ?

(18) Interestingly, injured-Naseem and Nisar have received injuries of a dimension of 1/8cm.x 1/9cm. while deceased Dunna has suffered injuries of a dimension of 0.3cm x 0.3cm. It shows that the deceased as well as both the injured have sustained injuries by two types of weapons out of which one weapon has caused the injuries measuring 1/8cm x 1/8cm. while the other weapon has caused the injuries of 0.3cm x 0.3cm. Further according to P.W.3 Dr. Anjani Kumar Dubey, who has conducted the medico legal examination of the injured fires were shot from a distance of six feet. There was no overlapping of any injuries. P.W.5 Dr. Saxena, who has conducted the postmortem of the body of the deceased-Dunna has stated that there was no overlapping of injury on the body of the deceased. Fires were shot from the distance as there was no blackening and tatooning? Dispersal was also wide due to distance in firing. It means that when injuries of the deceased as well as injured were not overlapping which shows that all the injuries were caused by two type of weapons. If the injuries could have been caused by different type of weapons then definitely, size and shape of the injuries would have been different. It is also not possible that when injuries were caused by a particular weapon then the fire shot by another weapon would cause injuries of the same dimension as was caused by earlier used weapon. Because, according to expert opinion of the doctor, there was no overlapping on the injuries of the injured as well deceased. Hence, it is established that two type of weapons were used in commission of the crime as has been started by P.W.1 Naseem.

(19) It is contended by learned counsel for the accused that the first information report is antetime. First information report was lodged by P.W.1 Naseem on 14.07.1999 at 8.30AM which was registered at Case Crime No.136 of 1999, under Sections 147, 148, 149, 307, 302 IPC and Section 7 Criminal Law Amendment Act. Entry of the same was made at G.D. No.12. Chick FIR and G.D. were proved by P.W.4 S. I. Inspector Vijay Kant Mishra, who was investigating officer of the case. It is stated by P.W.4 S. I. Inspector Vijay Kant Mishra that Chick FIR was prepared by H.C. Mata Pher and entry in G.D. was also made by him. H.C. Mata Pher had remained posted with him, he has identified the writing and signatures of H.C. Mata Pher. It is further stated that H.C. Mata Pher had died about 4-5 years ago. Hence, as a secondary evidence P.W.4 S. I. Inspector Vijay Kant Mishra, proved the chick FIR and G.D. In the G.D. it is mentioned that the injuries of injured Naseem and Nisar were examined at police station and Chitthi Mazroobi was prepared and injured were sent to C.H.C. Tambour for medico legal examination. Witness was not cross-examined on this point as to whether chitthi Mazroobi were prepared and injured were sent to C.H.C. Tambour before lodging of the first information report which was lodged at police station at 8.30AM? Hence, it is an uncontroverted fact which shows that injured Naseem and Nisar were sent to C.H.C. Tambour along with chitthi Mazroobi. After lodging of FIR at 8.30AM.

(20) Non cross-examination of P.W.4 S.I. Inspector Vijay Kant Mishra, on the point of time of lodging of FIR as well as delivery of the chitthi Mazroobi for medico legal examination of injured shows that it is an uncontroverted statement. It was held by Hon'ble Apex Court in the case of ***Gangabhavani v. Rayapati Venkat Reddy & Ors. 2013 CRI. L. J.4618*** (Supreme Court)

wherein the Hon'ble Apex Court has placed reliance upon Laxmibai (Dead) through ***L.Rs. & Another v. Bhagwantbuva (Dead) through L.Rs. & Ors. AIR 2013 SC 1204***:

"31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses." (Emphasis supplied) (See also: Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181; and Gian Chand & Ors. v. State of Haryana, JT 2013 (10) SC 515).

18. Thus, it becomes crystal clear that the defence cannot rely on nor can the court base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in- chief and the defence has not cross examined him on the said aspect of the matter."

(21) Learned counsel for the accused has vehemently argued that in the medico legal examination report of injured Nisar time of examination is mentioned as 8.00 AM on 14.07.1999 while, time of examination of Naseem is mentioned as 8.45AM. In between accused Ashfaq was also medically examined by P.W.3 Dr. Anjani Kumar Dubey on 14.07.1999 at about 8.15AM. It is argued that when the injured Nisar was medically examined at 8.00AM then, it shall be presumed that by that time first information report was not lodged.

(22) During the cross examination, P.W.3 Dr. Anjani Kumar Dubey has stated that the injuries of injured Asfaq was done prior to the medico legal examination of Naseem and Nisar as they were brought, subsequent, to the arrival of Asfaq. This statement and the cross examination itself explains the mistake which has been committed by Dr. Anjani Kumar Dubey in mentioning the time of medico legal examination of Nisar at 8.00AM. No doubt Dr. Anjani Kumar Dubey is a medical expert, whose opinion is of utmost importance in a criminal trial. But, at the same time, if the medico legal evidence is not in consonance with the ocular evidence then definitely, ocular evidence would prevail over the medico legal evidnce as has been held in the case of ***Sadhu Saran Singh v. State of U.P. and others 2016 CRI. L.J. 1908*** (Supreme Court) wherein Hon'ble Apex Court has placed reliance upon ***Darbara Singh v. State of Punjab (2012) 10 SCC 476*** wherein it was held that:-

"..... So far as the question of inconsistency between the medical evidence and the ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liabe to be disbelieved."

(23) Hence, when P.W. 3 Dr. Anjani Kumar Dubey has himself been cross-examined by the defence on the aspect of time of medico legal examination of injured Nisar that Dr. Dubey himself has given satisfactory explanation. Although, the prosecution has not discharged a duty satisfactorily to get the consistency explained through P.W.3 Dr. Anjani Kumar Dubey. But the same was got explained by the defence in cross-examination. Hence, we are of the view that when the discrepancy has been properly explained then, defence could not get any benefit out of it. It is settled legal position that the statement of witnesse shall be read as a whole, it cannot be read in piece meal.

(24) Learned counsel for the accused has drawn our attention towards the inquest report wherein it is mentioned that the date and time of lodging FIR is mentioned as 14.07.1999 at 7.30AM while the time of starting the inquest report is mentioned as 14.07.1999 at 10.30AM which concluded on 14.07.1999 at 12.00 Noon. It is submitted that time of lodging of FIR was shown at 7.30AM which means that the time of lodging of FIR information report at 8.30AM is wrong. We are not impressed with the argument of learned senior counsel. No doubt, time of lodging the FIR in the inquest report is shown as 14.07.1999 at 7.30AM. But, at the same time, it is to be kept in mind that the time of incident is shown as 14.07.1999 at 7.30AM in the first information report. Thereafter, first information report was lodged at 8.30AM which fact find support from From No.13 which was sent along with the dead body, wherein time of death is shown as 14.07.1999 at 7.30AM and the time of lodging of the FIR is shown at 8.30AM. It was also prepared by the investigating officer P.W.4 S.I. Vijay Kant Mishra.

(25) In ***Radha Mohan Singh @ Lal Saheb V. State of U.P.(2006) 2*** Supreme Court Cases 450, a three Judges Bench of the Hon'ble Apex Court has dealt with the provisions of Section 174 Cr.P.C. in detail in the said case, it was argued that the time and date of lodging FIR has been mentioned as "10 p.m on 15.3.1979 ." Though, the prosecution has come out with a case that the FIR had been lodged at "10 p.m. on 14.3.1979". It was submitted by the learned counsel for accused that the FIR had in fact not been lodged by the time the inquest was held and the same has been ante-timed. Hon'ble Apex Court as held as under:

"In our opinion the date of lodging the report has been wrongly written in the inquest report as "15.3.79 samai 10 baje raat (15.3.79 at 10 p.m.)". At the top of the inquest report

the crime number and the sections (Crime No.193/79 under Section 147/148/140/323/302 IPC) have been mentioned. The time of commencement of the inquest is written as "7 a.m. on 15.3.79" and the time of conclusion of the inquest is written as "8.30 a.m. on 15.3.79". If the inquest had been concluded by 8.30 a.m. on 15.3.79, there was no occasion for writing the time of lodging of the FIR as "10 p.m. on 15.3.79" as the person preparing the inquest report could not have written anything about an event which was yet to take place. We have not the slightest doubt that the investigating officer holding the inquest mentioned the date of lodging of the FIR as "15.3.79" instead of "14.3.79" inadvertently or by mistake. That apart, it is important to note that during the course of cross-examination PW.7 Ram Shabad Singh, SI, who held the inquest on the body of the deceased in the hospital, his attention was not drawn to the aforesaid fact that the date and time of lodging of the FIR was mentioned as "10 p.m. on 15.3.79". If the said discrepancy had been pointed out to him, he could have given an explanation for the same. No argument on the basis of an alleged discrepancy, overwriting, omission or contradiction in the inquest report can be entertained unless the attention of the author thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in Court. Therefore, in the present case it is impermissible to draw any inference against the prosecution on the ground that the date of lodging the FIR was wrongly mentioned in the FIR."

(26) In the present case also there is discrepancy about time of lodging the FIR as mentioned in the inquest report which is mentioned as 14.7.1999 at 7.30AM. While the first information report was lodged on 14.7.1999 at 8.30AM. It appears that since the time of occurrence was shown as 14.7.1999 at 7.30AM. Hence, instead of writing 14.7.1999 at 8.30AM investigating officer has wrongly mentioned time of lodging FIR as 14.7.1999 at 7.30AM. Further as has been held by the Apex Court in the case ***of Radha Mohan Singh @ Lal Saheb*** (supra) investigating officer has nowhere been cross-examined, on this point by the defence, so as to enable him to give opportunity to explain the fault. Hence, we are of the view that the time of lodging FIR as shown in the inquest report as 14.7.1999 at 7.30AM is wrongly mentioned.

(27) Defence has produced Mujeeb Ahmad as D.W.1 who is scribe of the written report. It is stated by him in examination-in-chief that at about 8-9 AM he wrote the written report on the dictation of Naseem who was injured. A suggestion was also given to him that he has prepared the written report on the dictation of police which he denied. It means that the defence himself has admitted the fact that the written report was written by D.W.1 Mujeeb who was the witness of defence and stated in examination-in-chief that he has written the written report on the dictation of Naseem who was in injured condition. This witness has not been declared as hostile by the defence meaning thereby that now defence cannot rescile with the statement of D.W.1 Mujeeb Ahmad. He has further stated the time of writing the first information report at about 8-9 AM.

(28) Hence, we are of the considered view that the first information report was lodged on 14.7.1999 at 8.30AM by injured Naseem. First information report is not ante-time.

(29) Now, we have to consider as to whether the evidence of P.W.1 Naseem and P.W.2 Nisar is wholly reliable, trustworthy and credible evidence or not ?

(30) According to the prosecution version when Dunna was coming back from Tambour to his Village when the accused assaulted him by rifle, lathi and danda. There are 10 accused named in the first information report.

(31) At the very out-set, it is relevant to mention here that no injuries of lathi and danda were found on the body of injured Naseem and Nisar or the dead body of deceased (Dunna). All three have received firearm injuries. According to P.W.3 Dr. Anjani Kumar Dubey, injured Naseem has received five injuries of firearm out of which injuries no.2 and 4 were two wounds of entry likewise, injured Nisar received total eight wounds of firearm injuries out of which injury no.4 was having three wounds of firearm with inverted margins. Injury no.7 were five wounds of firearm with inverted margins. In the same manner deceased (Dunna) had received the four injuries out of which injury nos.1 and 3 were multiple firearms wounds. Although, the size of wound was similar, it shows that the different weapons were used. Number of injuries caused as well as injured persons individually they might have received less number of injuries but collectively we found that total number of injuries of deceased as well as two injured is quite large which corroborates the prosecution version that 10 persons have fired upon the deceased and injured who received gun shot injuries.

(32) Now it is to be seen as to whether P.W.1 Naseem, P.W.2 Nisar were present at the place of occurrence and received injuries by firearms used by the accused ?

(33) P.W.1 Mohd. Naseem has stated that all the accused belongs to one family and are related to each other. Motive was also stated by the witness wherein it was stated that Bakreedi father of accused Mustakeem was murdered in 1976 wherein Mehandi Husan father of P.W.1 Naseem and his uncle Dunna (deceased) were named accused. They were convicted by the court. At the time of occurrence they were on bail. So far as motive is concerned even in the statement given under Section 313 Cr.P.C. it is admitted that Bakreedi was killed by Dunna who was convicted in the trial of murder of Bakreedi. It shows that admittedly there was enmity between the parties.

(34) Enmity itself is a double egged weapon which can be used either way. It was held in **Sunil Kundu versus State of Jharkahnd (2013) 4 SCC 422**, that enmity is a double edged weapon but possibility of false involvement because of deep rooted enmity also cannot be ruled out.

(35) That enmity is doubled edged weapons which can be used for false implication at the same time for attacking that persons. Hence, so far as enmity is concerned when it is an admitted fact then there is no question of drawing any inference that there was no motive for commission of the crime by the accused.

(36) In the first information report, it is mentioned that :---------

"सुबह जैसे ही ग्राम डवदेही के मो. हुसेन पुत्र अनवर के घर के पूरब सड़क पर पहुचे तेसे ही पहले से एक राय होकर बन्दुके व लाढी डण्डा लिया गाड़ा पर बढ़े शराफत अली पुत्र लियाक़त अली अपनी लाशेनसी बन्दुक व बाकी हाफिज अली व प्रधान पुत्र लियाकत अली सोकत अली पुत्र बादल, इसरार, समसाद अली पुत्र गाज सुजात अली, अब्दुल मालिक पुत्र मो. उमर, मुसतबीज पुत्र बकरीदी, आबिद अली पुत्र शराफत अली उर्फ़ शरफू, असफाक अली पुत्र बुनयाद अली, अमीन पुत्र मो. बकस व तीन चार अन्य लोग नाजायज असलह| व लाठी डण्डा से मेरे चाचा दुन्ना पर फायर करने लगे बन्दुक की आवाज व मेरे चाचा के चिल्लाने पर मै व मेरा भाई निसार अहमद दौड़ कर मौके पर आ गये| हम लोगो पर भी असलाह से फायर करना शुरू कर दिये| फायर की चोट से मेरे चाचा दुन्ना की मौके पर मृत्यु हो गयी मुझे व मेरे भाई निसार को फायर की चोट आयी है| ताबड़ तोड़ फायरिंग होने से आने जाने वाले तथा बच्चे तथा पडोसी भय के कारण भाग गये तथा अपने घरो का दरवाजा बन्द कर लिए लास मौके पर घर वालो की देखरेख मे पड़ी है||"

(37) Which shows that 3-4 unknown persons are also mentioned in the first information report but in the statement of P.W1 Naseem he has stated that the accused Sarafat was armed with double barrel licensed gun and all others were armed with single barrel country made gun and they fired from their weapons nowhere used of lathi and danda is stated. Further no injuries of lathi was found either on the body of the deceased or injured persons.

(38) According to P.W.1 Naseem, he reached at the spot on hearing the shrieks. He was sitting on shop which is shop of Rais at a distance about 50 steps from the place of occurrence. While his brother Nisar came from eastern side of road from the field. Nisar met him at the place of occurrence. Nisar arrived there prior to him. While P.W. 2 Nisar has stated that when he reached at the spot Naseem had already reached there.

(39) So far as minor contradictions are concerned, it is settled legal position that minor contradictions are bound to occur in the evidence of witnesses when their evidence were recorded after a long gap from the date of incident.

(40) In ***Sadhu Saran Singh v. State of U.P. & Ors.2016 CRI. L.J. 1908***; Hon'ble Apex Court has held that if there is a long gape of cross-examination which is done on several dates then natural minor discrepancies are bound to occur. Further, it is to be seen as to whether the discrepancies are going to the root of the matter or are trivial in nature. In the case at hand, so far as it is concerned as to whether P.W.1 Naseem arrived first at the spot or P.W. 2 Nisar arrived first at the spot. It is a minor contradiction. Both these witnesses have received gun shot injuries. At this stage, we may very carefully examine the suggestion has given to P.W.1 Naseem as well as P.W.2 Nisar by P.W. 3 Dr. Anjani Kumar Dubey and P.W.4 I.S. Vijay Kant Mishra, investigating officer.

(41) P.W. 3 Dr. Anjani Kumar Dubey was put to cross-examination by the defence and got the injuries of accused Asfaq proved from this witness wherein he has stated that on 14.7.1999 at 8.15 AM. he had medically examined the accused Ashfaq Ali son of Buniyad Ali and found following two injuries on his body:-

(1) lacerated wound ½ cm x 1/10c.m into bone deep fresh bleeding present surrounded by traumatic swelling all over dorsom of left hand pain tenderness and crepitus present in palm and lower part of forearm.

(2)Traumatic swelling pain and tender right forearm and hand.
(3) Pain and tender both leg. Contusion present on right leg upper part.
(4) Contusion of size 6cm x1/2cm present over left size over interior aspect of left thigh.

Nature of injury under observation. Caused of blunt objection duration fresh.

(42) According to Dr. Dubey these injuries were fresh in nature which was kept under observation and caused by blunt object. It is further stated by Dr. Dubey that these injuries could have been caused on 14.7.1999 at about 7, 7.30AM patient was referred to district hospital. It means that Dr. Dubey has given a specific report about the fact that accused Ashfaq has received a minor injury on 14.7.1999 at about 7.30AM. It is further suggested that Asfaq has lodged a report at the police station regarding incident prior to the FIR lodged by P.W.1 Naseem. Further, so far as injuries are concerned defence has given a suggestion that deceased alongwith injured Naseem, Nisar were trying to pluck mango from tree and they were asked not to do it by the owner of grove. They ran away Quarrel took place. Firing also took place. They have beaten Ashfaq who got badly injured thereafter Israr Ahmad took him to the police station and lodged first information report. It is further suggested that no other accused was involved in the incident of marpit.

(43) P.W.4 S.I. Inspector Vijay Kant Mishra investigating officer has stated that no report of Ashfaq was brought to his knowledge as to whether NCR No.57 under Sections 323, 504 was lodged by Ashfaq or not. Defence has admitted the incident and the defence was taken about lodging a cross FIR. But, no such FIR is brought on record. Nothing has been brought on record to show that any such FIR was lodged or if lodged then whether permission of the Magistrate under Section 155(2) Cr.P.C. was obtained or not in the NCR. At this stage, learned counsel for the defence has place reliance upon ***State of Rajasthan vs. Manoj Kumar (2014) 5 Supreme Court Cases 744*** wherein it is held that even if plea of private defence is not taken by the accused. It is open to the Court to consider such a plea if such a plea arises from the material available on record and burden to establish such a plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record. Learned counsel for the accused submits that the court can consider the plea of self-defence by accused on the basis of facts and circumstances of the case. Further, it is submitted that at the most it could be a case of exceeding the right of private defence by the accused, Ashfaq and Israr as the prosecution has failed to establish the presence of other accused on the place of occurrence.

(44) In ***2010(4)SCC (Criminal) 378 Bhanwar Singh Vs. State of M.P***. it was held that for a plea of right of private defence to succeed in totality to succeed, It must be proved that there is existed a right to private defence in favour of accused and that this right is extended to causing death. In the case at hand, firstly, we have to consider as to whether, although specific plea is not taken by the accused about right, from the evidence on record any case is make out for exercising the right to private defence by the accused? At this stage, we are not going to touch the issue as to how many accused were involved in the matter. But, so far as, exercise of right of private defence is concerned, a suggestion was given to P.W.1 Naseem that the deceased and the injured were trying

to pluck the mango from the mango grove and when owner of mango grove objected and apprehended and trying to apprehend them that they ran away, thereafter, fight took place where firing was also done and injuries were caused to Ashfaq. If we compare injures of Ashfaq with deceased as well as the injured persons, we found that only one simple injury was found on the body of Ashfaq while multiple fire arm wounds were found on the body of deceased and injured Naseem and Nisar. Hence, it cannot be inferred that any right to private defence occurred in favour of accused which has been exceeded by them.

(45) There is no iota of evidence to show that the deceased or the injured have made any attempt to pluck the mango from mango grove. At this stage, the place of occurrence also becomes very important. Place of occurrence as shown in the first information report is on the road near the house of Mohd. Husain. In the site plan place of occurrence is shown by letter 'A' which is on the road towards eastern side of the house of Mohd. Husain. Accused were firing from point 'B-C' which are towards western and eastern side of the road. In cross-examination, it is stated by P.W. 4 S.I. Vijay Kumar Mishra Investigating officer that the house of deceased and complainant is about 100 yards towards northern side from the place of occurrence. It is further stated by him that when he reached at the spot he found the dead body lying on a cot in front of the door of the complainant. Although, the investigating officer has not shown that place in the site plan which he should have shown but it can be termed as fault on the part of investigating officer. But, at the same time any lapse or defect in the investigation could not extend the benefit of the accused. Unless and until it is shown that material prejudice is to caused to the accused. P.W.4 S.I. Vinay Kumar Mishra himself has admitted that when he reached at the spot he found the dead body lying on a cot. Investigating officer has recovered the plain and blood-stained earth from the place of occurrence. P.W.1 Naseem and P.W.2 Nisar have also stated that the incident took place on the road. At the same time, when defence himself is admitting that the fight took place on the pretext of theft of mango and they are challenging the place of occurrence. Hence no mango grove is shown in the site plan near the place of occurrence. Copy of NCR was not filed by the defence. It should have been proved that in the cross version accused have been shown the place of occurrence some where else from the place as have been shown by the prosecution. Hence, we do not find any force in the argument that the injuries on the body of the injured P.W.1 Naseem and P.W.2 Nisar and deceased were caused by the accused in self defence. While, the injured or deceased were trying to commit theft of mango and fight took place.

(46) It is submitted that P.W.1 Naseem and P.W.2 Nisar are real brother. They are interested and related witnesses. Further, they are harden criminals and their evidence could not be believed. It is further argued that no independent witness is produced.

(47) P.W.1 Naseem and P.W.2 Nisar are brother and related witnesses. Deceased-Dunna is their uncle. This is an admitted situation but whether, the evidence of related and interested witnesses is trustworthy or not ?. It is to be tested on the touchstone of their evidence. In the case of Upendra Pradhan v. State of Orissa, (2015) 11 SCC 124 : (2015) 4 SCC (Cri) 309 it was held that:

*"**18**. The second ground pleaded before us by the counsel for the appellant-accused, that the testimonies of PW 1 and PW 7 should not have been considered, as they were interested witnesses, holds no teeth. We are of the opinion that the testimonies of interested witnesses are of great importance and weightage. No man would be willing to spare the real culprit and frame an innocent person. This view has been supplemented by the decision of this Court in Mohd. Ishaque v. State of W.B Bindeshwari Prasad Singh v. State of Bihar, (2013) 14 SCC 581 : (2014) 4 SCC (Cri) 299."*

(48) P.W.1 Naseem is an injured witness, who has admitted in his evidence that daughter of Kamruddin was married to him. Kamruddin was uncle of Abdul Maliq. P.W.1 Naseem has divorced his wife. Now, she is living in the house of accused Abdul Maliq. He has also given reason for divorce. It is stated that his wife and Naseem could not live together. As there was no understanding between them. A suggestion given to the witness due to this enmity, he has falsely implicated all the relatives. We do not find any force in the suggestion. Presence of P.W.1 Naseem at the spot is established from the evidence on record. According to the P.W.1 Naseem at the time of occurrence, he was sitting on Khokha about 50 steps away. He reached are the spot on hearing the sound of firing and shrieks of his uncle Dunna. According to P.W.1 Naseem when he reached at the spot his brother Nisar had already reached at the spot. While, there is contradiction in the statement of P.W.2 Nisar who has stated that when he reached at the spot, Naseem was already present there. This contradiction in their statement is not such which creates doubt about their presence at the spot. It may so happen that when any incident occurs and few persons reached at the spot. It might be possible that they may reach there, simultaneously or just after reaching one and another but this itself could not be a ground to disbelieve their presence at the spot. Every person reacts differently in a given situation, it is not possible that every one should react in a particular manner in particular situation. It might be possible that P.W.1 Naseem and P.W.2 Nisar may have reached at the spot, simultaneously, or behind each other but their presence at the spot could not be doubted in view of injuries sustained by them. Further defence has given a suggestion to the effect that incident has taken place therein. One accused Ashfaq also got injuries and his report was lodged by accused Israr.

(49) P.W.1 Naseem has stated that written report was scribed by Mujeeb Ahmad who was produced as D.W.1 Mujeeb Ahmad by the defence. P.W.1 has stated that in the written report it is mentioned that some unknown persons were accompanying the named accused who were carrying lathi and danda with them. At one place in cross-examination of P.W.1 Naseem has stated that it was written on the dictation of the police but D.W.1 Mujeeb Ahmad scribe of the written report was examined by defence who has stated that the report was written on the dictation of Naseem. Further specific suggestion was given to the witness that he has written the report on the dictation of police. D.W.1 Mujeeb Ahmad denied this suggestion. It means that defence witness has proved the prosecution version. At the same time, statement of D.W.1 Mujeeb Ahmad further corroborates the prosecution version.

(50) P.W.1 Naseem has stated that all the accused were collected at one place who were armed with guns. Although, in the site plan, it is shown that the accused were present at point 'B-C'

and fired from point 'B-C'. P.W.1 Naseem has stated that he reached at the spot from the northern side then other persons were also present there. He requested them to accompany him. But, nobody accompanied him. At time of firing, he and his brother was standing two steps away from the accused. This fact find support from the medico legal examination wherein doctor found blackening and tatooning on the injuries of the injured. Hence, presence of eye witnesses P.W.1 Naseem and P.W.2 Nisar is fully established.

(51) So far as, non-examination of the independent witnesses are concerned. It is not always necessary that the independent witnesses should be produced by the prosecution. It is always necessary that independent witnesses are willing to deposed agianst the accused. In ***Sadhu Saran Singh v. State of U.P. and Ors. 2016 CRI. L.J. 1908*** has held as under :-

"(VI) As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilized people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it distressing and stressful. Though, this kind of human behaviour is indeed unfortunate, but it is a normal phenonmena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy."

(52) It is also settled legal position that quality not quantity of evidence which matters in a criminal trial. It is always not necessary that large number of witnesses should be produced to prove the charges against accused rather if injured witnesses are produced whose evidence is trustworthy and reliable then conviction can be based on his evidence. Hence, we are of the considered view that even if independent witnesses are not produced then prosecution evidence cannot be discarded.

(53) There are some lapses on the part of the investigating officer. P.W.1 Naseem has stated that he has not got spot inspection done by the investigating officer. In the evidence of P.W.4 investigating officer has stated that he cannot say as to whether the complainant accompanied him to the occurrence of place or not. P.W.4 investigating officer has prepared the site plan. On whose pointing out, he prepared the site plan is not stated by him. But the suggestion which was given to P.W.1 Naseem by the defence shows that the incident has taken place on the road. It is stated by " यह सही है कि जब इस सड़क के पशचमी अन्य बागात में एक बाग़ अशफ़ाक़ के पिता बुनियाद अली के है, घटना वाले दिन आम के फसल का दिन था ऐसा नहीं है कि हमलोग बाहरी बाग़ बचाने वाले लोगो का दबंगई के कारण धमका कर आम तोड़ा करते थे| ऐसा नहीं है कि घटना वाले दिन सुबह हम उपरोक्त चारो लोगो का जबरदस्ती व चोरी से आम तोड़ने के लिया बागवानों ने पीछा किया उनसे झगड़ा हुआ फायर हुई और हमलोगों ने अशफ़ाक़ को बुरी तरह मारपीट कर घायल कर दिया|

(54) P.W. 2 Nisar another suggestion was given to P.W.1 that " यह भी कहना गलत है कि गांव के दक्षिण पर इसी सड़क पर भागते समय आम बचाने वाले के फायर हमलोगों को चोट आया और हमलोग वही असहाय कर मारे जिसे आज चोट आये है जिससे उसके हाथ पैर टूट गए। "

(55) This suggestion itself shows that the defence is admitting the incident as well as place of occurrence. Although, the investigating officer has also committed certain mistake. It settled legal position that a defect in the investigation could not extend any benefit to the accused.

(56) P.W. 2 Nisar is also the real brother of the P.W.1 Naseem who has also supported the prosecution version. He is also an injured witness who has received injuries of firearm from a distance of 7-8 feet. This witness reached at the spot from his field from the eastern side as has been discussed earlier. There is a little discrepancies about arrival of the two witnesses at the sport. But that itself is not shown material which may affect the credibility of their evidence. P.W.2 Nisar has stated that he along with his brother got injuries by firing of accused. He reached at the spot on hearing shrieks of his uncle Dunna. Initially, he ran towards the spot on hearing the sound of firing. When he reached near the place of occurrence, he found that all the accused were standing surrounding his uncle. When he alongwith his brother Nisar reached accused also fired upon them with close range which caused injuries to them. Statement of this witness finds support from the medico legal evidence of P.W. 3 Dr. Dubey. P.W. 2 Nisar has also explained the injuries of accused Ashfaq wherein it is stated that Ashfaq received the injuries in this incident but the nature of injuries caused to Ashfaq is such which is trivial type of injuries which could not be extend the benefit of right of private defence in favour of the accused. We are of the considered view that the evidence of P.W.2 Nisar is also fully reliable.

(57) Learned counsel for the defence submits that the dead body was found at the main door of the house of deceased on cot. While according to the prosecution version incident took place on the road how the dead body reached there is not explained by the prosecution. It has come in the evidence of P.W.1 Naseem and P.W.4 investigating officer that the distance of the house of deceased and P.W.1 Naseem from the place of occurrence is about 100 yards. Neither eye witness nor the investigating officer was cross-examined on the point as to how the dead body reached there. Even if the death body was found on the cot, it does not make any differences on the point of place of occurrence. As has been held earlier place of occurrence was constructed road wherein defence himself is taking a plea that the injuries were caused in exercise of the right of private defence.

(58) It is submitted that according to the prosecution of 10 accused fired upon the deceased as well as injured persons. Whose fire hit the deceased and whose fire hit the injured could not be established. Hence, the benefit of doubt should be given to accused. In the first information report all the accused are named. Further P.W.1 Naseem has specifically stated the name of all the accused. It is specifically stated that accused Sarafat Ali was armed with licensed double barrel gun and other armed with country-made single barrel gun. Presence of all the accused is fully established from the evidence of P.W.1 Naseem and P.W.2 Nisar. It has also come in the evidence that all the accused were firing when the presence of all the accused alongwith overt act committed by them is stated by the witnesses then the presence of all the accused cannot be doubted.

(59) According to P.W. 5 Dr. V. R. Saxena injuries on the body of the deceased-Dunna must have been caused by firing from a distance. He did not find any blackening or tatooning on the injuries. Further dispersal was also in large area. According to the prosecution, accused Sharafat

was armed with double barrel licensed gun. While, other accused were armed with single barrel country-made gun. P.W.1 Naseem has stated that the firing was done upon the deceased-Dunna from a distance of about 15 to 20 steps. It means that the injuries corelates with the ocular testimony of P.W.1 Naseem, P.W.2 Nisar. So far as injuries of P.W.1 Naseem and P.W.2 Nisar are concerned, there were blackening and tatooning on the wounds. P.W.2 Nisar has stated that fires upon P.W.1 Naseem and P.W.2 Nisar were made from a distance of about 3-4 'Kassi'. One kassi means three steps and one step is measured about two feet. Meaning thereby that fires were shot at a close range of about six feets. This statement further finds support from the medico legal examination report of P.W.1 Naseem and P.W.2 Nisar which was duly proved by P.W.3 Dr. Anjani Kumar Dubey, who has stated that the injuries of Naseem and Nisar were caused by firing from a distance of about six feet. Hence, so far as, fire arms injuries of deceased-Dunna and fire arms injuries received by P.W.1 Naseem and P.W.2 Nisar are concerned, they are fully proved by the ocular evidence as well as fully supported and corroborated by the medical evidence.

(60) Now, it is to be seen as to whether involvement of all the accused in the incident is proved by the prosecution or not ? All the accused are named in the first information report which was lodged by P.W.1 Naseem who himself is an injured in the incident. Scribe of the report is produced by the defence as D.W.1 Mujeeb Ahmad, who has proved that the written report was dictated to him by injured Naseem. First information report was lodged promptly as we have already held that it was not ante-time as has been argued on behalf of accused-appellants. Further, first information report contains all the facts relating to the incident. We have already held that the first information report is reliable document. Further, P.W.1 Naseem and P.W 2 Nisar are injured witnesses who have deposed before the court that all the accused have caused injuries to Dunna as well as Naseem and Nisar. Dunna succumbed due to the injuries. Nature of injuries coupled with the medico-legal evidence also corroborates the prosecution version. It is the defence case that accused Ashfaq has also received injuries in the same incident and Israr lodged the FIR at the police station which has already been discussed in the earlier part of body of the judgment. Incident in question is fully proved by the evidence of prosecution, thereafter by the defence taken by the accused.

(61) So far as role of accused in commission of crime is concerned, according to the prosecution version, all the accused have assaulted upon the deceased Dunna and injured Naseem and Nisar by the firearms. Ocular evidence of PW-1 Naseem and PW-2 Nisar coupled with the evidence of PW-3 Dr. Anjani Kumar Dubey and PW-5 Dr. V.R. Saxena establishes that the deceased Dunna and injured Naseem and Nisar have received firearm injuries on 14.7.1999 at 7:30 AM. Defence itself has taken a plea of cross version that accused Ashfaq have received injuries in the incident and accused Israr has taken the accused Ashfaq to the police station to lodge the first information report which part has already been discussed in the earlier part of the judgment. Now, it is to be seen as to whether the involvement of all the accused in commission of the crime is proved or not ? Whether all the accused can be punished with the aid of Section 149 IPC ? Whether an unlawful assembly was made by them? Whether in furtherance of the common object of the unlawful assembly all the accused can be held guilty with the aid of section 149 ?

(62) In recent judgment of the Hon'ble Apex Court ***State of Maharashtra versus Ram Lal Devappa Rathod and others (2016) 2 SCC*** Criminal 638 Hon'ble the Apex Court has held as under :-

"22.We may at this stage consider the law of vicarious liability as stipulated in Section 149 IPC. The key expressions in Section 149 IPC are:

(a) if an offence is committed by any member of an unlawful assembly;
(b) in prosecution of common object of that assemble;
(c) which the members of that assembly knew to be likely to be committed in prosecution of that object;
(d) every person who is a member of the same assembly is guilty of the offence.

This section makes both the categories of persons, those who committed the offence as also those who were members of the same assembly liable for the offences under Section 149 IPC, if other requirements of the section are satisfied. That is to say, if an offence is committed by any person of an unlawful assembly, which the members of that assembly knew to be likely to be committed, every member of that assembly is guilty of the offence. The law is clear that membership of unlawful assembly is sufficient to hold such members vicariously liable.

23. It would be useful to refer to certain decisions of this Court. In State of U.P. v. Kishanapal (2008) 16 SCC 73: it was observed :

"47..... It is well settled that once a membership of an unlawful assembly is established it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. In other words, mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in the prosecution of the common object of the unalwful assembly or such which the members of the unlawful assembly knew were likely to be committed."

Further in Amerika Rai v. State of Bihar (2011) 4 SCC 677 it was observed as under :

"13. The law of vicarious liability under Section 149 IPC is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly."

24. The liability of those members of the unlawful assembly who actually committed the offence would depend upon the nature and acceptability of the evidence on record. The difficulty may however arise, while considering the liability and extent of culpability of those who may not have actually committed the offence but were members of that assembly. What binds them and makes them vicariously liable is the common object in prosecution of which the offence was committed by other members of the unlawful assembly. Existence of common object can be ascertained from the attending facts and circumstances. For example, if more than five persons storm into the house of the victim where only few of them are armed while the others are not and the armed persons open an assault, even unarmed persons

are vicariously liable for the acts committed by those armed persons. In such a situation it may not be difficult to ascertain the existence of common object as all the persons had stormed into the house of the victim and it could be assessed with certainty that all were guided by the common object, making every one of them liable. Thus when the persons forming the assembly are shown to be having same interest in pursuance of which some of them come armed, while others may not be so armed, such unarmed persons if they share the same common object, are liable for the acts committed by the armed persons. But in a situation where assault is opened by a mob of fairly large number of people, it may at times be difficult to ascertain whether those who had not committed any overt act were guided by the common object. There can be room for entertaining a doubt whether those persons who are not attributed of having done any specific over act, were innocent bystanders or were actually members of the unlawful assembly. It is for this reason that in Masalti v. State of U.P., AIR 1965 SC 202 this Court was cautious and cognizant that no particular part in respect of an overt act was assigned to any of the assailants except Laxmi Prasad. It is in this backdrop and in order to consider

"whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly",

this Court at SCR pp. 148-49 in Masalti v. State of U.P., AIR 1965 SC 202 observed that his participation as a member of the unlawful assembly ought to be spoken by more than one witness in order to lend corroboration. The test so adopted in Masalti was only to determine liability of those accused against whom there was no clear allegation of having committed any overt act but what was alleged against them was about their presence as members of the unlawful assembly. The test so adopted was not to apply to cases where specific allegations and overt acts constituting the offence are alleged or ascribed to certain named assailants. If such test is to be adopted even where there are specific allegations and overt acts attributed to certain named assailants. it would directly run counter to the well-known maxim that "evidence has to be weighed and not counted" as statutorily recognised in Section 134 of the Evidence Act.

(63) It was further held that "We do not find anything ***in Masalti v. State of U.P., AIR 1965 SC 202*** which in any way qualifies the well settled principle that the conviction can be founded upon the testimony of even a single witness if it establishes in clear and precise terms, overt acts constituting the offence as committed by certain named assailants and if such testimony is otherwise reliable. It was further held that the test adopted in ***Masalti (supra)*** is required to be applied while dealing with the cases of those accused who are sought to be made vicariously responsible for the acts committed by others only by virtue of their alleged presence as members of unlawful assembly when any specific allegations of overt acts committed by them or where giving the nature of the assailant by the mob, the court comes to the conclusion that it would have been impossible for particular witness to have witnessed the relevant facets constituting the offecne.

(64) In another recent case of ***Susanta Das v. State of Orissa, (2016) 4 SCC 371*** Hon'ble the Apex Court has dealt with the provisions of Section 149 IPC and held that it has to be necessarily shown that there was an assembly of five or more persons forming an unlawful assembly. When once such an

participation of five or more persons is shown who indulge in an offence as a member of such an assembly, for the purpose of invoking section 149 IPC, it is not necessary that there must be specific overt act played by each of the member of such an unlawful assembly in the commission of an offence. What is required to be shown is the participation as a member in pursuance of a common object of the assembly or being a member of that assembly such person knew as to what is likely to be committed in prosecution of any such common object. Hon'ble the Apex Court has further placed reliance upon ***Ajit Savant Majagvai versus State of Karnataka (1997) 7 SCC 110.*** Hon'ble the Apex Court further approved and relied ***upon Rajendran versus State of Tamil Nadu (2004) 10 SCC 689*** and ***Bishna versus State of West Bengal (2005) 12 SCC 657***.

(65) In the ***Susanta Das case (supra)*** the facts of the case were that on 3.4.1996 at about 4:00 PM PW-8 and 11 alongwith deceased Padma Lochan Jena was attacked by accused who were five in number, each of them armed with deadly weapon. Learned trial court convicted the accused Ashok Das for offence punisable under section 302 IPC but acquitted the other accused on the ground that no clinching evidence was found to support the individual role played by each of the accused. On appeal High Court reversed the finding of acquittal and sentenced the four accused who were acquitted by the trial court. On appeal Hon'ble the Apex Court had dismissed the appeal holding that all the accused were liable for conviction with the aid of Section 149 as participation of all the accused in the offence was established.

(66) In the present case in the first information report PW-1 Naseem has named all the accused armed with firearms in the first information report. In the evidence also PW-1 Naseem and PW-2 Nisar, who were also injured in the incident, named all the accused and assigned them the role of firing. As has been held in the earlier part of the judgment defence version of self defence has failed, prosecution has successfully established the specific role of all the accused who have formed an unlawful assembly at the place of occurrence. It is proved by the evidence of PW-1 Naseem and PW-2 Nisar that accused have formed unlawful assembly near the place of occurrence. They all were present there. When the deceased Dunna came he was assaulted by the firearms by the accused in furtherance of the common object of the unlawful assembly.

(67) Hence, we are of the considered view that the learned trial court has rightly held the accused guilty for the offence of committing murder of Dunna and causing injuries to Naseem and Nisar. Prosecution has successfully proved the charges against the accused appellants.

(68) We are of the considered view that appeals are devoid of merit and are liable to be dismissed and are accordingly ***dismissed***. Impugned judgment and order of conviction and sentence is confirmed. Accused appellants are in jail. They shall serve out the sentence as imposed by the learned trial court.

(69) 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.

(2016) 9 ILRA 1075
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No.- 2957 Of 2016

Zafar Ahmad & Ors. **...Revisionists**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Revisionists:
Rakesh Dubey, Manish Tandon

Counsel for the Opposite Parties:
G.A

Criminal law – Criminal Revision — discharge application – rejected – SC/ST Act – caste related abusive language – public view – FIR – prima facie case – framing of charge – strong suspicion – police papers – Section 173 Cr.P.C. – probative value – cannot be gone into – material brought on record – accepted as true – interference at initial stage – revision dismissed.

This criminal revision has been preferred against the order dated 12.8.2016, passed by learned Additional Sessions Judge/ Special Judge (SC/ST Act), Kanpur Nagar, in SST No. 83 of 2014, State Vs. Zafar and others, arising out of Case Crime No. 283 of 2008, u/s 323, 504, 506, 452, 325 I.P.C. and 3(1)(X) SC/ST Act, whereby the discharge application of the revisionists has been rejected.(Para-1)

Learned counsel for the revisionists has submitted that the court below has illegally rejected the discharge application of the revisionists without considering the submissions raised by them regarding non-applicability of SC/ST Act as no finding with regard to the applicability of section 3(1)(x) SC/ST Act has been recorded by the court below. It is further submitted that the trial court while rejecting the discharge application has ignored the statements of the witnesses recorded by the I.O. in which not a single caste related word has been mentioned. Learned counsel has submitted that there is no iota of evidence on record that what specific words were used by the revisionists or what abuses were hurled by them to humiliate the O.P. No. 2/ a member of Scheduled caste, in public view, therefore, no offence u/s 3(1)(x) SC/ST Act, is made out against the revisionists. The learned counsel has submitted that the offence u/s 3(1)(x) SC/ST Act, being triable by the Special Judge/ Additional Sessions Judge, the right of the revisionists for filing an appeal before the Sessions Judge is curtailed in case the trial goes against the revisionist. Hence, it has been prayed that the revision be allowed, the impugned order be quashed and the case be remanded back to the court below to pass a fresh order on the discharge application moved by the revisionists.(Para-3)

Held:(Paras:- 7-14)
1.Thus a perusal of the FIR itself shows that prima facie, there is sufficient material that the the accused persons used caste related abusive language against the complainant in view of the public, to humiliate him.

As per settled law, at the stage of framing of charge, only prima-facie case is to be seen and even a strong suspicion in the mind of the court is sufficient to frame charge.

2.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.

3.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.

4.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.

5.In Soma Chakravarty v. State (through CBI);2007 (2) SCC (Cri) 514, it has been observed 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.

6.In Omwati v. State; AIR 2001 SC 1507, the Hon'ble Apex Court has expressed the clear view 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.

7.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, the revision appears to have no force and it is liable to be dismissed at the admission stage itself.The revision is accordingly **dismissed**.

Case Law discussed:
1.Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary, 2009 (1) SCC (Cri) 87 — para 9
2.State of Orissa v. Debendra Nath Padhi, 2005 SCC (Cri) 415 — para 10
3.Soma Chakravarty v. State (CBI), 2007 (2) SCC (Cri) 514 — para 11
4.Omwati v. State, AIR 2001 SC 1507 — para 12

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. This criminal revision has been preferred against the order dated 12.8.2016, passed by learned Additional Sessions Judge/ Special Judge (SC/ST Act), Kanpur Nagar, in SST No. 83 of 2014, State Vs. Zafar and others, arising out of Case Crime No. 283 of 2008, u/s 323, 504, 506, 452, 325 I.P.C. and 3(1)(X) SC/ST Act, whereby the discharge application of the revisionists has been rejected.

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

3. Learned counsel for the revisionists has submitted that the court below has illegally rejected the discharge application of the revisionists without considering the submissions raised by them regarding non-applicability of SC/ST Act as no finding with regard to the applicability of section 3(1)(x) SC/ST Act has been recorded by the court below. It is further submitted that the trial court while rejecting the discharge application has ignored the statements of the witnesses recorded by the I.O. in which not a single caste related word has been mentioned. Learned counsel has submitted that there is no iota of evidence on record that what specific words were used by the revisionists or what abuses were hurled by them to humiliate the O.P. No. 2/ a member of Scheduled caste, in public view, therefore, no offence u/s 3(1)(x) SC/ST Act, is made out against the revisionists. The learned counsel has submitted that the offence u/s 3(1)(x) SC/ST Act, being triable by the Special Judge/ Additional Sessions Judge, the right of the revisionists for filing an appeal before the Sessions Judge is curtailed in case the trial goes against the revisionist. Hence, it has been prayed that the revision be allowed, the impugned order be quashed and the case be remanded back to the court below to pass a fresh order on the discharge application moved by the revisionists.

4. Learned A.G.A. has vehemently opposed the application.

5. Considered the submissions.

6. A perusal of the FIR lodged by O.P. No. 2 against the revisionists and other accused persons, copy whereof has been annexed as Annexure no. 2 to the affidavit filed in support of the revision, shows that it is clearly mentioned in it that the revisionists and other accused persons reached at the house of the complainant and started throwing filthy abuse against the applicant related to mother and sister and uttered the words " lkys pekj uhp dgha ds] lkfcj dk edku [kkyh dj nks] ugha rks rqedks tku ls ekj Mkysaxsa". Thereafter they started beating the complainant with kicks, fists and hockey sticks. One of the accused Nadim also fired from the country made pistol, which he was carrying. It is stated in the FIR that on the alarm being raised, when the public gathered at the spot, the accused persons again used caste related abusive language against the complainant and threatened him to kill.

7. Thus a perusal of the FIR itself shows that prima facie, there is sufficient material that the the accused persons used caste related abusive language against the complainant in view of the public, to humiliate him. As per settled law, at the stage of framing of charge, only prima-facie case is to be seen and even a strong suspicion in the mind of the court is sufficient to frame charge.

8. 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.

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 ***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.

11. In ***Soma Chakravarty v. State (through CBI); 2007 (2) SCC (Cri) 514***, it has been observed 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.

12. In ***Omwati v. State; AIR 2001 SC 1507,*** the Hon'ble Apex Court has expressed the clear view 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.

13. 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, the revision appears to have no force and it is liable to be dismissed at the admission stage itself.

The revision is accordingly dismissed.

(2016) 9 ILRA 1079
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3514 Of 2012

Pradeep Kumar Saxsena ...Revisionist
Versus
State Of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
M.S. Pandey

Counsel for the Opposite Parties:
Govt. Advocate, Sanjeev Kumar Mishra.

Criminal law – Criminal Revision — Section 125 Cr.P.C. – maintenance allowance – marriage denied – legally wedded wife – previous proceedings – concealment of fact – matrimonial relationship – basic issue not framed – pivotal issue – impugned order – set aside – readjudicate and decide afresh – remanded – in accordance with law..

The instant criminal revision has been preferred against the impugned judgment and order dated 25.9.2012 passed by the learned Principal Judge, Family Court, District Bareilly in Criminal Misc. Case No.294 of 2008 (Smt. Suchitra and another vs. Pradeep Kumar Saxena) under Section 125 Cr.P.C., Police Station - Subhash Nagar, District- Bareilly, by which learned Principal Judge, Family Court, Bareilly has directed the opposite party, Pradeep Kumar Saxena, to pay the sum of Rs. 3,000/- per month to the applicant/ opposite party no.2 Smt. Suchitra and a sum of Rs. 2,000/per month to the applicant/opposite party no.3, Km. Tanvi.

The facts which have been mentioned in the impugned judgment and order dated 25.9.2012 in narrow compass are stated as follows:-
."Opposite party no.2, Smt. Suchitra was allegedly married to the revisionist Pradeep Kumar Saxena on 21.2.2007. The opposite party no.2, Smt. Suchitra was allegedly tortured by her husband and in-laws due to demand of dowry. Meanwhile, she became pregnant on 15.7.2007. She was ousted from her in-laws' place and she gave birth to one female baby in her parent's house on 24.1.2008. The revisionist Pradeep Kumar Saxena earns Rs.12,000/- per month by working in the Laxmi Printing Press, Mathura and Rs.5,000/- per month in part time jobs and Rs.4,000/- per month as rent of his own house. Thus, she has prayed that she may be awarded Rs.5,000/- per month for herself and Rs.4,000/- per month for her infant baby girl as a maintenance allowance.(Para-3)

Held:(Paras:- 8-12)

1.During the course of the arguments, learned counsel for the revisionist has pointed out towards the plaint of Case No. 294 of 2008 (Smt. Suchitra and another vs. Pradeep Kumar Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly presented before the learned Principal Judge, Family Court,

Bareilly and has argued that in paragraph 12 of the plaint it has been mentioned that she has never filed any suit before any court neither such type of case was pending nor has been dismissed regarding this and she was filing this case for the first time in the court. Whereas, the learned counsel for the revisionist has stated that opposite party no.2 Smt. Suchitra has presented a case No. 1259 of 1991 before the learned Family Court, Bareilly (Smt. Suchitra Saxena vs. Sushil Babu Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly, a copy of which is annexed as Annexure no.3 to this revision.

8.Learned counsel for the revisionist has also pointed out towards the annexure no.4 being the ex-parte judgment of the learned Additional Civil Judge (Senior Division), Room No.2, Mathura in matrimonial case no. 160 of 2008 (Smt. Anita Saxena vs. Smt. Suchitra Saxena and another) dated 18.5.2011 by which the learned court has declared the plaintiff-Smt Anita Saxena as a legally wedded wife of defendant no.2-Pradeep Kumar Saxena.

9.Learned Principal Judge, Family Court, Bareilly has not framed the basic issue of matrimonial relationship between the opposite party no.2-Smt. Suchitra Saxena and the revisionist-Pradeep Kumar Saxena. This was the pivotal issue to decide this case.

10.The matter requires to be re-adjudicated afresh. The case is remanded back to the court of learned Principal Judge, Family Court, Bareilly to readjudicate and decide afresh in accordance with law on the basis of evidence already available on the record.

11.In the light of the above discussions, this criminal revision is liable to be **allowed** with the following directions to the learned Principal Judge, Family Court, Bareilly :-
(i). The revision is allowed and impugned order dated 25.9.2012 passed by the learned Principal Judge, Family Court, District Bareilly, is hereby set aside.
(ii). The learned Principal Judge, Family Court, Bareilly, is directed to readjudicate and decide the matter afresh in Criminal Misc. Case No.294 of 2008 (Smt. Suchitra and one another vs. Pradeep Kumar Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly in accordance with law on the basis of evidence already available on the record; within one month from the date of production of a certified copy of this order.

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

1. Sri M.S. Pandey, learned counsel for the revisionist, Sri Sanjeev Kumar Mishra, learned counsel for the opposite party nos. 2 and 3 and learned A.G.A. for the State are present.

2. The instant criminal revision has been preferred against the impugned judgment and order dated 25.9.2012 passed by the learned Principal Judge, Family Court, District Bareilly in Criminal Misc. Case No.294 of 2008 (Smt. Suchitra and another vs. Pradeep Kumar Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly, by which learned Principal Judge, Family Court, Bareilly has directed the opposite party, Pradeep Kumar Saxena, to pay the sum of Rs. 3,000/- per month to the applicant/ opposite party no.2 Smt. Suchitra and a sum of Rs. 2,000/- per month to the applicant/opposite party no.3, Km. Tanvi.

3. The facts which have been mentioned in the impugned judgment and order dated 25.9.2012 in narrow compass are stated as follows:-

"Opposite party no.2, Smt. Suchitra was allegedly married to the revisionist Pradeep Kumar Saxena on 21.2.2007. The opposite party no.2, Smt. Suchitra was allegedly tortured by her husband and in-laws due to demand of dowry. Meanwhile, she became pregnant on 15.7.2007. She was ousted from her in-laws' place and she gave birth to one female baby in her parent's house on 24.1.2008. The revisionist Pradeep Kumar Saxena earns Rs.12,000/- per month by working in the Laxmi Printing Press, Mathura and Rs.5,000/- per month in part time jobs and Rs.4,000/- per month as rent of his own house. Thus, she has prayed that she may be awarded Rs.5,000/- per month for herself and Rs.4,000/- per month for her infant baby girl as a maintenance allowance.

The revisionist Pradeep Kumar Saxena denied the assertions made by the opposite party no.2 in her application for the maintenance allowance and has stated that opposite party no.2 was never married to him and she did not reside with him as his legally wedded wife. Opposite party no.2 was married to one Sushil Kumar Saxena s/o Late Om Prakash Saxena r/o Mohalla Chaukhanda, Raizada Inter College near Samsabad, District- Farrukhabad and she was residing with him as his legally wedded wife. Due to some misunderstanding between her and her husband Sushil Kumar Saxena, on 03.09.1991 she initiated a proceedings under Section 125 Cr.P.C. registered as Case No.1259 of 1991 in the court which was dismissed on 12.7.1993. Due to absence of the opposite party no.2, she concealed the fact from the court that the revisionist was married to Smt. Anita Sexena d/o Rajendra Saxena, r/o Mohalla Madarsa, District Bulandshahar prior to the alleged marriage with the opposite party no.2. Due to this nuptial knot, she has been blessed with one son and one daughter and has been leading his marital life happily. Wife of the revisionist Smt. Anita Saxena has initiated a civil suit of declaration for declaring the aforesaid marriage with the opposite party no.2 as null and void in the court of the learned Civil Judge, (S.D.), Mathura which is pending as ex-parte in the court and the opposite party no.2 is not appearing in the court intentionally."

4. The learned Principal Judge, Family Court has framed following issues:-

(i). Whether the applicant is unable to maintain herself and her minor daughter?

(ii). Whether the applicant is living separately with the opposite party due to proper reason and she is liable to be awarded maintenance allowance?

(iii). Whether opposite party can afford to pay maintenance allowance?

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

6. During the course of the arguments, learned counsel for the revisionist has pointed out towards the plaint of Case No. 294 of 2008 (Smt. Suchitra and another vs. Pradeep Kumar Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly presented before the learned Principal Judge, Family Court, Bareilly and has argued that in paragraph 12 of the plaint it has been mentioned that she has never filed any suit before any court neither such type of case was

pending nor has been dismissed regarding this and she was filing this case for the first time in the court.

7. Whereas, the learned counsel for the revisionist has stated that opposite party no.2 Smt. Suchitra has presented a case No. 1259 of 1991 before the learned Family Court, Bareilly (Smt. Suchitra Saxena vs. Sushil Babu Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly, a copy of which is annexed as Annexure no.3 to this revision.

8. Learned counsel for the revisionist has also pointed out towards the annexure no.4 being the ex-parte judgment of the learned Additional Civil Judge (Senior Division), Room No.2, Mathura in matrimonial case no. 160 of 2008 (Smt. Anita Saxena vs. Smt. Suchitra Saxena and another) dated 18.5.2011 by which the learned court has declared the plaintiff-Smt Anita Saxena as a legally wedded wife of defendant no.2-Pradeep Kumar Saxena.

9. Learned Principal Judge, Family Court, Bareilly has not framed the basic issue of matrimonial relationship between the opposite party no.2-Smt. Suchitra Saxena and the revisionist-Pradeep Kumar Saxena. This was the pivotal issue to decide this case.

10. The matter requires to be re-adjudicated afresh. The case is remanded back to the court of learned Principal Judge, Family Court, Bareilly to re-adjudicate and decide afresh in accordance with law on the basis of evidence already available on the record.

11. In the light of the above discussions, this criminal revision is liable to be **allowed** with the following directions to the learned Principal Judge, Family Court, Bareilly :-

(i). The revision is allowed and impugned order dated 25.9.2012 passed by the learned Principal Judge, Family Court, District Bareilly, is hereby set aside.

(ii). The learned Principal Judge, Family Court, Bareilly, is directed to re-adjudicate and decide the matter afresh in Criminal Misc. Case No.294 of 2008 (Smt. Suchitra and one another vs. Pradeep Kumar Saxena) under Section 125 Cr.P.C., Police Station- Subhash Nagar, District- Bareilly in accordance with law on the basis of evidence already available on the record; within one month from the date of production of a certified copy of this order.

(2016) 9 ILRA 1083
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

First Appeal From Order No.- 174 Of 2015
&
First Appeal From Order No.- 1029 Of 2014

The Oriental Insurance Co. Ltd. Throu Its Branch Manager. ...Appellant
Versus
Smt. Sunnai (Sanney) & Ors. ...Respondents

Counsel for the Appellant:
Anil Srivastava

Counsel for the Respondents:
Mohammad Saeed

Civil Law-Motor Accident Claims Tribunal – insurance policy – not filed – admitted in written statement – authorised passenger – liability of insurer – inconsistent stand – burden shifted – failure to produce document – procedural irregularity – summary proceedings – fair procedure – failure to record clear finding – extent of liability – injustice – award set aside – matter remitted – fresh decision.

FAFO No. 1029 of 2014 filed for enhancement of compensation arises out of the award rendered on 8.9.2014 in Claim Petition No. 114 of 1993 and FAFO No. 174 of 2015 arising out of the same award filed by the insurance company were heard together.(Para 1)

Sri Anil Srivastava, learned counsel for the appellants in FAFO No. 174 of 2015 and Sri Mohd. Saeed, learned counsel for the claimants were heard at length. The owner of the vehicle i.e. opposite party no. 4 though being served, has remained unrepresented and the respondent no. 5 who died during pendency of the claim petition itself, stands deleted from the array of parties.(Para 2)

It is also informed that opposite party no. 2 during pendency of claim petition had died, therefore, the appeal would not be maintainable against him as well. In these circumstances, the surviving respondents are respondent no. 1, 3 and 4 out of whom 1 and 3 are the claimants whereas respondent no. 4 is the owner of the offending vehicle.(Para 3)

In enhancement appeal no. 1029 of 2014 Sri Mohd. Saeed represented the appellant whereas Sri Waqar Hashim argued on behalf of the insurance company, however respondent no. 2 i.e. the owner though being represented through Mohd. Arif Jaffri, learned counsel, despite a written notice, has chosen not to appear and the proceedings being fixed for hearing have thus proceeded treating the notice to be sufficient. The written notice served upon Sri Mohd. Arif Jaffri, is taken on record.(Para 4)

Held: (Para-14-17)

1.This Court does not appreciate such a practice on the part of the Motor Accident Claims Tribunal where the proceedings though of summary nature are bound to be decided fairly and with due application of mind. Insofar as the procedure is concerned, by virtue of Rule 221 of U.P. Motor Vehicles Rules, 1998 Order XVI Rule 2 to 21 CPC are applicable wherein Order XVI Rule 6 in particular empowers the Tribunal to summon a document from the authority possessed with the same that may be decisive for adjudication of a claim. The application filed by the claimants for summoning of the insurance policy at worst was liable to be allowed at the cost of claimants but the order passed by the Tribunal leaving it open to the claimant and the owner to file such a document has allowed an uncertainty to creep in, resultantly, due to lack of necessary evidence on record, even this Court cannot record a finding one way or the other conclusively. Not only that the appellant has failed to file a copy of the insurance policy till date but the position is not better when the conduct of claimant or the owner is viewed.

2.The parties contesting the claim including the insurance company as well as the Tribunal having failed to lay hands on such a vital document, as a matter of fact, have contributed to the resultant injustice which could be avoided by showing due diligence by the Tribunal at an appropriate stage. The procedure to be adopted by the Tribunal is bound to be meticulously just and fair for the reason that it serves the purpose of justice. The Tribunals must bear in mind that the summary claims have not only to be decided expeditiously but judgements rendered by the Tribunals have to stand the test of real and expeditious justice. The case at hand is a glaring example where the procedure prescribed under law has not been seriously observed. Not only that the appeal filed by the insurance company but the appeal for enhancement being bereft of merit call for an interference to the extent that the matter in its entirety is remitted to the Tribunal for returning a clear finding on the question of extent of insurance of passengers as per insurance policy relating to the vehicle in question. Thus, the award in question is set aside and the matter in its entirety is remitted to the Tribunal for fresh decision.

3.Let record of the case be sent back to the Tribunal for rendering a decision by recording a clear finding on issues no. 3 and 5. For this purpose it is open to the Tribunal to call for the requisite insurance policy from the insurance company and in the event of failure on their part to file the same a clear finding fixing the liability thereof be recorded and the issues be decided accordingly. Quantum of compensation be also adverted to afresh by considering the relevant material. This exercise shall be undertaken by the Tribunal within a period of six months from the date a certified copy of this judgement is filed. The parties shall appear before the Tribunal on 7.11.2016.

4.In the result the **FAFO No. 174 of 2015 is allowed** and the enhancement appeal, namely, **FAFO No. 1029 of 2014 being dependent upon the award becomes infructuous** at this stage and is consigned to record accordingly.

Case Law discussed:

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. FAFO No. 1029 of 2014 filed for enhancement of compensation arises out of the award rendered on 8.9.2014 in Claim Petition No. 114 of 1993 and FAFO No. 174 of 2015 arising out of the same award filed by the insurance company were heard together.

2. Sri Anil Srivastava, learned counsel for the appellants in FAFO No. 174 of 2015 and Sri Mohd. Saeed, learned counsel for the claimants were heard at length. The owner of the vehicle i.e.

opposite party no. 4 though being served, has remained unrepresented and the respondent no. 5 who died during pendency of the claim petition itself, stands deleted from the array of parties.

3. It is also informed that opposite party no. 2 during pendency of claim petition had died, therefore, the appeal would not be maintainable against him as well. In these circumstances, the surviving respondents are respondent no. 1, 3 and 4 out of whom 1 and 3 are the claimants whereas respondent no. 4 is the owner of the offending vehicle.

4. In enhancement appeal no. 1029 of 2014 Sri Mohd. Saeed represented the appellant whereas Sri Waqar Hashim argued on behalf of the insurance company, however respondent no. 2 i.e. the owner though being represented through Mohd. Arif Jaffri, learned counsel, despite a written notice, has chosen not to appear and the proceedings being fixed for hearing have thus proceeded treating the notice to be sufficient. The written notice served upon Sri Mohd. Arif Jaffri, is taken on record.

5. From the perusal of record it is seen that by order dated 29.8.2013 passed by the learned Tribunal, it was left open to the owner of the vehicle and the claimants both to place a copy of the insurance policy on record and this order has remained unchallenged throughout.

6. On the premise of the aforesaid order, Sri Anil Srivastava, learned counsel for the Oriental Insurance Company has argued that once the responsibility of filing the insurance policy was shifted upon the claimants and the owner, there was no occasion for the insurance company to have placed on record the relevant document although in the written statement filed before the Tribunal on behalf of the insurance company paragraphs 17 and 22 make a specific admission as regards the insurance of vehicle, which are reproduced as under:

"17. That in reply to para 17 of the petition it is admitted to the extent that the alleged vehicle was insured with the answering opposite party with liability limited to the extent as enumerated in the policy terms and conditions and as laid down in the Motor Vehicle Act.

22. That the contents of para 22 of the petition are specifically denied. It is stated that the petitioner has not only claimed and set excessive and exorbitant claim but the said claim is also unreasonable. It is stated that the claimant is not entitled to any claim/compensation from the answering opposite party, specially when the liability of the answering opposite party is limited to the extent as per the terms and conditions of the policy. It is also stated that the liability of the answering opposite party is limited in case of property damage of third party."

7. Not only that the written statement had admitted the existence of the insurance policy of the vehicle in question but the evidence of one Jagdish Prasad, a clerical staff of the insurance company was also led before the Tribunal who in his examination-in-chief stated that the document of driving licence is filed as paper no. C-29 whereas the document of insurance policy is filed as Ga-30. As regards the driving licence, it was stated by the witness that the said document was obtained through a surveyor who is not a permanent employee of the company but apparently

driving licence being valid, the same cannot be doubted. Insofar as paper Ga-30 (insurance policy) is concerned, the owner of the vehicle while conducting cross-examination did not ask any question although the policy filed did not relate to the owner's vehicle. The statement made in the cross-examination merely shows that document Ga-30 is the insurance policy placed on record. Thus, learned Tribunal while deciding the claim on issues no. 3 and 5, has proceeded on the basis of evidence led by the claimants and the insurance company alone. In the light of pleadings and the evidence led before the Tribunal, the point of determination that crops up for consideration before this Court is; **whether the deceased being the owner of the goods was an authorised passenger and if yes, whether such a person was covered within the scope of insurance policy or not.**

8. It may be noticed that prior to the amendment of 1994 in the Motor Vehicles Act, 1988, there was no statutory obligation on the part of the owner of transport vehicle to insure liability of the insurance company for extra passenger i.e. the owner of the goods or his representative. However if the contract of insurance provided that extra cover, then the liability of the insurer was construed as per terms of the policy.

9. It is an admitted position that the deceased being owner of the goods was not an unauthorised passenger but what is disputed is that the authorised passenger was not insured as per the contract of insurance policy issued by the insurance company. Once the deceased was admittedly an authorised passenger and the existence of insurance policy was also admitted in the written statement filed by the insurance company, the question that immediately crops up is as to the extent of liability of the insurer. The liability was denied by the insurer by filing an additional written statement on 25.7.2013 wherein paras 1 and 6 state as under:

"1. That by way of order dated 29.05.1999, the answering opposite party/Oriental Insurance Co. Ltd. Was absolved of its liability and the liability of award was fixed upon opposite party no. 1, as the deceased was travelling in the alleged vehicle as a gratious passenger. Further by way of order dated 17.02.2012, order dated 29.05.1999 was set aside on depositing Rs. 1,00,000/- before the Hon'ble Tribunal, by the owners, such the need of this additional written statement of opposite party no. 3 before this Hon'ble Tribunal arose, as opposite party no. 1, filed its written statement before this Hon'ble Tribunal on dated 15.09.2012.

6. That as per order dated 29.05.1999, the Hon'ble Tribunal had clearly observed and held that the deceased was travelling in the alleged vehicle, at the time of alleged occurrence, as a gratious passenger and which is clearly the violation of the policy of insurance and thereby by way of said order had absolved the liability of opposite party no. 3, as against the payment of award, but had fixed the liability on opposite party no. 1, on account of violation of the conditions of the policy of insurance."

10. The statement made in paras 1 and 6 of the additional written statement when read alongwith para 17 and 22 of the written statement already reproduced above, lead to an inconsistency. On the one hand the insurance company admitted the existence of insurance policy but on the other hand, it is stated that the deceased was a gratuitous passenger.

11. Looking to the anomalous stand advanced bdy the insurance company, the owner of the vehicle filed an application on 29.8.2013 for summoning the copy of insurance policy, which was disposed of by an order passed on the same date, which reads as under:

"दिनांक 29.08.2013

याचिका प्रस्तुत हुई। पुकार करायी गयी। पुकार पर याचिनी के अधिवक्ता उपस्थित हैं। याचिनी पी०डब्लू01 के रूप में पुर्व में परीक्षित हो चुकी है। वर्ष 1993 के मोटर दुर्घटना प्रतिकर याचिका के इस मामले में पहले निर्णय दिनांक 29.05.1999 को पारित हुआ था इस निर्णय को निरस्त करने के लिए विपक्षी संख्या 1 फारुख अहमद की तरफ से आदेश 9 नियम 13 सपठित धारा 151 सी०पी०सी० के अन्तर्गत प्रार्थना पत्र प्रस्तुत किया गया था जो स्वीकार हुआ था। अब याचिका वास्ते याची साक्ष्य नियत है। याचिनी गवाही के लिए उपस्थित है परन्तु 12-45 पी० एम० तक विपक्षी संख्या 1 की तरफ से कोई उपस्थित नहीं आया। विपक्षी संख्या 3. बीमा कम्पनी के अधिवक्ता आज न्यायालय में उपस्थित आ चुके हैं। याचिका पुनः 2-30 पी० एम० पर पेश हो।"

13. Once the burden was shifted upon the claimants and the owner as per the order dated 29.8.2013, the insurance company did not choose to file the policy in relation to the vehicle in question so as to defend its liability.

14. Surprisingly while dealing with the issue which was open to be decided on the basis of a documentary evidence, the Tribunal misdirected its procedure and allowed more doubt to creep in and in this manner the Tribunal has failed to record a clear finding of fact on the aspect of extent of the liability of insurer.

15. This Court does not appreciate such a practice on the part of the Motor Accident Claims Tribunal where the proceedings though of summary nature are bound to be decided fairly and with due application of mind. Insofar as the procedure is concerned, by virtue of Rule 221 of U.P. Motor Vehicles Rules, 1998 Order XVI Rule 2 to 21 CPC are applicable wherein Order XVI Rule 6 in particular empowers the Tribunal to summon a document from the authority possessed with the same that may be decisive for adjudication of a claim. The application filed by the claimants for summoning of the insurance policy at worst was liable to be allowed at the cost of claimants but the order passed by the Tribunal leaving it open to the claimant and the owner to file such a document has allowed an uncertainty to creep in, resultantly, due to lack of necessary evidence on record, even this Court cannot record a finding one way or the other conclusively. Not only that the appellant has failed to file a copy of the insurance policy till date but the position is not better when the conduct of claimant or the owner is viewed.

16. The parties contesting the claim including the insurance company as well as the Tribunal having failed to lay hands on such a vital document, as a matter of fact, have contributed to the resultant injustice which could be avoided by showing due diligence by the Tribunal at an appropriate stage. The procedure to be adopted by the Tribunal is bound to be meticulously just and fair for the reason that it serves the purpose of justice. The Tribunals must bear in mind that the summary claims have not only to be decided expeditiously but judgements rendered by the Tribunals have to stand the test of real and expeditious justice. The case at hand is a glaring example where the procedure prescribed under law has not been seriously observed. Not only that

the appeal filed by the insurance company but the appeal for enhancement being bereft of merit call for an interference to the extent that the matter in its entirety is remitted to the Tribunal for returning a clear finding on the question of extent of insurance of passengers as per insurance policy relating to the vehicle in question. Thus, the award in question is set aside and the matter in its entirety is remitted to the Tribunal for fresh decision.

17. Let record of the case be sent back to the Tribunal for rendering a decision by recording a clear finding on issues no. 3 and 5. For this purpose it is open to the Tribunal to call for the requisite insurance policy from the insurance company and in the event of failure on their part to file the same a clear finding fixing the liability thereof be recorded and the issues be decided accordingly. Quantum of compensation be also adverted to afresh by considering the relevant material. This exercise shall be undertaken by the Tribunal within a period of six months from the date a certified copy of this judgement is filed. The parties shall appear before the Tribunal on 7.11.2016.

18. In the result the FAFO No. 174 of 2015 is allowed and the enhancement appeal, namely, FAFO No. 1029 of 2014 being dependent upon the award becomes infructuous at this stage and is consigned to record accordingly.

19. No order as to cost.

(2016) 9 ILRA 1089
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHASHI KANT, J.

First Appeal No.- 481 Of 1979

State Of U.P. **...Appellant**
Versus
Rani Rajendri Kumari **...Respondent**

Counsel for the Appellant:
S.C., S.N.Upadhayay, Ramesh Upadhyay

Counsel for the Respondent:
V.K.Singh, Ravi Kant, Shashi Nandan, Siddharth Nandan, Udayan Nandan, Rahul Agarwal

Civil law – defendant's appeal – mining lease – lease deed – quarrying – sand – silica sand – royalty – U.P. Zamindari Abolition and Land Reforms Act, 1951 – vesting of estates – rights, title and interest – mines and minerals – sub-soil – intermediary – statutory lease – MMRD Act, 1957 – ownership – proprietor – zamindar – lease valid and legal – promissory estoppel – royalty demand – void illegal and without jurisdiction – injunction.

This is a defendant's appeal under Section 96 of Code of Civil Procedure, arisen from the judgment and decree dated 02.07.1979 passed by Sri Ghanshyam Pandey, Civil Judge/Judge Small Causes Court at Allahabad in Original Suit No. 107 of 1969, whereby he had decreed the suit with cost in the following manner :

"Defendants are restrained from interfering in any manner whatsoever with the enjoyment and possession of the plaintiff over the land and mines held by her in pursuance of lease dated and as granted by the lease deeds dated 16.4.47 and 27.4.59 and also of all the minerals extracted from mines from the areas covered by said leases. Defendants are further restrained from inviting or accepting applications and considering or granting any mining lease for any mineral covered under the mining lease held by plaintiff for the area or any part or portion thereof which is mentioned in aforesaid plaintiff's lease deeds dated 16.4.47 and 27.4.59 so long as the subsisting lease in favour of plaintiff is in force and is not otherwise terminated or cancelled by any court of law of competent jurisdiction or in accordance with law. Defendants also cannot demand or realise the sum of rupees nine lacs forty thousand two hundred thirty five and paise five (940235.5 p.) as royalty for the period from 1.1.52 to 26.6.68, from plaintiff as claimed by them other than royalty stipulated in plaintiff's lease deed dated 16.4.47 and 27.4.59 till these leases are subsisting and are not cancelled or amended in accordance with law. It is also declared that the impugned order dated 31.5.68 and all subsequent orders etc. flowing there from in any manner directing that a clearance certificate from D.M./Collector is necessary before booking and transfer of silica sand situated within the district of Allahabad is void illegal and without jurisdiction. Plaintiff's suit for damages and also pendentelite and future damages is dismissed with cost. It is also made clear that defendants and all their servants, agent and subordinates will not hold out threat of criminal prosecution against plaintiff for alleged illegal mining of silica sand till her lease deeds are subsisting and are not terminated, modified or cancelled by any law or competent Court and plaintiff does not act centrary to any relevant law and also against the terms of lease." (emphasis added)

(Para2)

Original Suit No. 107 of 1969 was filed by Smt. Rani Rajendri Kumari Ba, w/o- Maharao Raja Kamlakar Singh, R/o- Sankargarh, Tehsil Karchhana, District Allahabad, impleading State of U.P. through Secretary, Industries and Union of India, New Delhi (hereinafter referred to as the plaintiff-respondent) as defendants. Plaintiff initially impleaded only State of U.P. as sole defendant but subsequently made amendment by impleading Union of India as defendant no.2 vide Court's order dated 24.9.1969. The plaintiff – respondent claimed following reliefs :

" (a) by prohibiting the defendants and all their servants, agents and subordinates by a permanent prohibiting injunction directing the defendants by themselves and through their officers and agents not to hold out threats of criminal prosecution against the plaintiff alleging that the plaintiff will be prosecuted and proceeded criminally for the alleged illegal mining silica sand from the area under lease of the plaintiff. (Valued at Rs. 2,000/-).

(b) by restraining the Government of U.P. and the Union of India by issue of a permanent prohibitory injunction prohibiting them from interfering in any manner whatsoever with the enjoyment and possession of the plaintiff over the land and mines held by the plaintiff in pursuance of the lease deed and as granted by the lease deed dated 16th April, 1947 and 27 April 1959 and also of all the minerals extracted from the mines from the areas covered by the said lease. (valued at Rs. 10,000/-)

(c) to issue a permanent prohibitory injunction restraining the Government of U.P. from inviting or granting any mining lease for any mineral covered under the mining lease held by the plaintiff for the area or any part or portion thereof which is mentioned in the aforesaid lease deed dated 16th April, 1947 and 27th April, 1959 so long as the subsisting lease in favour of the plaintiff is in force and is not otherwise terminated or cancelled by any court of law of competent jurisdiction. (valued at Rs. 2,000/-)

(d) to issue a permanent prohibitory injunction restraining the Government of U.P. and the Union of India from demanding or releasing the sum of Rs. 9,40,225/25 claimed by the defendants as royalty for the period from 1.1.1952 to 26.6.68 for the alleged mining of the so called silica sand or any royalty other than the royalty stipulated in the lease deed dated 16th April 1947 and 27th April 1959 from the plaintiff for extracting minerals including sand (silica sand) from the area held under lease deed is subsisting and is not otherwise cancelled amended or altered by the any competent court having jurisdiction in the matter. (valued at Rs. 10,000/-)"(Para 3)

HELD:(Paras 159-167)

1.Moreover, in the present case, deemed statutory lease under Section 108 of U.P. Act, 1951 came to an end on execution of another lease on 27.04.1959, hence statutory lease after enforcement of MMRD Act, 1957 got subjected to that Act, particularly in respect of royalty under Section 9, and thereafter vanished when new agreement was executed by plaintiff with State of U.P. It is a different matter that this new agreement, being in the teeth of MMRD Act, 1957 and Rules framed thereafter was unenforceable, inexecutable and inoperative since inception.

2.Term of lease dated 27.04.1959 noticed above, would show that lease is in perpetuity and not for a fixed tenure. The amount of royalty mentioned therein does not concur to the provisions of MMRD Act, 1957. It permits lessee to excavate and quarry Stone, Ballast, Kankar, Morrum and Sand. A lessee can work out mining operation throughout the year. He is also entitled to sublet the premises to any person but without consent of lessor it shall not assign. Further right is given to lessee for renewal with limited enhancement of royalty at the end of every 50 years. The MMRD Act, 1957 admittedly came into force on 1.6.1958 i.e. before execution of lease deed dated 27.4.1959. After enforcement of said Act to the extent it is applicable, denudation of power of State is total and not partial, as held in P. Kannadasan V. State of Tamilnadu (1996) 5 SCC 70 =AIR 1996 SC 2560. 161. All the items for which mining lease was granted vide lease deed dated 27.4.1959 did satisfy the definition of "minerals" under Section 3(a) and (e) of MMRD Act, 1957. "Minerals"

means an organic substance found either on or in the earth which may be garnered and exploited for profits as observed in V.P. Pithupitchal and Anr. Vs. Special Secretary to the Government of Tamilnadu, AIR 2003 SC 2455. Neither under provisions of MMRD Act, 1957, mining lease in perpetuity could have been granted nor for more than the area, prescribed as maximum area under Section 6 could have been provided, nor there could have been any occasion to agree for payment of royalty, which is not consistent with Section 9 of MMRD Act, 1957.

3.Thus, in the light of discussion made above, it cannot be doubted that on and after enforcement of MMRD Act, 1957, neither plaintiff-respondent had any right to continue mining on the disputed land nor removal of minerals without payment of royalty. In fact, entire mining operation and removal of minerals on the part of plaintiff-respondent and other sub-lessees was patently illegal, without any authority of law and in flagrant violation of provisions of MMRD Act, 1957. The lease deed dated 27.04.1959 was completely illegal, nullity and void-ab-initio. Question No. (vii) is answered accordingly.

4.The above findings make it clear that demand of royalty by Collector for the period from 01.01.1952 till 31.05.1958, when MMRD Act, 1957 came into force, being an amount outside statutory lease was not justified and valid. To that extent, impugned demand dated 31.05.1968, by Collector, demanding royalty for the period prior to 01.06.1958, was not valid. However, on and after 01.06.1958 entire mining operation carried out by plaintiff-respondent or sublessees including removal of minerals from land in dispute is/was wholly illegal. We also hold that State Government vide letter dated 14.02.1966 rightly informed plaintiff-respondent that he had been quarrying silica sand etc. from disputed villages illegally and in violation of provisions of MMRD Act, 1957. The demand of royalty by Collector for the period 01.06.1958 and onwards is absolutely legal and plaintiff-respondent was/is liable to pay the same.

5.In the result, we set aside impugned judgment and decree dated 02.07.1979 passed by Civil Judge/Judge Small Causes Court at Allahabad in Original Suit No. 107 of 1969 except to the extent that plaintiff-respondent was not liable to pay royalty from 01.07.1952 to
31.05.1958 to Collector as demanded by him under the provisions of MMRD Act, 1957 and Rules framed thereunder vide order dated 31.5.1968, but in respect of all other aspects and all other reliefs sought by plaintiff-respondent including liability on and after 01.06.1958, plaintiff-respondent was/is not entitled for any relief, whatsoever. The suit of plaintiff-respondent, therefore, is also liable to be dismissed in this regard.

6.However, since plaintiff-respondent has continued with mining operations initially under interim injunction granted by Court below and thereafter in the light of final judgment, it is our duty to put defendant-appellant in a position so that it may not stand permanently suffered for the act of the Court by issuing such direction as may restore State to its position in which it would have been. We find it appropriate to decide the appeal in following manner:
(i).Demand of Collector vide letter dated 31.05.1968 forpayment of royalty from 01.07.1952 to 31.05.1958 is hereby declared illegal.
(ii).In respect to all other reliefs sought by plaintiff, impugnedjudgment and decree dated 02.07.1979 is hereby set aside and the suit hereby is dismissed to that extent.
(iii).The defendant-appellant shall henceforth proceed torecover entire amount of royalty payable by plaintiff-respondent on and after 01.06.1958 till the date of this decision along with interest, if provided in the statute, as per the rates prescribed therein, and if not provided in Statute at the rate of 9 per cent per annum forthwith and without any further delay.
(iv).Plaintiff-respondent shall not carry out mining operations henceforth and defendant-appellant shall forthwith take steps to restrict defendant-appellant and its sub-lessees from undergoing any mining operation in the aforesaid 46 villages in respect to the minerals stated in this judgment and shall proceed to grant lease in accordance with provisions of MMRD Act, 1947 and Rules framed thereunder and only thereafter shall allow mining operations.

7.Appeal is partly **allowed** in the manner aforesaid. Defendant-Appellant shall be entitled to cost throughout to the extent it has succeeded in this appeal.

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Case Law discussed:

1.Bhagwan Das v. State of U.P., (1976) 3 SCC 784 — para 63
2.King Pal Singh v. State of U.P., (1996) 11 SCC 571 — para 64
3.Avadh Kishore Das v. Ram Gopal, AIR 1979 SC 861 — para 47

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

1. Heard Sri Ashok Kumar Pandey, Additional Advocate General, assisted by Sri R.C. Yadav, Dr. Y.K. Srivastava and Sri Lokendra Kumar, learned Standing Counsels for appellant; and, Sri Shashi Nandan, learned Senior Advocate, assisted by Sri Udayan Nandan and Sri Rahul Agarwal, Advocates, for respondent.

2. This is a defendant's appeal under Section 96 of Code of Civil Procedure, arisen from the judgment and decree dated 02.07.1979 passed by Sri Ghanshyam Pandey, Civil Judge/Judge Small Causes Court at Allahabad in Original Suit No. 107 of 1969, whereby he had decreed the suit with cost in the following manner :

*"Defendants are **restrained from interfering** in any manner whatsoever with the enjoyment and possession of the plaintiff over the land and **mines held by her** in pursuance of lease dated and as granted by the lease deeds dated 16.4.47 and 27.4.59 and **also of all the minerals extracted from mines from the areas covered by said leases**. Defendants are **further restrained from** inviting or accepting applications and considering or **granting any mining lease for any mineral covered under the mining lease held by plaintiff for the area or any part or portion thereof** which is mentioned in aforesaid plaintiff's lease deeds dated 16.4.47 and 27.4.59 so long as the subsisting lease in favour of plaintiff is in force and is not otherwise terminated or cancelled by any court of law of competent jurisdiction or in accordance with law. Defendants also cannot demand or realise the sum of rupees nine lacs forty thousand two hundred thirty five and paise five (940235.5 p.) as **royalty for the period from 1.1.52 to 26.6.68, from plaintiff as claimed by them other than royalty stipulated in plaintiff's lease deed dated 16.4.47 and 27.4.59 till these leases are subsisting and are not cancelled or amended in accordance with law.** It is also declared that the impugned order dated 31.5.68 and all subsequent orders etc. flowing there from in any manner directing that a clearance certificate from D.M./Collector is necessary before booking and transfer of silica sand situated within the district of Allahabad is void illegal and without jurisdiction. Plaintiff's suit for damages and also pendentelite and future damages is dismissed with cost. It is also made clear that defendants and all their servants, agent and subordinates will not hold out threat of criminal prosecution against plaintiff for alleged illegal mining of silica sand till her lease deeds are subsisting and are not terminated, modified or cancelled by any law or competent Court and plaintiff does not act centrary to any relevant law and also against the terms of lease."*

(emphasis added)

3. Original Suit No. 107 of 1969 was filed by Smt. Rani Rajendri Kumari Ba, w/o- Maharao Raja Kamlakar Singh, R/o- Sankargarh, Tehsil Karchhana, District Allahabad, impleading State of U.P. through Secretary, Industries and Union of India, New Delhi (hereinafter referred to as the plaintiff-respondent) as defendants. Plaintiff initially impleaded only State of U.P. as sole defendant but subsequently made amendment by impleading Union of India as defendant no.2 vide Court's order dated 24.9.1969. The plaintiff - respondent claimed following reliefs :

" (a) by prohibiting the defendants and all their servants, agents and subordinates by a permanent prohibiting injunction directing the defendants by themselves and through their officers and agents not to hold out threats of criminal prosecution against the plaintiff alleging that the plaintiff ***will be prosecuted*** *and proceeded criminally for the* ***alleged illegal mining silica sand from the area under lease of the plaintiff****. (Valued at Rs. 2,000/-).*

(b) by restraining the Government of U.P. and the Union of India by issue of a permanent prohibitory injunction prohibiting them ***from interfering*** *in any manner whatsoever* ***with the enjoyment and possession of the plaintiff over the land and mines held by the plaintiff*** *in pursuance of the lease deed and as granted by the lease deed dated 16th April, 1947 and 27 April 1959 and* ***also of all the minerals extracted from the mines from the areas covered by the said lease****. (valued at Rs. 10,000/-)*

(c) to issue a permanent ***prohibitory injunction*** *restraining the Government of U.P.* ***from inviting or granting any mining lease for any mineral covered under the mining lease held*** *by the plaintiff for the area or any part or portion thereof which is mentioned in the aforesaid lease deed dated 16th April, 1947 and 27th April, 1959* ***so long as the subsisting lease in favour of the plaintiff is in force and is not otherwise terminated or cancelled by*** *any court of law of competent jurisdiction. (valued at Rs. 2,000/-)*

(d) to issue a permanent prohibitory injunction restraining the Government of U.P. and the Union of India from ***demanding or releasing the sum of Rs. 9,40,225/25 claimed by the defendants as royalty for the period from 1.1.1952 to 26.6.68 for the alleged mining*** *of the so called silica sand or any royalty other than the royalty stipulated in the lease deed dated 16th April 1947 and 27th April 1959 from the plaintiff for extracting minerals including sand (silica sand) from the area held under lease deed is subsisting and is not otherwise cancelled amended or altered by the any competent court having jurisdiction in the matter. (valued at Rs. 10,000/-)"*

4. At the bottom of the plaint a list of 46 villages, subject matter of suit which fell within Pargana Bara, Tehsil Karchhana, District Allahabad was also given and reads as under :

1	Shankargarh	17	Lakhanpur	33	Lohgara
2	Talapar	18	Kaitha	34	Gadhamar
3	Kapari	19	Sheorajpur	35	Chandra
4	Barui	20	Osa	36	Lalai

5	Khansemra	21	Atari Kapson	37	Baisa
6	Beonra	22	Charihari	38	Laund Khurd
7	Raipatna	23	Gobra Sangram	39	Baghla
8	Matarwar	24	Pagwar	40	Pandua
9	Gorkha	25	Majhiari Bahelia	41	Parvezabad alia Burhi
10	Gheodora	26	Gobra Hewar	42	Basahra Tarahar
11	Chak Arazi Garhwa	27	Barhaiya	43	Lalapur
12	Gara	28	Bhonri	44	Manduri
13	Benipur	29	Ghoghar	45	Partappur
14	Ledar	30	Bokuliha	46	Surwal
15	Biharia	31	Mabaiya Raksel		
16	Abhaipur	32	Mehaiya Pahalwan		

5. The plaint case set up is that Maharao Raja Kamlakar Singh (hereinafter referred to as Kamlakar Singh) was proprietor of Bara Estate. 46 Villages mentioned in Schedule-A of the plaint and others comprised Bara Estate and Kamlakar Singh was the owner and proprietor of villages. In his capacity of owner and proprietor of these villages, he had absolute right to excavate and quarry Stones, Ballast, Kankar, Moram etc., found in those villages.

6. On 16th April, 1947, Kamlakar Singh transferred quarries of stones, Ballast, Kankar, Moram etc. by a registered lease deed executed in favour of plaintiff-respondent, his wife. The stipulations of lease deed, relevant for the purpose of the suit, and reproduced in para-5 of plaint, are reproduced as under:

"(a) That the lessee shall have liberty and power to enter upon the land mentioned in the Schedule 'A' hereto and to search for and dig and obtain by ***excavation and quarrying*** *both open to the day light and by underground working, the demise* ***stone, ballast, kankar, moram and sand*** *and to carry away and dispose of the same for her own benefit.*

(b) That the lessee shall have liberty and power to enter upon and to use and occupy to such an extent as may be deemed necessary by the lessee, the lessor's other land adjoining other pits (hereinafter called the said land) for depositing and heaping thereon the produce of the said quarries and all earth, soil and other substance dug up and brought to the surface in or about the working of the same and for otherwise carrying on the work of the said quarries.

(c) The lessee shall have the liberty and power to take lead and carry away from the said land the stone, ballast, kankar, morrum and sand to be obtained as aforesaid and disposed of the same at her will and pleasure.

(d) During the term of this demise, ***the lessee shall pay a royalty at the rate of Rs. 4000/-*** *(four thousand only) annually payable in two equal instalments, the first instalment to be due on the 1st of June and the second instalment on the 1st of December every year whether the lessee quarries or carries on any operations or not.*

(e) that lessee may export stone, ballast, kankar, morrum and sand from the quarries, hereby demised all the year round.

(f) ***The lessee shall be entitled to sublet the premises*** *hereby demised or any part hereof or any right or privileges under the lease* ***to any person without the consent in writing of the lessor.*** *But it will not be open to the lessee to assign her interest in the said lease in any manner whatsoever without the written consent of the lessor.*

(g) ***At the end of every fifty years from the date of the execution*** *hereof it will be open to the lessor to increase the amount of annual royalty payable by the lessee in accordance with the terms hereof by 10% in which case the royalty so fixed at the time of revision thereof by the lessor shall be payable by the lessee and all the terms with regard to the payment thereof shall apply to the amount so fixed."*

(Emphasis added)

7. The Estate held by Kamlakar Singh known as Bara Raj is an ancient Estate. Succession to the said Estate was governed by primogeniture. It was an impartible Estate. The family of Kamlakar Singh was directly connected with the ruling family of erstwhile Rewa Estate. Emperor Shah Alam in Hijri 1188 had granted a Sanad of full ownership of whole property of "Bara Raj" to the then Raja Rao Vikramaditya Singh. By virtue of said Sanad and by virtue of Wajibul Arz applicable to Bara Raj, the ancestors of Kamlakar Singh had been enjoying, all through, full, absolute and unrestricted rights over the area comprised in "Bara Raj", and worked, excavated, carried out and appropriated all minerals found within the area of Bara Raj, without any restriction and without paying any royalty to any superior authority. From time to time, proprietors of Bara Raj had been granting mining leases to different parties for extracting ballast, sand, bolders, moram and other minerals found within the area comprising Bara Raj. Mining of minerals by lessees, all through being done without any interruption and without paying royalty to the Government or any superior authority. The plaintiff-respondent after having lease of 46 villages, mentioned in Schedule-A to the plaint, sublet portions of demised land and right to excavate quarry stones, ballast, Kankar, Moram etc. to various other parties.

8. With effect from 1st July, 1952, with the enactment and enforcement of U.P. Zamindari Abolition and Land Reforms Act, 1951 (U.P. Act No. 1 of 1951) (hereinafter referred to as "U.P. Act, 1951"), rights of Kamlakar Singh in the land in dispute extinguished by virtue of Section 4 of the said Act. However under Section 108 of 1951, the plaintiff became lessee of Government of U.P. on 1.7.1952, on the same terms and conditions of the then subsisting lease.

9. The plaintiff-respondent continued to excavate and quarry sand (silica sand) under the lease deed of 1947 till it was acknowledged by State of U.P. in accordance with Section 108 of U.P. Act, 1951. On 27.04.1959, Governor of U.P. and plaintiff-respondent entered into a lease of mines, situated in the aforesaid villages, on the same terms and conditions as leased out by Kamlakar Singh in 1947. Under lease deed dated 27.04.1959, plaintiff was given liberty and power to enter upon the land mentioned in the schedule, attached to the deed of lease, and to search for, dig and obtain by excavation and quarrying, both open to day light and under ground working Stone, Ballast, Kankar, Moram and Sand etc. and to carry away and dispose of the same for her own benefit. The plaintiff was also conferred right to sublet the premises demised under the aforesaid lease or any part thereof or any right or privilege to any person, without written consent of the lessor. The plaintiff thus was enjoying all the aforesaid rights throughout.

10. After State Government executed lease deed on 27.04.1959, in 1959 in the area leased out to plaintiff, sand which was available and used to be extracted, quarried, mined etc. is commonly called as "silica sand", used for manufacture of glass, silicate and in foundry etc. It is this sand which plaintiff had been quarrying, excavating etc. throughout and none else.

11. Under lease deed dated 27.04.1959, plaintiff was to pay royalty at the rate of Rs. 4000/- per annum in two equal installments on 1st of June and 1st of December in the year, irrespective of whether plaintiff"s quarries are carried in mining operation or not during the year. This royalty had been paid and is being paid by plaintiff throughout. The plaintiff was excavating and digging Stones, Ballast, Kankar, Moram and sand etc. under the lease deed dated 16.4.1947 and continued to do so under the lease deed dated 27.4.1959 executed by State of U.P.

12. At no point of time, State of U.P. took objection regarding digging or excavation of sand i.e. "silica sand". On 17th February, 1966, the plaintiff received a letter from Secretary of Government of U.P., dated 14.02.1966, stating that plaintiff had been quarrying large quantity of silica sand from villages mentioned in lease deed in contravention of terms thereof and also in flagrant violation of the provisions of Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as "MMRD Act, 1957") and Rules framed thereunder. Plaintiff was called upon to stop quarrying of "silica sand" forthwith and cancel all sub-leases granted by her, authorizing quarrying of silica sand to others. Plaintiff was also directed to render full account of silica sand quarried by her and her sub-lessees within 15 days of the receipt of letter and deposit royalty for silica sand, quarried by her or her sub lessees, at the rate of Rs. 0.75 per tone within a month of receipt of the letter. It was also written in the notice that in case of default, lease deed dated 27.04.1959 may be cancelled and action for recovery of royalty money as well as prosecution for unauthorised mining may be initiated.

13. The case of plaintiff is that she had every right to quarry sand found at the leased out premises. State Government had no right to prohibit plaintiff from doing so and direction to stop quarrying or demand of royalty money was illegal. Lease was granted by virtue of Section 108 of U.P. Act No. 1 of 1951 and Mineral Concession Rules had no application to the same. District Magistrate/Collector, Allahabad also issued an order dated 31.5.1968 to Divisional Superintendent,

Railway Administration operating within the district of Allahabad that illegal quarried silica sand is being transported by Railways at the instance of persons, who have no licence for such quarrying and this is causing huge loss to Revenue and they were directed to stop such transportation immediately.

14. On account of the aforesaid illegal activity of State of U.P. and its authorities, plaintiff sent a notice under Section 80 CPC calling upon them to desist from :-

(a) Holding out threats and attempting to interfere in any manner whatsoever with the exercise of rights secured to the plaintiff by aforesaid lease for mining morrum, ballast, stone, sand (wrongfully described as silica sand), kankar etc.

(b) Holding out threat of inviting applications and considering and granting mining leases of areas already under lease of the plaintiff, for mining of aforesaid or any of the aforesaid minerals.

(c) Holding out threat for prosecuting plaintiff in criminal court for extraction of 'silica sand' from the area held under lease by plaintiff.

(d) Interfering with the working of mines and extraction of aforesaid minerals by plaintiff and her sub lessees in the area under lease of plaintiff.

(e) Putting any restriction by any order, direction or request either by themselves or through any other official of the State Government preventing booking and transport of sand or silica sand by rail from any railway station situated within the district of Allahabad to any other place within the Union of India.

(f) Threatening to put physical obstructions to the movement and sale of sand extracted from the mines held under lease by the plaintiff.

(g) Compelling the plaintiff and her sub lessees to take a clearance certificate from District Magistrate and / or Collector or from any other authority or authorities for the purposes of booking of sand (silica sand).

(h) Holding threats to realise royalty at the rate of Rs. 0.75 per tonne of the sand (silica sand) extracted by plaintiff or her sub lessees from the mines situated within the area under lease of plaintiff.

(i) Putting restrictions on the freedom of trade as stated above, held and enjoyed by plaintiff.

(j) Doing any act directly or indirectly interfering with or curtailing the rights, privileges and properties held owned and enjoyed by the plaintiff as the lease holder.

15. State Government demanded a sum of Rs. 940225.25 from plaintiff towards royalty for the period from 1.1.1952 to 26.6.1968 which demand was wholly illegal. It is in these circumstances, suit was filed seeking relief as already noticed above.

16. State of U.P. contested suit by filing a detailed written statement dated 8th October, 1969. It pleaded that neither there was any Estate named as "Bara Estate" known to the defendants nor Kamlakar Singh was proprietor thereof. He, in fact was an "Intermediary" in the district of Allahabad. He was "Zamindar" and "Intermediary" in some villages of the district. In this area, settlement of land was made in 1874 AD. Lumberdar Sri Vanaspati Singh of the family of Kamlakar Singh executed an agreement dated 10th March, 1874 and agreed to pay rent with effect from 1282 Fasli onwards until the next settlement in respect of each village or part of village in which he was an intermediary. His claim that he was owner and proprietor of the villages and had absolute right of excavation, quarrying etc. was incorrect. "Zamindar" or "intermediary" had no rights over mineral, hence, Kamlakar Singh also had no right to grant mining lease for quarrying to anyone. In fact, no valid lease for quarrying stones, ballasts, kankar, moram, sand, etc. was granted to plaintiff as required by law. The lease deed dated 16.04.1947 did not result in any legal consequences since lessor himself had no legal right to grant a mining lease to plaintiff. There is no record about alleged succession to the Estate, or that the succession was governed by primogeniture and that the aforesaid Bara Raj was an impartible estate. The allegation that the then Emperor Shah Alam in Hijri 1188 had granted a sanad of full ownership of the property of Bara Raj is incorrect and not admitted by defendant-1. After enforcement of U.P. Act, 1951, all the rights of Kamlakar Singh vested in State of U.P., since he was only an "Intermediary". There is no mineral known as "silica sand". The term "glass sand" finds mention in MMRD Act, 1957. Colloquially "glass sand" is known as "silica sand" as well. It is a major mineral, the lease whereof is governed by the statute enacted by Central Government. The State Government has no power to grant lease against provisions of Central Act and Rules framed thereunder.

17. State Government never granted a lease in favour of plaintiff for quarrying "glass sand" or "silica sand" as it is commonly known. The lease deed dated 27.4.1959 executed by State Government was for quarrying minor minerals and not glass sand, which is a 'major mineral' under central statute i.e. MMRD Act, 1957. Kamlakar Singh was also not a "Zamindar" or "Intermediary" of entire area in 46 villages, mentioned in the lease deed since there were other intermediaries also. There was a stipulation in deed dated 27.4.1959 that plaintiff shall pay royalty at the rate of Rs. 4000/- per annum, to State Government for quarrying minor minerals only.

18. Most of the paragraphs of plaint were basically denied whereunder plaintiff had endeavored to set up a case of valid lease rights for quarry of "silica sand" / "glass sand." In additional pleas, defendant-1 pleaded that cause of action arose on or after 24th May, 1969 and the suit was filed in Court on 28th May, 1969, hence no notice under Section 80 C.P.C. on cause of action in question was served upon defendants. No notice under Section 80 C.P.C. was ever received by defendants. Plaintiff had quarried a huge quantity of silica sand worth lacs of rupees and suit is undervalued. Union of India was a necessary party but not impleaded, hence suit is bad for non joinder of necessary party. The plaintiff had never quarried stones, ballasts, kankar, moram

or sand etc., hence has no right to file suit in question. Kamlakar Singh was a Zamindar and Intermediary in the District of Allahabad, not permanently settled in district and as such had no right or power to make collections of rent etc. from the tenants and pay a fixed revenue to Government according to revenue records. Kamlakar Singh was never owner or proprietor of any village or land as stated in the plaint. Paramount proprietary right and ownership of land within Zamindari of Kamlakar Singh vested in State of U.P. Defendant was never divested of any of the rights and powers vested in it. Lease deed dated 16.4.1947 was illegal and inoperative, for various grounds mentioned in para 65 of written statement which we shall discuss at the appropriate stage. Section 108 of U.P. Act, 1951 has no application to the land in question. There was no valid lease subsisting in favour of plaintiff, hence she had no right to claim a statutory lease under Section 108 of U.P. Act, 1951. No mining operation could have been allowed in violation of MMRD Act, 1957 and Rules framed thereunder.

19. Trial Court formulated 20 issues as under :

1. "Whether the plaintiff was holding a mining lease dated 16th April, 1947 and was carrying on mining operations prior to 1.7.1952 ?

2. If so, is the above mining lease dated 16.4.47 invalid and illegal alleged by defendant no.1 in para 65 of its written statement.?

3. Whether the lease deed dated 27.4.59 executed in favour of the plaintiff is valid and legal as alleged by the plaintiff? If so, its effect?

4. Whether no notice under Section 80 C.P.C. was served on the defendant in respect of the cause of action dated 24th May, 1969?

5. Whether a valid notice under Section 80 C.P.C. was served on the defendant?

6. Whether the suit is barred by estoppel and acquiscence?

7. Whether the suit is under valued?

8. If so, the court fee paid insufficient?

9. Whether the plaintiff has a right to quarry sand which is now being described by the Government as silica sand under the lease deed executed on 27.4.59 and she had also full right to grant sub-leases for quarrying such sand?

10. Whether the District Magistrate is authorised to impose conditions regarding the transport of silica sand Rail and can insist upon the plaintiff to take a clearance certificate for such transport from him?

11. Whether the lease deed dated 27.4.59 executed in favour of the plaintiff is liable to be modified in view of the provisions contained in the Mines and Minerals Concession Rules?

12. Is defendant no.1 entitled to realise royalty at the rates provided under the Mines and Mineral (Development and Regulation) Act for the sand (now called silica sand) mined by the plaintiff? If so, from what date?

13. Whether the lease deed dated 27.4.59 could not have been executed for a term exceeding 20 years and as such the aforesaid lease deed is determinable and therefore the plaintiff is not entitled to the relief of injunction?

14. Is the plaintiff entitled to any damage on account of the alleged threats for criminal prosecution/ If so, what is the amount?

15. Is the lease deed dated 27.4.59 for minor minerals only? Is to its effect?

16. Whether Maharao Raja Kamlakar Singh was the Zamindar of all the 46 villages mentioned in Schedule 'A' annexed with the plaint.

17. Whether the Government is not entitled to consider and execute a mining lease under the mines and mineral development and regulation Act for excavating sand stone moram etc., in favour of other persons for the areas and villages covered under the lease dated 27.4.59 held by the plaintiff as long as it had not been terminated?

18. That relief if any is the plaintiff entitled?

19. Is defendant no.1 not entitled to claim Rupees 9 lacs (Rs. 9,00,0225 and paise 05 as royalty for the period 1.1.52 to 26.6.68.

20. Whether this Court has no jurisdiction to try suit?"

20. Issues 7 and 8 relating to valuation and sufficiency of court fees were separately considered and decided vide order dated 26.7.1972. Since dispute relating to recovery of Rs. 9 lacs and odd towards royalty came to be inserted in the plaint by an amendment, requisite court fees was also paid by plaintiff. Both these issues 7 and 8 thus were answered in negative i.e in favour of plaintiff.

21. Issues 1, 2, 3, 9, 11, 13, 15, 16 and 17 were all taken together and while answering the same, Trial Court held :

(a) Kamlakar Singh was Zamindar of all 46 villages described in the plaint.

(b) From surface ownership, a presumption would arise that mines quarried and minerals in situ are part and parcel of the land. The owner of surface land is entitled prima facie to everything beneath or within it, down to the centre of earth and this principle applies even where title of surface has been acquired by prescription, unless by some conveyance etc., it is shown that the mines etc. are being enjoyed by persons other than owner of the surface. Defendant failed to make out any circumstance otherwise to dislodge rights of Kamlakar Singh.

(c) In Wajibul Arz (paper no. 176-C) filed by plaintiff in respect of village Shankergarh, there was entry that Zamindar had the right in respect of minerals. In view of above entry and definition of 'Intermediary' under Section 3(2), 'Estate' under Section 3(8) and 'Proprietor' under Section 3(21) of U.P. Act, 1951 and also the fact that under Section 27, compensation was determined by taking into consideration royalty received by Kamlakar Singh, he was the owner of underground minerals of his estate covering 46 villages.

(d) Another Wajibul Arz (paper no. C-362/7) in respect of village Shivrajpur filed by defendant, having no such entry in favour of Kamlakar Singh, was not believed by Trial Court on the ground that for the purpose of compensation, royalty in respect of 46 villages has been considered.

(e) Kamlakar Singh, the owner or proprietor of minerals lying in his estate, was legally entitled to execute sub-lease.

(f) The lease deed dated 16.04.1947 executed by Kamlakar Singh was neither a sham transaction nor benami. The defendants also could not prove that transaction was for no consideration or inadequate consideration. Defendants also could not prove that the lease was executed on a plain unstamped paper.

(g) The plaintiff became a statutory lessee within the meaning of Section 108 of U.P. Act, 1951. MMRD Act, 1957 applies to those leases which have been granted by Government and not to statutory leases, hence had no application to lease granted to plaintiff in 1947 and in respect whereto plaintiff' became statutory lessee under Section 108 of U.P. Act, 1951.

(h) Lease of plaintiff was not affected by Section 8(1) (b) of MMRD Act, 1957 for the reason that it was a statutory lease and remained unaffected by the provisions of MMRD Act, 1957. Defendant's contention that lease deed dated 27.4.1959 was liable to be modified in view of Section 16 of MMRD Act, 1957, is also without any force. Plaintiff's lease cannot be read so as to confine it to "minor minerals" or to exclude "silica sand" from its ambit.

(i) Mining Concession (Central) Rules, 1939 (hereinafter referred to as "Rules, 1939") were made by Governor General in respect of British Baluchistan and by Governor General in Council in respect of other Chief Commissioner's Provinces for regulating grants of prospective licences and mining leases in Chief Commissioner's Provinces. The aforesaid Rules were not

applicable in State of U.P. or United Provinces of Agra and Awadh since it was not a Chief Commissioner's Province.

(j) United Provinces Mining Concessions and Mineral Development Rules, 1940 do not indicate the statute under which same were framed. It also do not clarify that the same was a delegated legislation. Moreover, these Rules relate to mines and minerals which were properties of Crown but here, mines and minerals were properties of Kamlakar Singh and not of Crown, hence the aforesaid Rules of 1940 had no bearing with the suit land.

(k) State Government is bound by principle of estoppel, having executed lease in favour of plaintiff in 1959 with effect from 1.7.1952 and cannot turn around otherwise.

(l) State Government will have to honour terms of lease executed by it with plaintiff on 27.04.1959, being bound by the principle of Promissory Estoppel.

(m) Plaintiff' was holding a mining lease dated 16.4.1947 and carrying on mining operations prior to 1.7.1952, and it was neither invalid nor illegal.

(n) Lease deed dated 27.4.1959 executed by State Government in favour of plaintiff is valid and legal.

(o) Plaintiff has right to quarry "silica sand" under lease deed dated 27.4.1959. Lease deed dated 27.4.1959 is for major minerals and Government is not entitled to consider and execute a mining lease under MMRD Act, 1957 for area in villages covered under lease deed dated 27.4.1959 and held by plaintiff, to any third person so long as it had not been terminated in accordance with law.

22. Issues 4 and 5 having not been pressed, were decided against defendants. Issue 6 was also answered against defendants on the ground that the defendants could not show how suit was barred by principle of acquiescence and estoppel. Issue 10 was answered against defendants holding that District Magistrate cannot impose conditions regarding transport of silica sand by rail etc.

23. While answering issues 12 and 19, Court below held that royalty is payable during continuance of lease. Any amount not payable under lease would not be called 'royalty'. Demand of royalty under MMRD Act, 1957 is not permissible. Issue 19 was answered against State of U.P. Issue 20 was also answered against defendants. However, issue 14 was answered against plaintiff.

24. Ultimately Issue 18 was answered in favour of plaintiff holding that she is entitled to all reliefs excluding damages pendente lite and future.

25. Learned Additional Advocate General, giving backdrop of entire dispute, stated that Kamlakar Singh granted a lease in favour of his wife Rani in 1947 for operating mining lease on

various mines within his Zamindari. It is remarkable that resolution for abolition of Zamindari was passed by the then Government in the year 1937, when it assumed reign of the State after General Elections in the year 1937. Thereafter the then Government again came in power in 1946 and it had become an open secret that Zamindari is going to be abolished very soon in or about 1948. The final resolution for abolition of Zamindari in State was adopted and accordingly Bill was prepared. Under these circumstances, Raja wanted to save as much property for himself and his family and he granted a fake and sham lease in favour of his wife for an inadequate consideration for indefinite period. The royalty stipulated in the lease was Rs. 4000/- per annum. Somehow or other Raja prevailed upon State Government and obtain another lease in favour of Rani in 1959 and had been making gains thereunder. In fact, Rani never worked equerry. The lease was granted inter-alia for "sand' which included "ordinary sand". Kamlakar Singh transferred mining rights to his wife, by lease dated 16.04.1947 on the eve of independence and on the eve of enactment of U.P. Act, 1951 and Rules, the impending 1957 Mines Act, in a collusive attempt to give her a lease in perpetuity of mines to defeat attempt by State to acquire land and mines therein. Interestingly, he even received compensation from Compensation Officer for the land and mines which were held by him and which he had adroitly transferred to his wife at eleventh hour.

26. Sri Pandey continued to urge that under Government of India Act, 1935 (hereinafter referred to as "GI Act, 1935"), legislative field of Regulation of Mines and Development of Minerals was divided between Central Legislature and Provincial Legislature. Entry-36, List-1, Seventh Schedule of GI Act, 1935 reads as under:

*"**36**. Regulation of mines and oilfields and mineral development to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest."*

27. List-1 provides subjects within legislative power of Central Legislation. Similarly under GI Act, 1935, Entry-23, List-II, Seventh Schedule, which contains subjects of Provincial Legislation, reads as under:

*"**23**. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control."*

28. The word "Federal" in the above entries was substituted by the word "Dominion" by India (Provincial Constitution) Order 1947. In 1939, Government of India made Rules, 1939, for regulating grants of prospecting licences and mining leases in Chief Commissioner's Provinces and British Baluchistan. Need for Central regulation of mines and oilfields and minerals development began to be increasingly felt and became highlighted during second World war with the result that certain key minerals had to be controlled under Defence of India Act, 1939 (hereinafter referred to as "DI Act, 1939"). It was recognized that a planned and uniform policy of mineral development was essential to economic and industrial progress. Subsequently, pursuant to power conferred by Entry 36 of Federal Legislative List, Legislature of Dominion of India enacted on September 8, 1948, "Mines and Minerals (Regulation and Development) Act, 1948" (hereinafter referred to as

"MMRD Act, 1948") which was brought into force on 25.10.1949. The object of MMRD Act, 1948 was to regulate mines and oilfields and mineral development on the lines contemplated in the Industrial Policy Resolution of April, 1948.

29. In 1957, Parliament decided that Regulation and Development of Mines and Minerals should feature by themselves in a separate Act. Accordingly, Parliament enacted on December 28, 1957, MMRD Act, 1957. Section 32 of MMRD Act, 1957 amended MMRD Act, 1948 in the manner set out in Schedule-III to MMRD Act, 1957 so as to remove from MMRD Act, 1948 all references to mines and minerals and to confine it to oilfields and mineral oil resources. Title of MMRD Act, 1948 was amended suitably. The MMRD Act, 1957 was brought into force on 01.06.1958 by Notification No. GSR 432, dated 29.05.1958 (published in the Gazette of India, extraordinary, 1958, Part II) and was enacted by Parliament, specially for the purpose of Regulation of mining operation and development of minerals and as such for all purposes (mining purposes), provisions of MMRD Act, 1957 will exclude other law relating to mining operations and development of minerals.

30. In the context of U.P. Act, 1951, learned Additional Advocate General stated that this is an Act to provide abolition of Zamindari system which involves Intermediaries and for acquisition of their rights, titles and interest and to reform law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected thereto. It came into force on 01.07.1952. Thus, mining operations and its development, being subject of List-I, Seventh Schedule of Constitution, and in exercise of power thereof, MMRD Act, 1957 was enacted covering field of mining operations, and mineral, it shall prevail over all general Acts including U.P. Act, 1951. Special law shall prevail over general statute. He sought to fortify aforesaid proposition by relying on decisions in **J. K. Cotton Spinning** and **Weaving Mills Co. Ltd. Vs. State of U.P. AIR 1961 SC 1170 and State of Orissa and others Vs. Commissioner of Land Records and Settlement, Cuttack and others (1998) 7 SCC 162**.

31. Learned Additional Advocate General urged that Kamlakar Singh was not owner and proprietor of disputed land, hence execution of lease deed by him on 16.04.1947 and grant of mining rights to lessee was illegal and conferred no valid authority upon lessee to continue quarrying of "silica sand" etc. in the villages in dispute. He further contended that in any case with enactment of U.P.Act, 1951, entire disputed area vested in State Government. It is also admitted by plaintiff. In the circumstances, whatever rights Kamlakar Singh had as owner and proprietor of villages in dispute, if any, same ceased after enactment of U.P.Act, 1951 and thereafter, status of Kamlakar Singh became as that of a tenant and mining rights, if any, so far as permitted under U.P. Act, 1951 could have continued only to that extent. In respect of mining operations of minerals governed by MMRD Act, 1957, when it came into force, the rights, if any, of Kamlakar Singh as also plaintiff's lessee ceased and after enactment of MMRD Act, 1957, neither plaintiff' nor Kamlakar Singh nor anybody else could have continued with mining operations of minerals governed by MMRD Act, 1957, unless licence / permission is granted in accordance with the procedure thereunder. Court below in holding that MMRD Act, 1957 has no application to the

villages in question, has completely erred in law, therefore, the impugned judgment and decree is ex-facie illegal and liable to be set aside.

32. He further submitted, assuming that on 16.4.1947, Kamlakar Singh had proprietary and ownership right over area within disputed villages and may have corresponding rights of mining and quarrying but the ownership and proprietary rights ceased and stood vested in State of U.P. with effect from 1st July, 1952 on enforcement of U.P. Act, 1951. Thereafter, corresponding rights regarding minerals etc. which were available to Kamlakar Singh, if any, being proprietor and owner of disputed villages, also vested in State of U.P. and he (Kamlakar Singh) ceased to have such rights. That being so, plaintiff lessee also ceased to have such rights unless permitted by State of U.P. or by U.P. Act, 1951. If plaintiff is held to be entitled to continue with lease rights under Section 108 of U.P. Act, 1951, the same ceased on enactment and enforcement of MMRD Act, 1957 in respect of minerals governed by such enactment and thereafter minerals and mining rights would be governed by MMRD Act, 1957. Since in the present case, admittedly no mining rights had been conferred upon plaintiff lessee under MMRD Act, 1957, after following procedure prescribed therein, by competent authority, she has/had no right to continue with mining operations in respect of minerals governed by MMRD Act, 1957 and Court below in holding otherwise, has acted wholly illegally, hence the impugned judgment is liable to be set aside.

33. Sri Pandey contended that in any case MMRD Act, 1957 has two different aspects, one, regulating mining lease and the procedure of grant of lease; and, another, charge of Royalty on extraction and transportation of minerals. Right to charge Royalty on extraction, excavation and transportation of minerals is absolute and covers all kind of leases whether governed by MMRD Act, 1957 or otherwise having a overriding provision on instruments of leases as also on otherwise law. Therefore, plaintiff-respondent in any case is liable to pay Royalty on minerals excavated or extracted from disputed land and in that view of matter, Collector rightly raised demand of Royalty for the period plaintiff had carried out mining operations and extracted minerals without payment of Royalty prescribed under Section 9 read with Second Schedule of MMRD Act, 1957 to the State. Trial Court has completely erred in law in not appreciating scope of Section 9 of MMRD Act, 1957 and, therefore, judgment in question is liable to be set aside. He placed reliance on **Khas Karanpura Collieries Ltd. and Ors. Vs. State of Bihar and others AIR 1971 Pat. 328 and Sheo Varan Singh vs. State of U.P. AIR 1980 All. 92**.

34. Lastly, he contended that lease deed by which Kamlakar Singh transferred his right in favour of his wife i.e. agreement executed on 16.04.1947, and agreement between Rani Rajendri and State of U.P. dated 27.04.1959 are void in view of Sections 23 and 24 of Indian Contract Act, 1872 (hereinafter referred to as "Act, 1972") and 19 of MMRD Act, 1957 as terms and conditions of agreement were not consistent with the law in force . Illustrating his submission, he urged that in view of following facts, terms and conditions referred to in agreements are inconsistent with the law in force on the date agreement was executed:

(I) The agreement is violative of Section 8(1) of MMRD Act, 1957 which limits maximum period for operation of major mining (Silica sand). Furthermore, for extension of period,

permission of Central Government was needed and apparently in the present case no such permission was obtained. The agreement refers to lease in perpetuity and as such, the agreement is void in terms of MMRD Act, 1957.

(II) The maximum area of which lease could be given are 10 sq.km. as per Section 6(1)(b) of MMRD Act, 1957. This area could only be extended with the permission of Central Government. Admittedly, in agreement area is much more than the area referred to in MMRD Act, 1957 Act and, as such, agreement is void.

35. In support of above submissions, Sri Pandey, learned Additional Advocate General placed reliance on **Tata Iron and Steel Co. Ltd. Vs. Union of India and another 1996 (9) SCC 709, Kaviraj Basudevanand Vs. Harihar Gir AIR 1974 SC 1991 and Life Insurance Corporation of India Vs. Devendrappa Bujjappa Kadabi and others AIR 1987 Kant. 129**.

36. He summed up his argument and urged that in view of Section 19 of MMRD Act, 1957, lease deed dated 27.04.1959 is void being in contravention of provisions of MMRD Act, 1957. Any agreement in conflict to existing law is void and would give no right to plaintiff-respondent to operate mining lease.

37. Per contra, Sri Shashi Nandan, learned Senior Advocate, appearing for plaintiff-respondent, submitted that here is not a case of any contradiction between a lease which became 'statutory lease' under U.P. Act, 1951 and provisions of MMRD Act, 1957 inasmuch Section 4 of MMRD Act, 1957 confines application of said Act to the matters where leases are granted under MMRD Act, 1957 while plaintiff's lease became 'statutory lease' by virtue of Section 108 of U.P. Act, 1951 and so long as such lease is not modified and cancelled in accordance with U.P. Act, 1951 and Rules and Regulations framed thereunder, neither plaintiff's lease can be interfered by defendants- appellants nor they have any right to raise a demand which is not consistent with the terms and conditions of 'statutory lease' which now is deemed to be granted to plaintiff-respondent by State of U.P. In support of his submissions, he has placed reliance on **Bihar Mines Ltd. Vs. Union of India AIR 1967 SC 887, Hindustan Steel Limited, M/s. Rourkela Vs. Kalyani Banerjee AIR 1973 SC 408, Sone Valley Portland Cement Co. Ltd. Vs. General Mining Syndicate Pvt. Ltd. AIR 1976 SC 2520, State of Bihar Vs. Khas Karanpura Collieries Ltd. AIR 1976 SC 1978, Chhatu Ram Horil Ram Private Ltd. Vs. State of Bihar AIR 1969 SC 177, India Thermal Power Ltd. Vs. State of M.P. and others 2000 (3) SCC 379 and Mary Vs. State of Kerala and others 2014 (14) SCC 272.**

38. Before coming to the effect of statutes dealing with mining and minerals and their consequences on the lease and extraction of minerals on the lease land in dispute, we propose to examine two basic questions:

(i) Whether Kamlakar Singh was proprietor and owner of disputed villages when he executed lease deed dated 16.4.1947 and entitled to execute a lease deed in respect of minerals found in those villages ?

(ii) Whether Kamlakar Singh continued to have ownership rights over minerals found in disputed villages after vesting of land in State of U.P. with effect from 1.7.1952 under U.P.Act, 1951 ?

39. The first question up for consideration for deciding this appeal is the status of Kamlakar Singh before enactment of U.P. Act, 1951, in respect of disputed land. Plaintiff claimed status of Kamlakar Singh as owner and proprietor of disputed property in 1947. Judgment of Court below shows that there was no documentary evidence adduced by plaintiff to show that Kamlakar Singh or his predecessors were owner and proprietor of disputed land. In this regard, Kamlakar Singh himself appeared in witness box and deposed. His statement on oath is paper No. 337-A. He claimed to be 'Zamindar' of Bara Estate. Smt. Rajendri Kumari Ba is his second wife. In cross-examination, he said that he was resident of Tehsil Karchhna, which had two Parganas, Bara and Arail. His Zamindari extended to both parganas, i.e. Bara and Arail. He, however, admitted that in Pargana 'Bara', besides him, there were some other petty/small Zamindars. Pargana Bara consisted of 250 villages and he had share in 10-12 villages. In 50-60 villages of pargana Bara; Gitti, Moram, Balu, Patthar etc., used to be quarried. He, however, could not tell names of those villages. He further said that area for which lease was granted, mostly was in his Zamindari, while in some, he was a share holder but could not give details thereof. His statement, in this regard is as under:

38- जो मौजे lease में दिये गये थे उनमें से अधिकांश का मैं मुसल्लम जमीदार था और कुछ में share holder था। परन्तु प्रत्येक ऐसे गाँव का विवरण में नहीं दे सकता।"

" 38. Of most of the villages mentioned in lease, I was full fledged Zamindar and in some, I was a share holder. But I cannot give details of each of such villages."

(English translation by the Court)

40. He further said that he is not aware of permanent settlement at Allahabad. His statement reads as under:

39- - - - - मैं नहीं जानता कि Allahabad में permanent settlement हुआ था कि नहीं।"

" 39..... I do not known whether there had been any permanent settlement in Allahabad or not."

(English translation by the Court)

41. Besides, plaintiff also deposed in support of her case. In her own deposition also, she did not say regarding status of Kamlakar Singh except that he was "Zamindar' in the area and disputed land was leased out to her by Kamlakar Singh.

42. Trial Court while answering Issue 16, whether Kamlakar Singh was Zamindar of disputed villages, has referred to the pleadings contained in paragraphs 1 and 2 of plaint and its reply contained in paragraph 2 of written statements and therefrom has held that Kamlakar Singh was "Zamindar' of all 46 villages. Paragraphs 1 and 2 of plaint read as under:

*"1. That **Maharao Raja Kamlakar Singh** (herein after referred to as the Raja Saheb of Shankergarh) Tehsil Karchana in the District of Allahabad **was the proprietor of the Bara Estate.***

*2. That a number of villages including 46 villages mentioned in the Schedule "A" of the plaint were situated in the Bara Estate and Raja Saheb of Shankergarh **was the owner and proprietor of these villages.**"*

43. The defendant State of U.P. had replied aforesaid paragraphs no. 1 and 2 of plaint in paragraphs no. 1 and 2 of written statement, as under:

*"1. That **the facts stated in Paragraph 1 of the plaint are not admitted**. In fact, there was no BARA ESTATE known to the defendant or its officers and Maharaja **Kamlakar Singh** (hereinafter called the Raja) **was not the proprietor** thereof. Of Course the **Raja was an intermediary** in the district of Allahabad.*

*2. That the **facts stated in paragraph 2 of the plaint are denied**. In fact, the Raja was not the owner or proprietor of any of the villages in the district of Allahabad. Of course as, stated above, the **Raja was zamindar and intermediary** in some of the villages of the district. In this area the Settlement of land was last made in 1874 A.D. The Lambardar Sri Banspati Singh of the family of the Raja, executed an agreement dated March 10, 1874 and agreed to pay rent w.e.f. from 1282 Fasli onwards **until the next settlement in respect of each village or part of the village in which he was an intermediary.**"*

(emphasis added)

44. This Court does not find any ambiguity in reply of State denying assertions made in paragraphs no. 1 and 2 of plaint. Plaintiff claimed that Kamlakar Singh was proprietor of above Estate, which has been denied specifically in paragraph 1 of written statement. Similar assertion in paragraph 2 of plaint has been denied specifically in paragraph 2 of written statement. Defendant appellant has clarified that Kamlakar Singh was not "owner" or "proprietor" of disputed land but a "Zamindar" and "Intermediary" in some villages of district. It referred to settlement of 1874 A.D. and said that Lambardar Sri Banaspati Singh of the family of Kamlakar Singh, executed an agreement dated 10.03.1874, agreeing to pay rent w.e.f. 1242 Fasli onwards until the next settlement in respect of each village or part of village in which he was an "Intermediary."

45. Copy of the agreement, which is a document in Urdu was filed by defendant-appellant along with list of documents dated 25.8.1972. A certified copy obtained from Revenue Department was filed and marked as Paper No. 170-C/2. Hindi transliteration is also on record as Paper No. 170-C/3 and reads as under :

"नम्बरदारान मौजा शंकरगढ परगना बारा जिला इलाहाबाद के है मन मुकरान इनकार करते हैं कि बशर्त मनजूरी गवर्नमेन्ट इक्तदाय 1282 फ लगायत 1311 फसली यानी तीस साल तक जमा सरकार बकदर और बाद अजॉ ता न होने इकारारनामा जदीद बन्दोबस्त के साल आखीर के शरह से अदा करते रहेंगे।

"Numberdars are residents of village Shankargarh, Pargana Bara, District Allahabad. We the parties agree that subject to the sanction by the Government from 1282 Fasli till 1311 Fasli i.e. for 30 years, we shall be depositing the requisite fee with the Government in accordance with the agreement and thereafter at the rate paid in the last year of this agreement till the new settlement/agreement is not entered into." (English translation by the Court)

46. The defendants- appellants also filed copy of Wajibul Arz, Mouza Shivrajpur, Pargana & Tahseel Bara, District Allahabad, which is also a document in Urdu and certified copy thereof obtained from record room of Revenue Section of Collector's office has been filed as Paper No. 170-C/4 to 170-C/6. Its Hindi transliteration has been filed as Paper No. 170-C/7. The aforesaid document clearly mentions status of predecessor of plaintiff as that of 'Zamindar'. Section 1 of aforesaid document clearly mentions as under:

दफा-1	*जिक नवइयत महाल*	*बसूरत जमीन्दारी है*
Section 1	*Description of the nature of possession*	*Is in the form of Zaminidari*

47. Trial Court has observed by referring to **Avadh Kishore Das Vs. Ram Gopal & Ors., AIR 1979 SC 861** that "Wazibul Arz" is a village administration paper prepared with due care and after due enquiry by public servant in discharge of his official duty. It is a part of settlement record and statutory presumption of correctness is attached to it. Therefore, unless shown otherwise, a "Wazibul Arz" is a creditworthy document. In view thereof it has relied on the "Wazibul Arz" (paper no. 176) filed by plaintiff-respondent for Village- Sankargarh, which contains a statement that 'Zamindar' had a right in respect of minerals, to hold that Kamlakar Singh was owner over minerals in village Sankargarh. It says that Kamlakar Singh being Zamindar of 46 villages was also an 'Intermediary' within Section 3 (21) of U.P. Act, 1951. It, then relied on Sections 27, 34, 49 and 50 of U.P. Act, 1951 to hold that Compensation Officer in determining gross assets of Kamlakar Singh took into consideration royalties, he received in respect of quarry, which shows that Kamlakar Singh was owner and proprietor of minerals. To our mind, all these considerations by Trial Court were not necessary for the reason that status of Kamlakar Singh as "Zamindar" and "Intermediary" was admitted by defendant-appellant clearly in para-2 of the written statement.

48. The aforesaid documents also make it clear that Kamlakar Singh claimed status of his predecessor and himself as 'Zamindar' in respect of disputed villages.

49. On behalf of State an attempt was made to claim that being "Zamindar", predecessor and Kamlakar Singh were not owner and proprietor of disputed villages but it was in the nature of "Intermediary." Record makes it very clear that predecessors of Kamlakar Singh were given status of "Zamindar" which continued and by succession, devolved upon Kamlakar Singh.

50. Here it takes us to examine meaning of the term "Zamindar" at the relevant time. "Wajibul Arz" (Paper no. 170C)/4-6 was executed on 15th June/10th July, 1875 A.D. We have got some part of this document translated in english and it shows that the same was executed by Sri Syeed Jahir Hussain Khan, the then Deputy Collector. It had various stipulations in four chapters which read as under :

"CHAPTER-1, Nature of Possession

Section-1: Description of the Nature of Possession	In form of Zamindari
Section-2: Description of the method of realization of rent of payment of Malguzari	**Sole owner**

CHAPTER-2, Right of owner

Section-1: Description of the Nature of Possession	NIL
Section-2: Description of the appointment of Numberdars	According to customs, the eldest son of Zamindars would be owner of the property and he would be appointed Numberdar
Section-3: Description of the Right of Pre-emption	At the time of death, the ownership may be transferred to anyone without the consideration of family.
Section-4: Description of the Sir & Khudkasht	NIL
Section-5: Description of the expenses of village	Responsibility of Zamindar
Section-6: Description of Management of Realization of Rent within the sharers of MOHAL	NIL
Section-7: Description of the Management of Land, fit for Agriculture	Management of the cultivable land will be through servant (Karinda) (Sic).
Section-8: Description of realization and distribution of amount	Rs. 52/- annual income is realized as under: 1. Income from Mahua trees in the possession of Zamindar : Rs. 30/- 2. Income from Bazar: Rs. 20/- 3. (Sic) : Rs. 2/-
Section-9: Description of customs of irrigation between co-sharers.	NIL

Section-10: Description of land which are exempted from rent for any reason	NIL
Section-11: Description of flooded and non-flooded lands	NIL
Section-12: Description of titles and co-sharers	NIL
Section-13: Description of any specific thing or custom which does not fall in the above sections	NIL

CHAPTER-3

Section-1: Description of Maafi, permanent OR till life	NIL
Section-2: Description of Maafi by forfeiture	
Section-3 : Description of the land in possession of others (Non-Zamindar)	2 Bigha, 7 Biswan, 10 Dhur
Section-4: Description of the land of other specific nature	NIL
Section-5: Description of the land in the possession of any privileged	NIL

CHAPTER-4, Right of Cultivators

Section-1: Description of the time of realization of revenue/rent of land.	Rent from the non-occupant tenant is realized 36 Youm and 21 Youm from the other tenants, before the time fixed.
Section-2: Description of ponds and wells.	No tenant can dig pond or well without the permission of Zamindar.
Section-3 : Description of the construction of houses	No farmer can construct a new house without the permission of landlord. The farmer can sale, if he has built it on his own expense. **Landlord is the owner of land where farmer is absconding**. Every farmer uses his compost. The compost of non-farmers is in the use/right of landlord.
Section-4: Description of unplanted and miscellaneous trees	Farmers can cut trees for the purpose of making instrument of agriculture from the infertile land with the permission of Zamindar.

Section-5: Description of gardens, farms and lands of unknown owners	Owner of the gardens will have right to sale/rent. Nobody can (sic) a new garden without the permission of Zamindar.
Section-6: Description of the methods of irrigation by ponds and lakes.	Fields are irrigated from ponds and rivers. Right of irrigation is not fixed.

TITIMMA

The garden land will be exempted from (sic) but when the land will be vacant from the trees and fresh trees are not planted on it, the government will have power to decide.

Sd/-j Illegible Sd/-j Illegible Sd/-j Illegible

Written on 10th July, 1875, A.D., the present Wajibul-Arz between the landlords and farmers, in presence of the Deputy Collector, Sahab Bahadur Syed Zahid Husain Khan."

Order filed in the "Settlement File" dated : 15th June, 1875."

51. The aforesaid document is in respect of Mauja Shivrajpur, Pargana Bara, Tehsil Karchhana, District Allahabad. The document makes it very clear that it declared status of 'Zamindar' as "sole owner" and expenses of villages are responsibility of 'Zamindar'. He shall manage cultivable land through servants etc. Any other tenant or farmer needs permission of Zamindar to do anything in the land governed by aforesaid document. Erstwhile concept of 'Zamindar' was also that he was a man of the land or landlord. They were a sort of micro king who ruled their own small territory by collecting taxes and running a court to resolve dispute maintaining security- personnel and building palaces. In most cases, they had to share a big chunk of their taxes with the Lord above them like in the present case, the British Government, but otherwise they were owners of land under Zamindari.

52. We find that the kind of Zamindari system inherrited by British India was created by Mughals who replaced earlier tax collection system and appointed their own Collectors. They were responsible for local law and order. In British Rule, Zamindari system was introduced by Lord Cornwallis in 1793 through Permanent Settlement Act. It was introduced in Provinces of Bihar, West Bengal, Orissa and Varanasi. In every reference, including history books, we find that "Zamindars" were recognized as owners of land. They were given right to collect rent from peasants. There were two other parallel systems introduced in British system, one is 'Rayyatwari' system, sometime in 1820 by Thomos Munro, but it prevailed mostly in South India and some areas of erstwhile Bombay, part of Assam and Kurk Provinces of British India. A third system similar to 'Zamindari' was 'Mahalwari system' introduced sometime in 1833 during the period of William Bentick in Central Provinces and North-West Frontier i.e. Provinces in Agra, Punjab and Gangetic Valley. However, for our purpose, that is not relevant.

53. Artificial distinction, sought to be drawn by defendant-appellant, that Kamlakar Singh or his predecessors were 'Zamindar' and 'Intermediary' but not owner or proprietor of concerned villages has no basis or justification and none could be pointed out before us by learned Additional Advocate General. From settlement of 1875, relied on by defendant-appellant on their own, we have no doubt that status of 'Zamindar' conferred upon predecessors of Kamlakar Singh therein was nothing but a conferment of ownership rights or proprietors right. Therefore, status of 'ownership' was conferred upon predecessors of Kamlakar Singh and it stood devolved upon him also. In 1947 when he executed deed dated 16.4.1947, he was a 'Zamindar' (owner and proprietor) of villages in dispute.

54. Whether aforesaid ownership would include minerals found in the villages concerned, on this aspect, learned Additional Advocate General could place nothing before us to show that rights of 'Zamindar' were confined only to cultivation or collection of rent taxes etc. and he had no right over minerals found in concerned villages. Ownership right as conferred by "Wazibul Arz" dated 10.7.1875 did not restrict rights of 'Zamindar' in respect of land only and not minerals. Learned counsel appearing for appellant could not place any contractual or statutory provision or otherwise to persuade us to hold that Kamlakar Singh or his predecessor despite being 'Zamindar' of disputed area, did not possess ownership or proprietorship rights on minerals found in disputed area. We, therefore, concur with the findings of Court below that Kamlakar Singh, when executed lease deed dated 16.4.1947, possessed absolute right to deal with the disposal of minerals, found in disputed area, after quarry, excavation etc. and its findings on issue-16 are hereby confirmed.

55. **Question (i),** we have formulated above, therefore, is answered accordingly in favour of plaintiff-respondent.

56. Now we come to question (ii). It is an admitted case of plaintiff- respondent that on enforcement of U.P.Act, 1951, area of the land of disputed villages vested in State of U.P. The Notification required under Section 4(1) was published in U.P. Gazette, Extraordinary dated 01.07.1952. This is also admitted by plaintiff-respondent. In para-11 of plaint, plaintiff-respondent himself has stated as under :

"11. That in 1951 the U.P.Legislature enacted the U.P.Zamindari Abolition and Land Reforms Act (U.P.Act No. 1 of 1951) and ***with effect from 1st July, 1952 the rights of Raja*** *Saheb of Shankargarh* ***in the land demised*** *under* ***the lease were extinguished under Section 4 of the Act.****"*

57. Section 4(1) of U.P.Act, 1951 reads as under :

"4. ***Vesting of estates in the State****- (1) As soon as may be after the commencement of this Act, the State Government may, by notification, declare that, as from a date to be specified,* ***all estates situate in Uttar Pradesh shall vest in the State*** *and as from the beginning of the date so specified (hereinafter called the date of vesting),* ***all such estates shall stand transferred to and***

vest, except as hereinafter provided, in the State free from all encumbrances."
(Emphasis added)

58. Section 4 talks of vesting of all 'Estates' situated in the State of U.P. The term 'Estate' has been defined in Section 3(8) of U.P.Act, 1951. Initially, Section 3(8) read differently and was substituted by U.P. Act No. XIV of 1958 with effect from 01.07.1952. A proviso was also added in Section 3(8) of U.P. Act, 1951 with effect from 01.07.1952. It reads as under:

"(8). "Estate" means and shall be deemed to have always meant the area included under one entry in any of the registers described in Clause (a), (b), (c) or (d) and, in so far as it relates to a permanent tenure holder, in any register described in Clause (e) of Section 32 of the U.P. Land Revenue Act, 1901, as it stood immediately prior to coming into force of this Act, or, subject to the restriction mentioned with respect to the register described in Clause (e), in any of the registers maintained under Section 33 of the said Act or in a similar register described in or prepared or maintained under any other Act, Rule, Regulation or Order relating to the preparation or maintenance of record-of-rights in force at any time and includes share in, or of an "estate":

Provided that in Mirzapur District each of the areas bounded as given in Schedule VII shall, notwithstanding anything contained in the foregoing definition, be deemed to be an estate.

Explanation- The Act, Rule, Regulation or Order referred to in this clause shall include, Act, Rule, Regulation, or Order made or promulgated by the erstwhile Indian States whose territories were merged or absorbed in the State of Uttar Pradesh prior to the date of vesting notified under section 4 of this Act."

59. Consequences of vesting of 'Estate' are provided in Section 6. The relevant part i.e. Section 6 (a) (b) and (c) is reproduced as under:

*"**6. Consequences of the vesting of an estate in the State**- When the notification under Section 4 has been published in the Gazette, then**, notwithstanding anything contained in any contract or document or in any other law for the time being in force** and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensure in the area to which the notification relates, namely :*

*(a**) all rights, title and interest of all the intermediaries-***

*(i) **in every estate** in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries trees (other than trees in village abadi, holding or grove), fisheries, tanks, ponds, water-channels, ferries, pathways, abadi sites, hats, bazars and melas (otherthan hats, bazars and melas held upon land to which Clauses (a) to (c) of sub-section (1) of Section 18 apply and,*

(ii) ***in all sub-soil*** *in such estates* ***including rights, if any, in mines and minerals,*** *whether being worked or not;*

shall cease and be vested in the State of Uttar Pradesh free from all encumbrances*;*

(b) all grants and confirmations of title of or to land in any estate so acquired, or of or to any right or privilege in respect of such land or its land revenue shall, whether liable to resumption or not, determine;

(c) (i) all rents, cesses, local rates and sayar in respect of any estate or holding therein for any period after the date of vesting and which, but for the acquisition would be payable to an intermediary, shall vest in and be payable to the State Government and not to the intermediary and any payment made in contravention of this clause shall not be valid discharge of the person liable to pay the same;

(ii) where under an agreement or contract made before the date of vesting any rent, cess, local rate or sayar for any period after the said date has been paid of or compounded or released by an intermediary the same shall, notwithstanding the agreement or the contract, be recoverable by the State Government from the intermediary and may without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

....." *(Emphasis added)*

60. The above provisions make it clear that all rights, title and interest of all Intermediaries in every estate, including land and sub-soil in such estate, including the right, if any, in mines and minerals shall cease and be vested in State of U.P., free from all encumbrances, unless provided otherwise in U.P. Act, 1951.

61. The term 'Intermediary' has been defined in Section 3(12) and reads as under:

*"Intermediary" with reference to any estate means a proprietor, under- proprietor, sub-****proprietor****, thekedar, permanent lessee in Avadh and permanent tenure-holder of such estate or part thereof."*

62. Kamlakar Singh, therefore, was covered by term 'Intermediary' and his estate vested in State of U.P. including all rights etc. in respect of mines and minerals in sub-soil in such estate.

63. A three Judge Bench of Apex Court had an occasion to consider effect of Section 4 and 6 of U.P.Act, 1951 in **Bhagwan Das Vs. State of U.P., 1976 (3) SCC 784**. After referring to Section 4 and Section 6(a) (i & ii), Court said:

"these provisions of the 1951 Act leave no doubt that whatever rights, inclusive of the rights to mines and minerals, which the erstwhile Zamindars possessed, ***stood extinguished and became vested in the State Government.****"* *(emphasis added)*

64. The above view was followed in **King Pal Singh Vs. State of U.P. and others, 1996 (11) SCC 571**, wherein para 16, Court quoted an exerpt from its earlier judgment in **Bhagwan Das Vs. State of U.P. (supra**) as under:

*"16. In this connection, we need only to refer to the judgment of this Court rendered under the very same provisions with which we are concerned****. In Bagwan Das vs. State of U.P. & Others (AIR 1976 SC 1393).*** *this court observed as follows :-*

"The ***right of the former Zamindars to mines and minerals was extinguished by the Act of 1951 and became vested in the State Government.*** *So long as the proprietory right to the land was vested in the Zamindar, he was entitled to mines and minerals.* ***With the abolition of Zamidari by the 1951 Act that right has passed on not to the appellant but to the State Government. The appellants' writ petition filed to restrain the State Government from auctioning the right to undertake mining operations must, therefore, fail.****"*
(Emphasis added)

65. In view of provisions discussed above as well as judicial authorities, considering effect of Sections 4 and 6 of U.P. Act, 1951, we have no manner of doubt that not only land of disputed villages, but all rights relating to mines and minerals, whether on the surface or under the surface etc. vested in State of U.P. and it became sole owner thereof. All the rights etc. of erstwhile owner, i.e. Intermediary, i.e., Kamlakar Singh, ceased and extinguished as on 01.07.1952 and thereafter.

66. **Question (ii)**, therefore is answered accordingly in favour of defendant-appellant and against plaintiff-respondent. We find that on this aspect, Trial Court has not dealt with matter properly and has misled itself with assessment of compensation under Section 27. Consequences of Sections 4 and 6 of U.P. Act, 1951 are not otherwise affected by assessment of compensation and that was a totally different aspect. Trial Court in taking an otherwise view has clearly erred in law and it is also contrary to express provisions of U.P. Act, 1951 hence contrary findings are reversed.

67. Learned counsel for plaintiff-respondent contended that rights of lessee and sub-lessee have been allowed to continue under Chapter VI read with Section 7 of U.P. Act, 1951 and to that extent, even if erstwhile lessor, i.e., Kamlakar Singh, ceased to have any right of ownership etc. over disputed land, lessee's and sub-lessee's rights to continue with their mining operations in terms of existing lease dated 16.04.1947 were protected and that would not stand affected. Though this aspect we intend to discuss while considering other substantial issues, which have arisen in Suit, but at this stage, we may consider the above argument only to the extent whether Section-7 and Chapter-VI of U.P. Act, 9151 in any manner affects ownership rights of State, vested on 01.07.1952 by virtue of Sections 4 and 6 of U.P. Act, 1951, so as to whittle down to any extent.

68. With respect to continuance of mining operations, attention of Court has been drawn to Section 7 and Chapter VI comprising Sections 106 to 112 of U.P.Act, 1951. Sections 7, 106, 107 and 108 of U.P.Act, 1951 relevant for our purpose read as under :

*7. "**Saving in respect of certain rights- Nothing contained in this chapter shall in any way affect the right of any person-***

(a) to continue to work any mines comprised in any estate herein above acquired which shall be governed by the law for the time being in force;

(aa) being a bhumidhar, sirdar, adhivasi or asami of any land, to continue to enjoy any easement or any similar right for the more beneficial enjoyment of the land, as he was enjoying on the date immediately preceding the date of vesting;

(b) to recover any arrears of rent, cesses, sayar or other dues which accrued before the date of vesting and the same shall, notwithstanding anything contained in this Act, be recoverable as hereto before by the person entitled thereto.

Provided that no decree for an arrear of rent or order for ejectment in default of an arrear of rent shall be executed by ejectment of the judgment debtor from his holding:

Provided further that rent, cesses, local rates, sayar or other dues as aforesaid which are payable by an intermediary, whose interest in the state in respect of which the arrear is due has been acquired under the provisions of this Act, may in addition to any other remedy open to the person entitled, be realized from or paid out of the compensation money payable to such intermediary."

*"106. **Working of mines to be governed by this chapter- Notwithstanding anything contained in this Act, the right to operate or work mines and to extract minerals therefrom shall, from the date of vesting, be governed by the provisions of this chapter**.*

*107. **Mines worked by the intermediary**-(1) With effect from the date of vesting, all mines comprised in the estate or estates acquired under this Act, **as were in operation on the date immediately preceding the said date and were being worked directly by the intermediary shall, if so desired by him, be deemed to have been leased by the State Government to the intermediary** and such intermediary shall be entitled to retain possession of those mines as a lessee thereof.*

*(2) The **terms and conditions of the said lease by the State Government shall be such as may be agreed upon between the State Government and the itnermediary,** or, in default of agreement, as may be settled by a Mines Tribunal appointed under Section 110.*

Provided that ***all such terms and conditions shall be in accordance with the provisions of any Central Act for the time being in force regulating the grant of new mining leases.***

108. ***Subsisting leases of mines and minerals****- (1) Where immediately* ***before the date of vesting of the estate or estates, there is a subsisting lease of mines or minerals comprised in the estate or estates or any part thereof the whole or the part of the estate or estates comprised in such lease shall, with effect from the date of vesting, be deemed to have been leased by the State Government to the holder of the said subsisting lease for the remainder of the term of that lease and such holder shall be entitled to retain possession of the held property.***

(2) ***The terms and conditions of the said lease*** *by the State Government shall, mutatis mutandis,* ***be the same as the terms and conditions of the subsisting lease referred to in sub-section (1)****, but with the additional condition that, if, in the opinion of the State Government, the holder of the lease had not, before the date of the commencement of this Act, done any prospecting or development work, the State Government shall be entitled at any time before the expiry of one year from the said date to terminate the lease by giving three months' notice in writing:*

Provided that nothing in this sub-section shall be deemed to ***prevent any modifications being made in the terms and conditions of the said lease in accordance with the provisions of any Central Act for the time being in force regulating the modification of existing mining leases.***

(3) The holder of any such lease of mines and minerals as is referred to in sub-section (1) shall not be entitled to claim any damages from the outgoing intermediary on the ground that the terms of the lease executed by such intermediary in respect of the said mines and minerals have become incapable of fulfillment by the operation of this Act." (Emphasis added)

69. The lease deed executed by Kamlakar Singh on 16.4.1947 in his capacity as proprietor/owner/Zamindar of the land in dispute, including mines and minerals found on the land or in sub-soil was valid at that time. We find no infirmity since statute existed on that date to make it invalid. Thereafter, when entire disputed land vested in State of U.P. with effect from 1st July, 1952 under Sections 4 and 6 of U.P.Act, 1951, Kamlakar Singh ceased to have any rights, whatsoever, in respect of the said land as well as mines and minerals etc. His right even to excavate minerals etc. or transfer of such rights on rent to others extinguished. The entire estate including mines and minerals etc., from the date of vesting, vested in State of U.P. leaving status of Kamlakar Singh only that of an ex Zamindar entitled to compensation under Section 27 of U.P. Act, 1951.

70. It is not disputed before us that as a result of vesting of Estate of Kamlakar Singh in State of U.P., resultant compensation determined under U.P. Act, 1951 has been paid to Kamlakar Singh and he ceased to have any interest, right or otherwise privilege or benefit in the disputed land, including minerals found therein, on and after 01.07.1952. Section 107 protected existing

lease rights of Intermediary if he was continuing any mining lease but that was not a case with respect to Kamlakar Singh since he was not carrying on any mining activity on the disputed land, and, instead, entire land in dispute was let out to plaintiff-respondent. Hence, Kamlakar Singh did not continue any right of mining under Section 107. The existing rights of lessee or sub-lessee, if any, insofar as protected under Section 108 read with Section 7 of U.P. Act, 1951, is a different thing, which may be discussed in detail while considering other issues, but at this stage, we may elaborate the aforesaid provisions only to the extent said provisions have been relied by learned counsel for plaintiff-respondent having effect on Question (ii) regarding ownership on mines and minerals.

71. Section 7 of U.P.Act, 1951 protected a right to continue to work any mines comprised in any 'Estate' vested in State of U.P. If there was any arrears of rent, cesses, sayar or other dues, the same could have been recovered from such person. The ownership, therefore, in respect of minerals etc. ceased to be vested in Kamlakar Singh and acquired by State of U.P. Thereafter, manner in which mining operations etc. may continue, as we have already said, would be governed by the provisions contained in Chapter-VI of U.P. Act, 1951. Section 106 very clearly says that notwithstanding anything contained in the Act, i.e. U.P. Act, 1951, right to operate or work mines and to extract minerals therefrom, on and after the date of vesting, would be governed by provisions of Chapter -VI. Section 107 has no application in this case. Since plaintiff has nowhere pleaded facts, either in the plaint or otherwise, before Court below, that area of 46 villages leased out to it by Kamlakar Singh, any part thereof had continued under mining operation with Kamlakar Singh, who was "Intermediary" on the date of vesting. On the contrary, the case set up by plaintiff is that entire mining operations etc. in 46 villages were leased out to plaintiff by Kamlakar Singh. The plaintiff, therefore, was in the capacity of lessee while lessor-Intermediary i.e. Kamlakar Singh lost ownership rights over mines and minerals, being part 'Estate', to State of U.P. by virtue of Sections 4 and 6 of U.P. Act, 1951. Therefore, Kamlakar Singh did not get any "deemed lease" from State of U.P. under Section 107(1).

72. Case of plaintiff in fact is founded on Section 108 which deals with interest of subsisting lessees in respect of mines and minerals, who were operating on the date of vesting. Here also, Section 108(1) makes it very clear that from the date of vesting, susbsisting lease may continue but instead of initial lessor, the 'Estate' thereof would be that of State of U.P. Section 108(1) also says that from the date of vesting, subsisting lease shall be deemed to have been leased out by State Government to the holder for remaining term of that lease and such holder shall be entitled to hold possession of leasehold property. Regarding terms and conditions, Section 108(2) provides that it would be the same as were in subsisting lease but State Government, in certain conditions, would have a right to terminate the same. The Proviso thereof however, makes it clear that nothing in Section 108(2) would prevent any modification in terms and conditions of subsisting lease to make it consistent with the provisions of any Central Act, in force for the time being, in respect of existing mining leases.

73. The resultant effect of above discussion is that subsisting lease(s) continued to be operated by plaintiff-respondent by virtue of Section 108(1) and (2) respectively but plaintiff could

not have raised any objection if any modification is made to bring terms and conditions of subsisting lease in accordance with any Central Act, for the time being in force, in respect of existing mining leases. The status of plaintiff became as lessee of State of U.P.

74. Plaintiff-respondent, therefore, is not much, off the point, in contending that despite vesting of Estate in State of U.P., subsisting lease of plaintiff-respondent, continued subject to change of the terms and conditions by State of U.P. and plaintiff got a deemed lease with State of U.P.

75. Till enactment of MMRD Act, 1957, it is nobody's case that State of U.P. proceeded to make any change in terms and conditions of lease deed dated 16.4.1947. Therefore, plaintiff-respondent validly continued with mining operations even after vesting of 'Estate' in State of U.P., as per terms and conditions of lease dated 16.04.1947.

76. The right to continue mining operations is one thing but it cannot be said that plaintiff-respondent possessed ownership rights over minerals found in disputed villages despite vesting of same in State of U.P., who became owner. Subject to payment of rent, royalty etc., as the case may be, subsisting lessees only continued with the right to operate mines under subsisting lease. In other words, by virtue of Section 108, plaintiff'-respondent continued lease rights of mining etc. under lease deed dated 16.4.1947 with the modification that in place of Kamlakar Singh, owner of land became State of U.P. and all dues towards rent etc. became payable to State of U.P.

77. The view, we have taken above, is further fortified from Section 6 of U.P. Act, 1951, which makes it clear that contracts or leases etc., already executed by "Intermediary," notwithstanding thereof, rent etc. shall be payable/recoverable by State Government from "Intermediary" as well as "lessees", as the case may be, and nothing would be payable to "Intermediary". The land etc. would stand transferred without any encumbrance, meaning thereby, State of U.P. would enter into the shoes of erstwhile owner and will enjoy the same status after vesting. That being so, lease/contract, as the case may be, executed by "Intermediary" before date of vesting, if are allowed to continue by any provision of U.P. Act, 1951 with respect to right to operate or work mines etc., that would mean that agreement/contract would be read as if after vesting, it continued as was executed by State Government. Any other view, would be contrary to specific effect of Section 4 and 6 of U.P. Act, 1951.

78. Further Section 108(1) says, where there is a subsisting lease of mines or minerals in respect of 'Estate' which vested in State of U.P. and was executed before date of vesting, with effect from the date of vesting, it shall be deemed to have have been leased by State Government to the holder of said subsisting lease and such holder shall be entitled to retain possession of the lease held property. Thus the view we have taken above is duly founded on clear provisions of statute, i.e. U.P. Act, 1951.

79. The terms and conditions of subsisting lease would continue to be same but State Government is conferred with right to alter the same or to terminate, before expiry of one year from

the said date, by giving three months' notice in writing. The provision is very clear. It provides that subsisting lease, would continue under Section 107 and 108, as the case may be, by operation of law and State Government would be deemed to have granted such lease.

80. **Question (ii),** therefore, is answered holding that after vesting of 'Estate' constituting disputed villages in State of U.P., with effect from 1st July, 1952, under U.P. Act, 1951, including sub-soil, mines and minerals, Kamlakar Singh ceased to have any ownership right over mining and minerals found in the said land. The protection of existing lease rights of plaintiff did not dilute ownership rights of State of U.P. which it acquired free of all encumbrances.

81. Now, we formulate questions relating to substantial aspects which gave cause of action to plaintiff-respondent to file Suit, i.e., action of defendant-appellant and its authorities in demanding Royalty in accordance with the provisions of MMRD Act, 1957 and also to take action for execution of fresh lease to third parties with regard to mining and extractions etc. of minerals in the disputed villages. In addition to two questions answered above, further questions/points for determination, arise in this appeal, as we have culled out from respective arguments, are:

(iii) Whether mining lease dated 16.04.1947 continued to be contractual lease or by virtue of Section 7 read with Sections 107 and 108 of U.P. Act, 1951 became 'statutory lease'?

(iv) Whether lease rights of plaintiff were controlled by any Central or Provincial legislation in 1947 or thereafter when it was a contractual lease controlling terms and conditions of lease as well as excavation, transportation etc. of minerals?

(v) Whether lease rights of plaintiff were controlled by any Central or Provincial legislation when it became a 'statutory lease', controlling terms and conditions of lease as well as excavation, transportation etc. of mineral?

(vi) Whether terms and conditions of statutory lease under U.P. Act, 1951, are governed, regulated and controlled by MMRD Act, 1957 and Rules framed thereunder so as to affect terms and conditions of lease and also dead rent and royalty on the minerals?

(vii) Whether lease deed dated 27.04.1959 is/was legal and executable in view of MMRD Act, 1957.

82. Sri Shashi Nandan, learned Senior Advocate, appearing for plaintiff-respondent, at the outset, contended that after enforcement of U.P. Act, 1951 with effect from 01.07.1952, Estate vested in State Government but the existing lease continued with lessee and only difference is that in place of private lessor, i.e. Zamindar, State Government was substituted by operation of law and that is how existing lease changed its nature from contractual to statutory and became a "statutory lease". He also contended that aforesaid statutory lease was not governed by provisions of any Central or State legislation dealing with mines and minerals including MMRD Act, 1957 and, therefore, demand of royalty under provisions of MMRD Act, 1957 by Collector is wholly illegal

and plaintiff-respondents or any other sub-lessee is liable to pay only such dead rent or royalty, as is admitted under lease-deed dated 16.04.1947 and 27.04.1959.

83. The question whether lease-deed dated 16.04.1047 entered into between erstwhile Zamindar/ Intermediary and plaintiff-respondent became statutory lease when it was allowed to continue by virtue of Section 7 read with Section 108 of U.P. Act, 1951 can not detain us long since we find substance in submission of Sri Shashi Nandan that it became a "statutory lease" as on 01.07.1952.

84. This question has been considered in **Bihar Mines Ltd. Vs. Union of India (supra).** It is a Constitution Bench judgment deciding the matter by majority, consisting of Hon'ble Raghubar Dayal, Hon'ble K. Subba Rao and Hon'ble S.M. Sikri, J.J. Therein Court considered question, whether a lease granted before enactment of Bihar Land Reforms Act, 1950 (hereinafter referred to as "Bihar Act, 1950"), continued by virtue of Section 10 would be a new "statutory lease" or an existing mining lease executed before 25.10.1949. It would be necessary to examine basic facts giving rise to the dispute in **Bihar Mines Ltd. Vs. Union of India (supra).** One Raja Ran Bahadur Singh of Palganj had a big Estate under his Zamindari. On 11.08.1928 he executed a lease with respect to certain area of his estate in favour of Babu Tribanj Murari Chakravarti of Asansol (hereinafter referred to as "Head Lessee") for a period of 49 years. Purpose of execution of lease as mentioned therein, was to carry out mining operations in the said area for "soap stone", "kaoline" etc. "Head Lessee" executed a sub-lease in favour of Deoji Jairam Solanki on 18.05.1933. Sri Solanki, sub-lessee, granted a further sub-lease in respect to same area to M/s Hirji Premji Parmar and Brothers on 18.05.1934. Then on 18.10.1954 M/s Hirji Premji Parmar and Brothers assigned their right, title and interest in the said area in favour of M/s Bihar Mines Ltd., Calcutta for a period of 19 years and 7 months expiring on 17.05.1974. On 25.09.1952, Bihar Act, 1950 came into force. On 13.07.1953, Government of Bihar issued a Notification under Section 3(1) of Bihar Act, 1950 declaring that estate of Palganj passed to and became vested in State. On 26.01.1955, Government of Bihar issued another notification under Section 3A of Bihar Act, 1950 declaring that intermediary interests of all intermediaries in whole estate had passed to and become vested in the State. An argument was advanced that in view of Section 10, by aforesaid vesting in State and protection of existing leases to continue with the change of lessor by substituting "Zamindar" with "State Government", there came into existence a "new statutory lease" on the date of such vesting.

85. Section 10 of Bihar Act, 1950 reads as under:

"Subsisting leases of mines and minerals -

(1) Notwithstanding anything contained in this Act, where immediately before the date of vesting of the estate or tenure there is a subsisting lease of mines or minerals comprised in the estate or tenure or any part thereof, the whole or that part of the estate or tenure comprised in such lease shall, ***with effect from the date of vesting, be deemed to have been leased by the State Government to the holder of the said subsisting lease for the remainder of the term of that lease,*** *and such holder shall be entitled to retain possession of the leasehold property.*

(2) The terms and conditions of the said lease by the State Government shall mutatis mutandis be the same as the terms and conditions of the subsisting lease referred to in sub-section (1), but with the additional condition that, if in the opinion of the State Government the holder of the lease had not, before the date of the commencement of this Act, done any prospecting or development work, the State Government shall be entitled at any time before the expiry of one year from the said date to determine the lease by giving three months' notice in writing :

Provided that nothing in this sub-section shall be deemed to prevent any modifications being made in the terms and conditions of the said lease in accordance with the provision of any Central Act for the time being in force regulating the modification of existing mining leases.

(3) The holder of any such lease of mines and minerals as is referred to in sub-section (1) shall not be entitled to claim any damages from the outgoing proprietor or tenure-holder on the ground that the terms of the lease executed by such proprietor or tenure-holder in respect of the said mines and minerals have become incapable of fulfilment by the operation of this Act." (emphasis added)

86. Construing Section 10 of Bihar Act, 1950, Court held that effect of Estate being deemed to be leased by State Government is that lessee of Intermediary becomes lessee of State Government for all purposes from the date of vesting of Estate in the State. He cannot be deemed to be a lessee of Intermediary whose title under the original lease stood lost. It also held that "statutory lease" now held by "Head Lessee' from State Government is a new lease granted after 25.10.1949 i.e. on the date of vesting. The aforesaid judgment, however, lays down, firstly, that after vesting of Estate in State Government, individual lessor stood substituted by State Government and existing/subsisting lease became a new lease. Since it changed its nature from "contractual lease" to "statutory lease"; is deemed to have been granted on the date of vesting by State Government. This judgment was rendered interpreting Section 10 of Bihar Act, 1950.

87. Having gone through Section 10 of Bihar Act, 1950 and Section 108 of U.P. Act, 1951, we do not find any substantial difference with regard to consequences of vesting of Estate in State of U.P. and substitution of Zamindar /Intermediary, the original lessor, by State Government. Thus, taking a view in favour of plaintiff-respondent and accepting argument of Sri Shashi Nandan, particularly when nothing otherwise could be placed by learned Additional Advocate General before us, we find no hesitation in holding that in the present case also, a new "statutory lease" came into existence on 01.07.1952 after vesting of land of disputed villages with State Government and substitution of status of lessor from erstwhile owner to State Government.

88. Now the effect would be that plaintiff-respondent or any other sub-lessee(s) continued to have a right of carrying on mining operations on the let out land under the erstwhile lease, but it would be treated to be a new lease which came into existence on 01.07.1952 with status of a "statutory lease", instead of "contractual lease". Further, right to make alteration in terms and conditions in statutory lease is also retained with State Government so as to make terms and

conditions of lease consistent with provisions of Central Act, for the time being in force relating to mines and minerals.

89. We answer **Question (iii)** accordingly holding that lease deed dated 16.04.1947 which was a "contractual lease" ceased to be in operation as such on and after 01.07.1952 and thereafter there came into existence a new "statutory lease", though terms and conditions of said lease would continue to be same as were under contractual lease dated 16.04.1947, unless and until alterations are made. However, this lease had to conform with the provisions of any Central Act for the time being in force, regulating mining operations.

90. Now we propose to deal with Questions (iv), (v) and (vi) together. We are informed that earliest Legislation, which relates to mines and minerals is "Indian Mines Act, 1923" (hereinafter referred to as "Act, 1923"). Neither the said Act has been placed before us by either of the parties nor we have otherwise advantage of its perusal, but it is also not shown by either of parties to us that the said Act in any manner impose any constraint upon erstwhile owner of land including mines, for leasing it out for extraction of minerals etc. Therefore, we have to proceed as if the said Act has no application to lease-deed dated 16.04.1947 granting rights to excavate or take away minerals from disputed land.

91. Next comes GI Act, 1935. Entry 36 List-I of Seventh Schedule (which was called "Federal Legislative List") provided for legislation with regard to "mines and minerals". We are informed that with reference to Entry 36, List-I of Seventh Schedule, Government of India framed Rules, 1939, but copy of such Rules has also not been made available to us to find out whether there was anything inconsistent with provisions of said Rules in the lease-deed dated 16.04.1947. In absence of such Rules placed before us to show that the same regulated or controlled grant of mining lease for extraction, transportation, removal etc. of minerals, we find no reason to hold that lease-deed dated 16.04.1947, as it was then executed by Kamlakar Singh, was invalid or inconsistent with any statutory provision. Hence it has to be held a valid lease as it then was executed between the parties.

92. But, the matter does not rest here for the reason that after a short while of execution of lease-deed dated 16.04.1947, exercising legislative power, Federal Legislation enacted MMRD Act, 1948 (Act No. LIII of 1948), which received assent of Governor General on 08.09.1948 and came into force on 25.10.1949 by virtue of Notification issued by Central Government under Section 1(3) of MMRD Act, 1948. Section 4 prohibited grant of any mining lease after commencement of MMRD Act, 1948 otherwise than in accordance with Rules made thereunder and also declares that any mining lease granted contrary to Sub-section (1) shall be void and of no effect. Section 5 conferred power upon Central Government for making Rules in respect of mining leases. Section 6 conferred power to make Rules in respect of mineral development, which may provide for regulation or prohibition of mining, quarrying or digging for or excavating or collecting of minerals from any mine or in any area and also collection of royalties, fees etc. and various other aspects detailed in Sub-section (2) of Section 6. Section 7 provided that in respect of existing leases, Central Government may make Rules for modifying or altering terms and conditions of any mining

lease granted prior to commencement of MMRD Act, 1948 so as to bring such lease in conformity with Rules made under Sections 5 and 6.

93. The aforesaid Act had its application to the area of disputed villages. Since lease-deed was already executed and it was an existing lease, being that of 16.04.1947, if any Rules would have been made by Central Government under Section 7, it was open to modify or alter terms and conditions of lease-deed dated 16.04.1947 to bring the same in accordance with such Rules, else lease-deed dated 16.04.1947 could have been operated without obstruction.

94. We are informed that under MMRD Act, 1948, Central Government published Mineral Concession Rules, 1949 (hereinafter referred to as "Rules, 1949") for regulating grant of prospecting licences and mining leases for minerals other than petroleum and natural gases. These Rules came into force on 25.10.1949.

95. Lease-deed dated 16.04.1947, thus, so long as it continued to be a "contractual lease" is not shown to have been affected otherwise by defendant-appellant even when MMRD Act, 1948 and Rules, 1949 were framed. The said lease deed continued to hold field on its own and right of lessor and lessee did not get adversely affected or regulated by said Statutes on their enactment.

96. As soon as lease became "statutory", it ceased to be an existing lease granted on 16.04.1947. Court in **Bihar Mines Ltd. Vs. Union of India (supra)** said in para 18 of judgment, "We are therefore of opinion that the statutory lease now held by head lessee from the State Government is a new lease granted after October 25, 1949."

97. Thus, we may now examine whether this "new statutory lease" had to comply with the provisions of MMRD Act, 1948 and Rules, 1949. Terms "mines", "minerals" and "mining lease" were defined in Section 3 (b) (c) and (d) of MMRD Act, 1948 and read as under:

*"**3. Definitions**.- In this Act, unless there is anything repugnant in the subject or context,-*

(a) ....

(b) "mine" means any excavation for the purpose of searching for or obtaining minerals and includes an oil-well;

(c) "minerals" include natural gas and petroleum;

*(d) "mining lease" means a **lease granted** for the purpose of searching for, winning, working, getting, making merchantable, **carrying away or disposing of minerals or for purposes connected therewith**, and includes an exploring or a prospecting license;"*

98. Section 4 prohibits grant of any mining lease after commencement of MMRD Act, 1948 otherwise than in accordance with Rules. It reads as under:

*"**4. No mining lease to be valid unless it is in accordance with this Act**.- (1) No mining lease **shall be granted after the commencement of this Ac**t otherwise than in accordance with the rules made under this Act.*

*(2) Any mining lease **granted** contrary to the provision of sub-section (1) shall be void and of no effect."*

99. Section 7 deals with the modification of existing leases granted prior to commencement of MMRD Act, 1948. It is contended that the word "granted" means a lease granted by owner and not where a lease has come into existence by operation of law, i.e., a "statutory lease". Therefore, statutory lease came into existence on 01.07.1952, would remain unaffected by MMRD Act, 1948, since it is not a lease granted.

100. We find force in the submission of learned counsel for plaintiff-respondent. Even after coming into existence a "new statutory lease" on 01.07.1952, it remained unaffected by provisions of MMRD Act, 1948 and Rules, 1949 framed thereunder, since it was not a lease granted by owner but operated by virtue of operation of law.

101. We are also informed that under Section 7 of MMRD Act, 1948, Central Government published in Gazette of India, Extraordinary dated 05.09.1956 "The Mining Leases (Modification of Terms) Rules, 1956" (hereinafter referred to as "Rules, 1956"). Section 7 was applicable to existing leases granted prior to commencement of MMRD Act, 1948. In the present case, a new statutory lease has come into existence on 01.07.1952, hence the said Rules would have no impact on the continuance of mining operations by plaintiff-respondent, i.e., Head Lessee and sub-lessees. Thus, even new statutory lease remained unaffected by MMRD Act, 1948 and Rules framed thereunder. The plaintiff's right to operate mining lease under statutory lease thus continued validly.

102. Under Constitution of India, Entry 54, List-I, Seventh Schedule empowers Union to make laws regulating mines and mineral development to the extent such regulation and development under the control of Union is declared by Parliament by law to be expedient in the public interest. This Entry reads as under:

"54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

103. With respect to Provincial Legislation, the relevant Entries 23 and 50 of List-II, Seventh Schedule, read as under:

"23. Regulation of mines and mineral development ***subject to the provisions of List*** *I with respect to regulation and development under the control of the Union."*

"50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development."

104. Parliament, consequently, enacted MMRD Act, 1957 making a declaration under Section 2 that it is expedient in public interest that Union should take under its control regulation of mines and development of mineral to the extent hereinafter provided. Section 4 thereof regulates mining leases. Section 9 read with Second Schedule provides for rate of Royalty payable by a lessee in respect of each mineral and Section 9-A provides for dead rent which is in the nature of minimum Royalty.

105. Court below after referring to Section 4 has held that MMRD Act, 1957 is not applicable to statutory lease of plaintiff-respondent which has continued under Section 108 of U.P. Act, 1951 for the reason that it is not a lease granted under MMRD Act, 1957 and Rules framed thereunder and the said Statute is not applicable to statutory leases. In our view, Court below has misread and misconstrued Section 4 of MMRD Act, 1957. It reads as under:

*"****4. Prospecting or mining operations to be under licence or lease:- (1) No person shall undertake any prospecting or mining operations in any area****, except under and in accordance with the terms and conditions of a prospecting licence or, as the case may be, a mining lease, granted under this Act and the rules made thereunder:*

Provided that ***nothing in this sub-section shall affect*** *any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or* ***mining lease granted*** *before* ***the commencement of this Act which is in force at such commencement.***

(2) ***No*** *prospecting licence of* ***mining lease shall be granted*** *otherwise* ***than in accordance with the provisions of this Act and the rules made thereunder.****"*

(emphasis added)

106. Section 4(1) is in two parts. First part prohibits any prospecting or mining operations in any area whatsoever. Second part permits such activities subject to terms and conditions on which a prospecting licence or a mining lease is granted under MMRD Act, 1957 and Rules framed thereunder. The prohibition is complete. It applies to all kinds of mining operations. The term "mining operation" has also been defined in Section 3 (d) of MMRD Act, 1957 and reads as under:

"(d) "mining operations" means any operations undertaken for the purpose of winning any mineral;"

107. The term "mining operation" which is prohibited by Section 4(1) is very wide and has no reservation, restriction or reason so as to be given a narrow meaning or interpretation. Any work which is carried out for winning any mineral is included within the words "mining operation". An attempt was made to read the word "winning" in a restricted manner, but negating the same in **Bihar Mines Limited Vs. Union of India (supra**), Court said that there is no reason to give a narrow meaning to expression "winning". In popular sense, winning a mineral means getting or extracting it from mine.

108. In **D.K. Trivedi and Sons Vs. State of Gujarat AIR 1986 SC 1323,** Court held that quarrying mineral is a mining operation as it consists of an operation undergone for the purpose of winning particular classes of minerals.

109. In **Industrial Fuels Marketing Company Vs. Union of India AIR 1983 Cal. 253** also Court followed comprehensive meaning of the expression "winning" and said that "winning" does not necessarily means extracting a mineral by excavating earth or soil, but it means also collection of mineral from surface of earth. In other words, if a mineral is extracted or obtained irrespective of the fact, whether the activity is carried out on the surface or in the bowels of earth, it is within the meaning the word "winning".

110. It is not the case of plaintiff-respondent that sand, ballast, stones etc., which were being quarried from disputed land is not winning of minerals, and, therefore, it was a "mining operation" as defined under Section 3(d). Section 4(1) prohibits any "mining operation" in any area. The only exception is, where mining lease is granted under MMRD Act, 1957 and Rules framed thereunder or it is one covered under Proviso to Section 4(1) of MMRD Act, 1957. Meaning thereby, it was mandatory and obligatory for any person whatsoever to obtain a mining lease under MMRD Act, 1957 and the Rules framed thereunder to carry out mining operations, else it is void, illegal and contrary to MMRD Act, 1957.

111. We may also point out that term "mining lease" is defined under Section 3(c) and it talks of a lease granted for the purpose of undertaking mining operations. Unlike MMRD Act, 1948, intention of Legislature under MMRD Act, 1957 is much wide and comprehensive. Under MMRD Act, 1948, term "mining operation" was neither defined nor stressed but only "mining lease" was defined therein under Section 3(d) and controlling provision, i.e., Sections 4 and 7 were in respect of mining leases whether granted before MMRD Act, 1948 or thereafter. In MMRD Act, 1957, Legislature after having experienced in the past nine years, realised difficulty in controlling matters relating to mines with reference to mining leases, and, therefore, made it wider by expanding the horizon using the term "mining operation". Therefore, under Section 4 of MMRD Act, 1957 what has been restricted/prohibited is a mining operation, which is very wide and covers everything. It is wholly irrelevant whether such mining operation was under a "contractual mining lease" or "statutory mining lease". Parliamentary legislation enacted under List-I completely prohibits a mining operation in any area and that applies to all. Court below in observing that Section 4(1) is applicable only to "contractual lease" and not "statutory lease", has read something therein which is not there and aforesaid finding of Court below is clearly incorrect and has to be

reversed. Court below also has erred in holding that MMRD Act, 1957 would apply to such leases only as are granted thereunder.

112. Then Section 4 permits mining operations etc. in two circumstances; (1) permit, licence or lease, as the case may be, is granted under Act, 1957 and Rules framed thereunder; and, (2) if there was already a prospecting or mining operation, undergoing in an area in terms and conditions of a prospecting licence or mining lease granted before the commencement of MMRD Act, 1957 which is in force at such commencement, that would continue and prohibition under Section 4(1) shall have no application on such prospecting licence or mining lease.

113. Here again this proviso of Section 4(1) which permits a mining operation already undergoing in an area, is applicable to a mining lease granted before commencement of Act. We have already held while upholding contention of plaintiff-respondent that term "granted" means a lease granted by owner under an agreement, but this word "granted" will not cover a statutory lease. Plaintiff's lease which became a "new statutory lease" by virtue of Section 7 read with Section 108 of U.P. Act, 1951 cannot be said to be a mining lease granted so as to be covered by Section 4(1) proviso. The reasons is also obvious. Any contractual lease, if granted before commencement of MMRD Act, 1957, must and could have been granted complying provisions of MMRD Act, 1948 and Rules framed thereunder. Hence, Legislature allowed such lease to continue.

114. Counsel for plaintiff-respondent sought to explain the word "granted" in reference to Section 4 of MMRD Act, 1948 that the word "granted" would not mean a "statutory lease" and in that way claimed protection from application of MMRD Act, 1948 and Rules, 1949. If that be so, same interpretation and meaning will have to be assigned to word "granted" under Section 4(1) Proviso of MMRD Act, 1957 in the absence of any otherwise intention shown in the said provision. Hence, this proviso will not protect plaintiff-respondent so as to continue with mining operation under "statutory lease", came into existence on 01.07.1952. We thus, have no hesitation in holding that on and after 01.06.1958 plaintiff-respondent lost any authority to continue mining operations on the land within villages in dispute relying on statutory lease of 01.07.1952 since all such mining operations stood prohibited by Section 4(1) of MMRD Act, 1957 and thereafter only those operations could have operated as are allowed/granted under such Act.

115. However, for the benefit of plaintiff-respondent, even if we read proviso to Section 4(1) so as to protect existing statutory lease of plaintiff-respondent operating since before commencement of MMRD Act, 1957, still finding, of Trial Court that MMRD Act, 1957 is not applicable in this case cannot be saved and has to be declared illegal for the reason that proviso to Section 4(1) permits mining operations in an area in accordance with terms and conditions of a mining lease granted before commencement of MMRD Act, 1957 but that brings in applicability of MMRD Act, 1957 on the statutory lease, plaintiff respondent was having at the time of commencement of MMRD Act, 1957. That takes us to some other provisions of Act, which have overriding effect over instrument of lease or any law in force at the time of commencement of MMRD Act, 1957. We may refer to Section 9 of MMRD Act, 1957 which talks of royalties in

respect to mining lease and is applicable to mining leases whether granted before commencement of said Act or thereafter. It reads as under:

*"**9**. Royalties in respect of mining leases : (1) The **holder of a mining lease granted before the commencement of this Act** shall, **notwithstanding anything contained in the instrument of lease or in any law** in **force at such commencement, pay royalty** in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, **at the rate for the time being specified in the Second Schedule in respect of that mineral.***

*(2) **The holder of a mining lease granted on or after the commencement of this Act shall pay** royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.*

*(2A) The **holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972**, shall not be liable to pay any royalty in respect of **any coal** consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.*

*(3) The **Central Government may**, by notification in the Official Gazette, **amend the Second Schedule** so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:*

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years."

(Emphasis added)

116. Section 9(1) declares to have overriding effect over any instrument of lease or any law in force at the commencement of MMRD Act, 1957 and notwithstanding thereto holder of mining lease has to pay royalty in respect of mineral removed or consumed by him or his agent etc., at the rate specified in Second Schedule in respect of that mineral. Section 9 thus shall prevail even upon a statutory leases since not only instrument of lease but even any law in force will not come in the way is the clear intention of Legislature. Plaintiff-respondent, therefore, cannot absolve itself of the liability of payment of royalty as per rates specified in Second Schedule of MMRD Act, 1957.

117. We may also notice at this stage that Parliament had no reservation to bring in existing statutory leases also in conformity with MMRD Act, 1957 and Rules made thereunder. In initial enactment of MMRD Act, 1957, Section 16(1), as enacted, read as under:

"16. (1) All mining leases granted before the 25th day of October, 1949 shall, as soon as may be after the commencement of this Act, be brought into conformity with the provisions of this Act and the rules made under sections 13 and 18:

Provided that if the Central Government is of opinion that in the interest of mineral development it is expedient so to do, it may, for reasons to be recorded, permit any person to hold one or more such mining leases covering in any one State a total area in excess of that specified in clause (b) of section 6 or for a period exceeding that specified in sub-section (1) of section 8."

118. It was amended by substitution by Act 56 of 1972 in view of declaration by Court that contractual leases granted before statutes came to be enacted relating to abolition of Zamindari rights and vesting of land in State thereunder rendering contractual leases, by operation of law statutory leases to which Section 16(1) as it was initially enacted was inapplicable and thus, to bring in within its ambit even statutory leases, Section 16 was widely amended. For our purpose we may reproduce Section 16(1) as it was substituted by Act No. 56 of 1972, as under:

*"16. **Power to modify mining lease granted before 25th October, 1949**: (1) (a) All mining leases granted before the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972 (56 of 1972) if in force at such commencement, shall be brought into conformity with the provisions of this Act, and the rules made thereunder, within six months from such commencement, or such further time as the Central Government may, by general or special order, specify in this behalf.*

*(b) Where **the rights under any mining lease, granted by the proprietor of an estate or tenure before the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, have vested, on or after the 25th day of October, 1949 in the State Government in pursuance of the provisions of any Act of any Provincial or State Legislature which provides for the acquisition of estates or tenures or provides for agrarian reform, such mining lease shall be brought into conformity with the provisions of this Act** and the rules made thereunder **within six months** from the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972 (56 of 1972) or within such further time as the Central Government may, by general or special order specify in this behalf." (emphasis added)*

119. This amendment made in 1972 makes it clear that all mining operations which were carried out under contractual leases or statutory leases, irrespective of nature of lease, would be mining operation and within the ambit of Section 4(1) and such operation stood prohibited unless a lease under MMRD Act, 1957 is granted or is protected by Proviso to Section 4(1).

120. If for the sake of benefit of plaintiff-respondent and reading the word 'granted' so as to cover statutory lease also, we extend protection of proviso to Section 4(1) of MMRD Act, 1957 to plaintiff-respondent, still she is not protected from her liability of payment of royalty under, and, in terms of Section 9 and subsequently in respect of the 'dead rent' also under Section 9-A which was also inserted by Act 56 of 1972. Section 9 applies to statutory leases also is the view expressed in **State of Bihar Vs. Khas Karanpura Collieries Ltd. (supra),** which we may discuss in detail at a later stage and on this aspect Sri Shashi Nandan could not place any thing when we drew his attention and made query. Section 9 is very clear and unambiguous so as to make obligatory upon plaintiff-respondent to pay royalty as per rates under Schedule-2 of MMRD Act, 1957.

121. Learned Counsel for plaintiff-respondent sought to argue that right of mining operations protected under Section 108 of U.P. Act, 1951 could not have been overridden by the provisions of MMRD Act, 1957. The submission is thoroughly misconceived. Once a declaration was made by Central Government under Section 2 of MMRD Act, 1957 to take under its control regulations of mines and development of minerals to the extent provided under MMRD Act, 1957, Provincial Legislation having contrary provision, would cease to operate. Such Provincial Statutes would not then confer any right in respect of mines and minerals, contrary to the provisions of MMRD Act, 1957. To that extent plaintiff-respondent cannot claim protection under Section 108 of U.P. Act, 1951 since provisions of MMRD Act, 1957 shall prevail and would render State statute inoperative. Various authorities relied by counsel for plaintiff-respondent, as referred to above, have no application so as to deal with the situation which had arisen with the enactment of MMRD Act, 1957 and, therefore, he cannot get any advantage under those authorities.

122. We may point out that all these authorities basically deal with the distinction of "contractual lease" and "statutory lease" and virtually a follow up of decision in **Bihar Mines Ltd. Vs. Union of India (supra)**. This may be demonstrated as hereunder.

123. In **Chhatu Ram Horil Ram Private Ltd. Vs. State of Bihar (supra),** appellant-Company, Chhatu Ram Horil Ram Private Ltd. (hereinafter referred to as "Company") obtained a lease on 30.09.1940 from owners of 3,300 acres of mica land in Village Sapahi in the District of Gaya for a period of 15 years. With enactment of Bihar Act, 1950 and Notification issued under Section 3 thereof, right of owner of land vested in State of Bihar with effect from 27.06.1953. Thus, Company retained lease rights for the remaining period of contractual lease under a "deemed statutory lease" by State Government. After expiry of remaining period, Company sought to exercise option for renewal vide letter dated 22.02.1955 in terms of Clause 29 of lease deed. State of Bihar on 06.01.1956 granted a lease to Company in respect of 410 acres of land for 20 years and remaining area was granted to one Sant Saran Bhadani, a Director of the Company. This action of State Government was challenged by one Sudha Devi in Patna High Court on the ground that fresh lease have been granted in violation of Rules 67 and 68 of Rules, 1949. High Court set aside Bihar Government's order dated 05.07.1956. Company then filed a suit for specific performance for covenant of renewal under lease deed dated 30.09.1940. Trial Court dismissed suit holding that Clause-29 provides a right of pre-emption and not renewal. High Court confirmed decree passed by Trial Court though on different grounds. High Court held that right granted by Clause 29 gave rise to an "encumbrance" which extinguished when interest of owners vested in the State of Bihar free of all encumbrances. Company then came in appeal. Supreme Court held that in view of Notification under Section 3 of Bihar Act, 1950 and vesting of land with State Government, Company acquired rights of "statutory lease" for the remaining period of lease with the same terms and conditions. However, right of renewal etc. which amounts to an "encumbrance" under the contractual lease could be claimed to have continued since State of Bihar got land vested free from any encumbrance or obligation granted by contract. Supreme Court upheld the view taken by High Court that Clause of renewal or pre-emption under Clause 29 as claimed by Company would have effect of limiting freedom of State of Bihar as an absolute owner which was against the provision of Section 4 of Bihar Act, 1950 which provides that vesting shall be free from all encumbrance. An

attempt was made by Company by referring to Rule 40 of Rules, 1949 to argue that a lessee could have been entitled to at least one renewal thereunder. Court held that Rule 40 was applicable to a mining lease "granted" and interpreting the word "granted" Court held that the Rule applies to grants made by Government and has no application to "statutory lease" arising by virtue of Section 10 of Bihar Act, 1950.

124. The aforesaid judgment nowhere helps the plaintiff-respondent except to the contention that she got contractual lease converted into a "new statutory lease" on 01.07.1952 with the enforcement of U.P. Act, 1951 and there also land vested in State free from all encumbrances. Meaning of the word "grant" taken by Supreme Court in the above case fortify our view also as we have discussed above. Further the claim of renewal etc. under contractual lease would also disappear since land vested in State of U.P. free from all encumbrances.

125. Then **comes Hindustan Steel Limited, M/s. Rourkela Vs. Kalyani Banerjee AIR 1973 SC 408.** Therein by a registered document dated 11.07.1919 one Kumar Amardeyal Singh, proprietor of Ladi Estate, granted a lease in favour of one Pran Kristo Chatterjee. It was in respect of various minerals including iron ore and related to a large tract of land in District Palamau, covering an area of 2227 acres in village Adar and 1303 acres in village Gore of District Palamau. In 1937, heirs of original lessee, i.e., Pran Kristo Chatterjee, assigned and transferred their interest under lease dated 11.07.1919 to one Vyomkesh Mukherjee. Sri Mukherjee died in 1949. On 21.09.1951, heirs of late Vyomkesh Mukherjee granted sub-lease to one Madan Gopal Rungta. Deputy Commissioner of Palamau in December' 1952 obstructed sub-lessee Madan Gopal Roongta in working of mining operations. On 16.04.1953 sub-lessee Madan Gopal Roongta entered into an agreement to pay royalty to Government of Bihar for working mining rights covered by sub-lease. On Notification issued in January, 1955 whole of Ladi Estate vested in State of Bihar under Bihar Act, 1950. In 1959 Controller of Mining Leases started proceeding of modification of terms of lease dated 11.07.1919. Controller passed an order on 28.09.1959 exercising power under Rule 6 of Rules, 1956 and modified lease dated 11.07.1919 so as to make it terminable with effect from 20.09.1961. On 11.12.1961 Government of Bihar invited applications for grant of mining leases in respect of Village Gore. On 10.09.1962 Madan Gopal Rungta and his son Tribeni Prasad Rungta applied for mining lease for the said area. Certain other parties also applied. On 13.11.1962 a notice was issued to Tribeni Prasad Rungta under Section 7 of Bihar and Orissa Public Demand Recovery Act demanding Rs. 66,317.93 by way of dead rent and royalty alleged to have accrued during period when Madan Gopal Rungta was working mines under sub-lease. On 01.04.1963 M/s. Hindustan Steels Limited (hereinafter referred to as "HSL") applied for grant of mining lease for an area of 67.26 acress in Village Gore. Tribeni Prasad Rungta filed a Writ Petition in Patna High Court which was allowed vide judgment dated 23.11.1964. On 22.07.1965 State of Bihar, acting with approval of Central Government, granted a mining lease to HSL in respect of 67.26 acres. Another lease was granted to M/s Bharat Marble Company on 17.10.1966. One S.K. Jain, acting on behalf of heirs of Vyomkesh Mukherjee, filed a Writ Petition challenging leases granted to HSL and M/s Bharat Marble Company. Vide judgment dated 17.09.1971, Writ Petition was allowed and both these leases were cancelled and that is how HSL came to Supreme Court. The Court considered following four issues:

"(1) Could Kumar Amardeyal Singh, the proprietor of Ladi Estate, grant a mining lease ?

(2) What was the effect of the Bihar Land Reforms Act, 1950 upon the right and title, if any, of the petitioners ?

(3) Assuming that the petitioners became lessees under the State of Bihar by reason of the Bihar Land Reforms Act, could the Controller of Mining Leases terminate their lease ?

(4) What is the effect of the possession that has been enjoyed by the appellant since the grant of the mining lease on 22 July 1965."

126. Following the view taken in **Bihar Mines Limited (supra),** Court held that on the date of vesting of Ladi Estate, there came into existence notionally a statutory lease granted by State Government to heirs of Vyomkesh Mukherjee who were holding lease rights on the date of vesting for the remainder terms of lease. It held that effect of vesting and continuance of lease rights of existing leases under Bihar Act, 1950 was that instead of being lessee under Kumar Amardeyal Singh and his successors, existing lessee petitioners became lessee directly under State Government on the same terms and conditions on which the original lease was granted by original lessor i.e. Kumar Amardeyal Singh. The decision in **Bihar Mines Limited Vs. Union of India (supra)** was followed and reaffirmed. Court also held that Controller of Mining Lease had no authority under Rules, 1956 for the reason that there was no subsisting contractual lease. By virtue of Section 10, a "new statutory lease" came into existence on the date when Estate vested in Government.

127. In the present case also, we have also held that Rules, 1956 having been framed under Section 7 of MMRD Act, 1948 were applicable to existing lease granted prior to commencement of MMRD Act, 1948 and, therefore, will have no application to "new statutory lease", came into existence after enforcement of U.P. Act, 1951, for example, in the present case, on 01.07.1952. The aforesaid judgment also does not show anything otherwise to the view we have taken and discussed above.

128. In **Sone Valley Portland Cement Co. Ltd. Vs. General Mining Syndicate Pvt. Ltd. (supra),** a lease was granted to Karunaranjan Dutt and Jugal Chandra Dutt (hereinafter referred to as "Original Lessees") by Raja Bishambharnath Sahi on 31.07.1927 of the land known as Sonepura Estate, Pergana Rohtas, District Shahbad and some other villages for a period of 40 years commencing from 01.08.1927 with an option to continue for further period of 25 years. On 12.10.1928 Original Lessee executed a sub-lease in favour of Sone Valley Portland Cement Co. Ltd. (hereinafter after referred to as "Cement Company"). Sub-lessees were also given option to pay royalty directly to Original Lessor. On 15.02.1929, Original Lessees, i.e., Dutt brothers, transferred by a deed of assignment all their rights, title and interest under and by virtue of indenture of lease dated 31.07.1927 to General Mining Syndicate Private Limited (hereinafter referred to as "GMSPL"). Sub-lessee Cement Company had due notice of the said assignment and accepted

GMSPL as Lessor in place of Original Lessee, i.e. Dutt borthers who were lessor so far as Cement Company is concerned when sub-lease was executed to it. Under MMRD Act, 1948, Central Government made Rules for regulating grant of mining leases or for prohibiting grant of such leases in respect of any mineral or in any area. Rules, 1949 were also framed thereunder, but had no application to leases or sub-leases prior to 25.10.1949. On 25.09.1950, Bihar Act, 1950 came into force. Under Section 3 and 3A of Bihar Act, 1950 a Notification was issued and Estate of Sonepura belong to Raja Bishambharnath Sah came to be vested in State of Bihar on 14.11.1951 pursuant to Notification dated 06.11.1995. Thereafter MMRD Act, 1957 came to be enacted wherein Section 9 was amended by Act No. 56 of 1972. Purporting to act under Rules, 1956, Controller of Mining Leases, by order dated 08.08.1959 enhanced royalty payable under lease dated 31.07.1927. Cement Company, however, as per Sub-lease dated 12.10.1928 paid royalty directly to Original Lessor up to the date, land vested in State of Bihar. Thereafter, Cement Company started paying royalty directly to State of Bihar in terms of sub-lease dated 12.10.1928 but stopped doing so from 01.07.1958. GMSPL, who was assigned all rights by Original Lessee, i.e., Dutt Brothers, brought a suit on 10.07.1961 being Suit No. 1104 of 1961 in the High Court of Calcutta claiming declaration for payment of royalty from 01.07.1928 to 07.08.1959, the date immediately preceding the date on which Controller enhanced royalty payable to State of Bihar and 08.08.1959 to 31.03.1961. It also claimed interest on the aforesaid amount.

129. Cement Company contested the suit pleading that position of Dutt was like a tenure holder under erstwhile owner Raja Bishambharnath Sahi and after vesting of land with State of Bihar, the position of Cement Company became that of a lessee in possession. It mistakenly continued to pay royalty to GMSPL due to ignorance of Notification of vesting with State of Bihar. In the alternative, it pleaded that GMSPL continued to be lessee and Cement Company as sub-lessee, hence, GMSPL being holder of mining lease within the meaning of Section 9 of MMRD Act, 1957, was liable to pay royalty at the rate determined by Controller and since Cement Company has paid royalty to State being agent of GMSPL, it should be reimbursed by the said lessee. It is, thus, clear that in the aforesaid matter, there was a dispute between two parties, one was the assignee of Original Lessee of all lease rights and another, a sub-lessee, with regard to payment of royalty. There was no issue whether lease after vesting of land including mines, minerals etc. in State of Bihar would be governed by provisions of MMRD Act, 1957 or not.

130. Be that as it may, the aforesaid facts show that MMRD Act, 1948 and Rules, 1949, since both came into existence on 25.10.1949, hence did not apply to leases or sub-leases granted prior to 25.10.1949.

131. With enactment of Bihar Act, 1950 and issue of Notification dated 06.11.1951 under Section 3, Estate of Sonepura vested in State of Bihar. By Notification dated 01.01.1956 issued under Section 3A all Intermediary interest were also vested in State of Bihar. Rules, 1956 came to be enacted on 04.09.1956 for modifying and altering terms and conditions of existing leases. Cement Company after vesting of land in State of Bihar, started paying royalty directly to State Government. A suit was brought claiming payment of royalty under sub-lease dated 12.10.1928 contending that notwithstanding the Notification under Section 3, interest of lessee under lease

continued to subsist, did not vest in State of Bihar and lessee was entitled to receive royalty. The dispute basically was with regard to right to receive royalty by a sub-lessee.

132. Calcutta High Court held that sub-lessee was not an Intermediary or tenure holder in respect of Estate and its interest did not vest in State of Bihar as a result of Notification dated 06.11.1951 or 01.01.1956. Therefore, sub-lessee was entitled for a decree with respect to amount of royalty. In Appeal Supreme Court upheld this view and said:

"... the estate comprised in the head lease in the instant case which was assigned to the respondent notionally stood leased by the State from the date of vesting to the holder of the subsisting lease for the remainder of the term of the lease and the respondent became entitled to retain possession of the leasehold property."

133. However, there was also a dispute with respect to a subsequent period of 08.08.1959 to 31.03.1961 during which period there had come into existence MMRD Act, 1957. In this regard, Court observed that this aspect is not free from difficulties since has to be examined with reference to Section 9 of MMRD Act, 1957 read with Rules, 1956 and also Section 9 of Bihar Act, 1950. However, Court did not answer this question observing that the order of Controller dated 08.08.1959 appears to have been passed with agreement of parties, therefore, it is not necessary to resolve this aspect.

134. We find that this judgment does not help plaintiff-respondent in any manner except that it has followed the decision in **Bihar Mines Limited Vs. Union of India (supra**) to the extent that on vesting of land in State under the provisions of Bihar Act, 1950, State became owner and holder of a subsisting lease could have continued for remainder term of lease.

135. The next decision dealing with this aspect is **State of Bihar Vs. Khas Karanpura Collieries Ltd. (supra)** which has also been relied heavily by plaintiff-respondent. Therein also Rajas of Ramgarh and Jharia, proprietors of Big Estates, prior to 25.10.1949 granted mining leases, in Districts of Hazaribagh, Dhanbad and Singhbhum to various persons for winning and extracting coal for a period of 999 years, in lieu of payment of premiums and fixed annual rental. In the leases, either there was no stipulation for payment of royalty or the amount of royalty was very low. Except few cases, all other lessees granted sub-leases. After enactment of Bihar Act, 1950, entire land including mines and minerals of Rajas vested in State of Bihar free from all encumbrance. Under Section 9 of Bihar Act, 1950, it was provided that mines which were in operation at the commencement of Bihar Act, 1950 and being worked directly by Intermediary, shall be deemed to have been leased by State Government to Intermediary and he would be entitled to retain possession of those mines as a lessee thereof. Mines in dispute in **State of Bihar Vs. Khas Karanpura (supra)** were not worked out by Intermediary classes, therefore, Section 9 was not attracted. Section 4 read with Section 10 of Bihar Act, 1950 permitted continuance of subsisting leases of mines and minerals with change of Intermediary and substitution by State Government as lessor for remainder term of lease. Thus, Original contractual lease came to an end and "fresh statutory lease" in favour of lessee came into being under Section 10 of Bihar Act, 1950. Court

clearly observed in para 10 that from 03.11.1951, when Estate of Jharia Rajya vested in State of Bihar, subsisting leases came to be treated "new statutory leases" granted by State Government in terms of Section 10 of Bihar Act, 1950. The mining leases were for coal. Court observed that though royalty under Section 9 of MMRD Act, 1957 was payable but Section 30-A inserted by Amendment Act of 1958 excluded Section 9(1) and 16(1) in respect of leases granted for coal before 25.10.1949. It also empowers Central Government by issuing a Notification in Official Gazette directing to apply Section 9(1) and 16(1) including any Rules made under Section 13 and 18 to such exempted leases. Section 30-A was inserted with retrospective effect. It exercise of power under Section 30-A, Central Government issued a Notification on 29.12.1961 to apply Section 9(1) to mining leases in respect of coal granted before 25.10.1949 subject to modification that lessee would pay royalty at the rate specified in agreement with the lessor or 2½ per cent of F.O.R. price of coal, whichever is higher, in place of rate of royalty specified for coal under Second Schedule. State Government then demanded royalty on 2½ per cent and initiated recovery proceedings. Thereafter Section 10-A was inserted in Bihar Act, 1950 by virtue of an amendment on 26.10.1964 whereunder even lessee's interests in mines and minerals which were subject to sub-leases also came to vest in State of Bihar. Another Notification was issued by Central Government under Section 30-A of MMRD Act, 1957 on 01.01.1966 superseding Notification dated 29.12.1961 and applying Section 9(1) of MMRD Act, 1957 to leases granted prior to commencement of said Act of 1957. Court noticed that judgment in **Bihar Mines Limited Vs. Union of India (supra)** was pronounced on 03.10.1966 holding that from the date of vesting Original Lessor's right came to an end and new "statutory leases" came into existence with the substitution of State Government as lessor for remainder term. In the light of aforesaid judgment, Patna High Court in **Narendra Nath Mandal Vs. State of Bihar decided on 22.12.1967** held that due to vesting, new statutory leases came into existence but by virtue of Section 9 read with Second Schedule royalty was payable as per rates mentioned therein and Section 30-A and Notifications issued thereunder were not applicable to such leases which came into being on vesting of Estate in State of Bihar on the date of vesting. District Mining Officer, consequently raised demand from **Khas Karanpura Collieries Ltd**. (hereinafter referred to as "lessee"), who challenged the said demand by filing writ petition in Patna High Court. Their case was that Rule 41 of Rules,1949 requiring royalty at the rate specified in Schedule I of Rules, 1949 would apply to a lease granted under Rules, 1949 after commencement of MMRD Act, 1948 and had no application to sub-leases of lessees obliging them to pay royalty as per rates under Rules, 1949 for the period between date of vesting to 31.05.1958, i.e., just preceding date of enforcement of MMRD Act, 1957. They further pleaded that from 01.06.1958 to 28.12.1961 royalty was payable at contractual rates since Section 9(1) of MMRD Act, 1957 was not applicable to statutory leases and even otherwise Section 30-A excludes application of Section 9(1) to mining leases of coal. They said that in any case, they paid royalty at the rate of 2½ per cent from 29.12.1961 to 31.12.1965 as per Central Government's Notification and State having accepted the same was not entitled to raise a further demand. State of Bihar contended that a combined reading of Section 9 and 29 of MMRD Act, 1957 read with Second Schedule to Rules, 1949 lessees or sub-lessees were liable to pay royalty as per rates of Rules, 1949 from the date of vesting of respective Estate of Proprietors in the State of Bihar. It also pleaded that Section 9 was applicable to all leases, whether contractual or statutory, which came into existence before MMRD Act, 1957. Section 30-A was applicable only in respect of mining leases of coal and not to statutory mining leases of lessees.

A Special Bench of five Judges of Patna High Court heard the bunch of Writ Petitions and allowed vide judgment dated 03.09.1970 holding that earlier judgment in **Narendra Nath Mandal Vs. State of Bihar (supra)** was wrongly decided. It held that Rule 41 of Rules 1949 was applicable only to contractual grants and not to statutory leases arising by virtue of Section 10 of Bihar Act, 1950. It also held that there was no reason to relate back Section 9 by virtue of Section 29 to any date anterior to the date of enforcement of MMRD Act, 1957. Section 30-A was applicable not only to mining leases but other leases also which expression covered statutory leases. It is this judgment which came in appeal before Supreme Court. Two issues were raised in this matter:

(1) Whether the claim for royalty in regard to the period prior to June 1, 1958 can be sustained?

(2) whether the claim for royalty in regard to the period from June 1, 1958 to December 31, 1965 is justified?

136. Court upheld High Court's view that Rule 41 of Rules 1949 was applicable only to contractual leases and not to statutory leases and fortified this view by referring to its earlier judgment in **Chhatu Ram Horil Ram Private Ltd. Vs. State of Bihar (supra).** It held that claim for royalty for period prior to 01.06.1958 was unfounded and unsustainable. Now coming to subsequent period, i.e., 01.06.1958 and onwards, Court held that no exception can be taken to the view taken by High Court that in view of Section 30-A which excludes application of Section 9 temporarily, royalty could have been demanded under Section 9 for the period of 01.06.1958 to 31.12.1965 for the reason that aforesaid provisions were applicable to statutory leases also. Court said that Section 9 consists of three parts and then it read Section 9 of MMRD Act, 1957 as under:

"Sub-section (1) casts a liability on the holder of a mining lease granted before June 1, 1958 - the date of the commencement of the Act- to pay royalty in respect of any mineral removed by him from the leased area after that date at the rate for the time being specified in the Second Schedule, notwithstanding anything contained in the instrument of lease or in any law in force on the aforesaid date of the commencement of the Act. Sub-section (2) makes also the holder of a mining lease granted on or after June 1, 1958 liable to pay royalty in respect of any mineral removed by him from the leased area at the rate for the time being specified in the Second Schedule. Sub-section (3) empowers the Central Government to amend the Second Schedule and enhance or reduce the rate of royalty in respect of any mineral by issue of a notification subject to the restriction contained in the proviso to this sub-section."

137. Court held that Section 9 embraces all leases which came into existence before 01.06.1958 and in case statutory lease is excluded from Section 30-A, it would render it nugatory for the reason that after enactment of Biahr Act, 1950 all mining leases became statutory by virtue of Section 10. The relevant observations are as under:

"Section 30-A would be rendered nugatory because on the coming into being of the statutory leases as a result of section 10(1) of the Bihar Land Reforms Act, there would hardly be

left any mining lease to which Section 30-A of the 1957 Act would be applicable. ***Thus there can be no room for doubt that the Legislature intended that Section 30-A of the 1957 Act should cover the aforesaid statutory leases as well.****"*

138. Thus, the aforesaid judgment makes it clear that Section 9 of MMRD Act, 1957 was applicable to all leases which came into existence before 01.06.1958 which includes statutory leases also. In cases wherever Section 30-A was applicable, payment of royalty under Section 9 stood excluded for the time being till embargo under Section 30-A is not lifted by Central Government by issuing a Notification in exercise of powers under the said provisions, i.e., Section 30-A. In the present case, however, Section 30-A has no application whatsoever since we are not concerned with leases relating to coal and, therefore, plaintiff-respondent having a statutory lease since before commencement of MMRD Act, 1957 was liable to pay royalty in accordance with provisions of Section 9.

139. We may make it clear that it has not been disputed by either of the parties that term "mining lease" since includes sub-leases also, therefore, whatever is liability of plaintiff-respondent as a lessee is extended to even sub-lessees also.

140. This judgment in **State of Bihar Vs. Khas Karanpura Collieries Ltd. (supra),** we find, in fact, goes against plaintiff-respondent to the extent that even if lease of plaintiff-respondent is taken to be "statutory" under Section 108 of U.P. Act, 1951, it was an existing lease granted before 01.06.1958 and on enforcement of MMRD Act, 1957 for any removal, extracting or quarrying of minerals, lease holder was bound to pay royalty as per Schedule-2 of MMRD Act, 1957.

141. Sri Shashi Nandan, learned Senior Counsel, in support of plaintiff-respondent relied on **India Thermal Power Limited Vs. State of M.P. and others 2000 (3) SCC 379** and contended that in order to constitute a statutory contract, mere fact, that contract entered into was in exercise of an enabling power under a Statute, is not sufficient, but terms and conditions must also be governed by Statute. In para 11 of judgment, we find that Court has said as under:

"Merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. ***If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory****. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2)." (emphasis added)*

142. The aforesaid judgment for our purpose is not much relevant for the reason that with regard to mining leases, and, that too, with reference to provisions of Section 7 and 108 of U.P. Act,

1951, we have already upheld contention of plaintiff-respondent that with the vesting of land free of all encumbrances, in State of U.P., and continuance of lease rights of existing lease holders by virtue of Section 108, it became a statutory lease. Since this aspect is already covered by judgment in **Bihar Mines Limited Vs. Union of India (supra)** dealing with the pari materia provision, we have already held that on and after 01.07.1952, existing contractual lease of plaintiff-respondent became a "new statutory lease". But having said so, further submission that such a statutory lease cannot stand altered or modified or subjected to any subsequent enactment is neither an argument which can be sustained nor in law such an argument is tenable. Legislature has ultimate power of legislation and like a statue can be altered, modified, repealed etc. by Legislature, similarly, even a statutory lease could/can be modified, amended, altered and subjected to conditions imposed under a subsequent enactment. MMRD Act, 1957 has been legislated by Parliament with reference to its Legislative power under List-1 Schedule-VII and such legislation prevails over any Provincial legislation or statutory instrument under Provincial legislation. MMRD Act, 1957, in respect of the subject of Mines and Minerals, cannot be read so as to sub-serve a Provincial Legislation.

143. A Central law dealing with mines and minerals cannot be said to be overridden by law made by Provincial Legislation enacted with reference to its legislative power under List-II, i.e., Land and Agrarian Reforms. In any case, subject of "Land and Agrarian Reform" are general terms and the subject of "mines and minerals" being specific, even otherwise, legislation on a specific aspect shall prevail over a general statute. The law relating to Land and Agrarian Reforms incidentally covers topic of "mines and mineral" but when Parliament enacted law in exercise of its legislative power for development and regulation of mines and minerals, we have no hesitation in holding that it is the Parliament's Statute which shall prevail in the matter relating to mines and minerals.

144. Last authority, cited in support of plaintiff-respondent is **Mary Vs. State of Kerala (supra).** With great respect to learned Senior Counsel, we find nothing therein to help plaintiff-respondent in the present case. The matter relates to excise auction and liability of payment of consideration by parties for parting of privilege by State for trade in Liquor. Mary bid successfully in an auction conducted on 24.03.1994 for sale of privilege to vend arrack in ten shops for the period 01.04.1994 to 31.03.1995. Excise auction was governed by Kerala Abkari Shops (Disposal in Auction) Rules, 1974 (hereinafter referred to as "Excise Rules, 1974"). Mary was declared auction purchaser and she deposited 30 per cent of bid amount on the same date. She also executed a temporary agreement which was subject to confirmation by Board of Revenue. The shops were to run at a place known as Kalady Range-III. Kalady is the birth place of Adi Shankaracharya and adjoining thereto, existed a Christian Pilgrim Centre, associated with St. Thomas. Local people objected to excise shops as a result whereof, auction purchaser could not run business successfully. On 03.04.1994 she informed Excise Authorities as well as Board of Revenue that due to mass movement, it was not possible to open and run shops. She requested not to confirm auction since it was impossible to execute business for the reason beyond her control. She also reserved right to claim refund of amount already deposited. Excise Inspector, however, vide notice dated 08.04.1994 informed Mary that sale has been confirmed in her favour. She was asked to accept confirmation and enter into agreement. Auction purchaser informed Excise Inspector about facts which rendered

her unable to run Excise shop and requested to cancel entire proceeding pursuant to auction held on 24.03.1994. Excise Authorities did not accept her request and Assistant Excise Commissioner by notice dated 24.04.1995 called upon auction purchaser to pay Rs. 33,41,400/- being the balance amount, along with interest at the rate of 18 per cent. A recovery notice was issued for the said amount. It was challenged by Mary in a Writ Petition before Kerala High Court and another Writ Petition was filed praying for refund of amount already deposited. A Single Judge allowed both the Writ Petitions, quashed demand notice and directed for refund of amount already deposited. State preferred two Intra-Court appeals. Division Bench dismissed appeal and confirmed judgment quashing demand notice, but judgment of Single Judge with regard to refund was set aside relying on Rule 5(15) of Excise Rules, 1974 observing that these are statutory provisions and contractual terms are governed by statutory provisions between the parties. Hence, in that view of matter, rights and liabilities between the parties have to be worked strictly in accordance with Rules and the offer of auction purchaser having been accepted could not have been withdrawn. In Appeal Supreme Court examined the matter in the light of Rule 5 of Excise Rules, 1974 and found that there was a non compliance of Rule 5(15) and in terms thereof money deposited by auction purchaser was liable to be forfeited. However, application of said Rules was examined considering whether doctrine of frustration or impossibility could be invoked therein or the auction purchaser would be bound by terms of statutory contract. Court observed that the facts attract Section 56 of Contract Act since there is an event which made performance of contract impossible. But then the question was "whether it would be applicable in a case of statutory contract or not." Court ultimately held that doctrine of frustration is an incident of ordinary contract and would not be applicable to statutory contract. Consequences of non performance of contract are provided in the statutory contract itself. Court held that consequences of non performance when provided by statutory contract, Section 56 is not applicable and parties cannot take shelter beyond it. Court also held that a statutory contract is not to be struck down on the ground of unfairness in the cases relating to grant of privilege for dealing in liquor. It observed that in such case, there is no issue of consideration of bargaining power of parties. Relying on the decision in **Excise Commissioner Vs. Issac Peter 1994 (4) SCC 104,** Court observed that there is no room for invoking doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. Mutual rights and liabilities of parties in such cases are governed by the terms of contracts and laws relating to contracts. These contracts are entered into, pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into such contracts. It is voluntary on both sides. There is no question of inviting State power being involved in such contracts. In such contract, duty to act fairly so as to modify contract or its terms and conditions cannot be asked for. Court held:

"... the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. ***Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative***

in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions*, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language." (emphasis added)*

145. In **Mary Vs. State of Kerala (supra),** Court observed that a contract of employment cannot be equated with a contract to vend arrack. A contract of employment and a mercantile transaction stand on a different footing. Where bargaining power of contracting parties are equal or almost equal or where both the parties are businessmen and contract is a commercial transaction, doctrine of fairness or duty to act fairly or reasonably has no application.

146. The aforesaid decision, therefore, has no application in the case in hand inasmuch there is nothing to show that demanding royalty and to ask plaintiff-respondent not to proceed with the mining lease except in accordance with the provisions of MMRD Act, 1957 and Rules framed thereunder, is in any manner, unfair and unreasonable.

147. At this stage, we may observe hereat, as pointed out by learned Additional Advocate General, that disputed area of 46 Villages is extremely rich in commercially high value minerals like stones, ballast and more important "silica sand". Silica sand is widely used as a potential raw material in Glass industries, Foundries, Pottery Industries etc., across the Country. Thousands of tons of silica sand every month is quarried and transported from these villages to such Industries and market value of "silica sand" transported every month runs in millions of rupees. In the last more than 50 years, plaintiff-respondent initially took advantage of lack of clarity with respect to rights of State in regard to operation of mines, extraction and quarry of minerals therefrom, and when in 1966 letter was issued to plaintiff-respondent for stopping mining operations and demand of royalty was made in 1968, it filed a suit, wherein an interim injunction order was passed and pursuant thereto royalty worth hundreds of millions has been avoided by plaintiff-respondent. Subsequently under the judgment of Court below and during pendency of appeal, the same thing has continued and here is a case where staggering high amount of public revenue towards royalty has been evaded by plaintiff-respondent besides the facts that mining leases which need be distributed to various other persons, are being operated by creating a monopoly and that is how, plaintiff-respondent and her agents are also controlling price of mineral and ultimately earning huge and colossal profit. Here is not a case where there is anything unfair, unreasonable or impermissible in law, which is sought to be acted upon by State but plaintiff-respondent, with an intention of preventing State from implementation and observance of MMRD Act, 1957 and Rules famed thereunder, has raised this entire dispute which has continued for last half a century in Courts and ultimate sufferer is not only State but public exchequer as well.

148. Be that as it may, the aforesaid submissions do not influence us either way in considering and answering issues involved in this appeal and we have discussed entire matter

strictly in the light of statutory provisions as also judicial precedents, we answer **Questions (iv) (v) and (vi)** holding that lease deed dated 16.04.1947, when granted, was not controlled by any Central or Provincial legislation. On 01.07.1952, contractual lease granted earlier became a "new statutory lease" and continued to be governed by provisions of U.P. Act, 1951 till the enactment of MMRD Act, 1957. On enforcement thereof, statutory lease got subjected to the provisions of MMRD Act, 1957 and could not have continued on its own but has to be governed by provisions of MMRD Act, 1957.

149. Before closing discussion on Issues No. (v) and (vi), we may also notice hereat that question, whether Section 9 of MMRD Act, 1957 would cover statutory lease or not has also been answered by a Division Bench of this Court in **Sheo Varan Singh vs. State of U.P. (supra)** wherein it has said as under:

*"**17.** It may be noted here that the use of the words "or in any law in force at such commencement" in the non obstante clause of Section 9(1) is clearly suggestive of the fact that this sub-section (1) of Section 9 covers the cases of statutory leases as well."*

150. Now we come to Question No. (vii), i.e. validity of subsequent lease dated 27.04.1959. It is pleaded that aforesaid lease was granted by State Government, affirming lease rights of plaintiff-respondent with reference to Section 108 and, therefore, shall hold and prevail over any provision otherwise, under MMRD Act, 1957 or Rules framed thereunder.

151. The lease deed dated 27.4.1959 does not refer, at all, to MMRD Act, 1957 for any purposes whatsoever. It only refers to State Government's order dated 15.12.1956 so as to recognise terms of lease dated 25.4.1947 for the purpose of Section 108(1) of U.P.Act, 1951 and maintain royalty of Rs. 4000/- per annum with effect from 19.1.1957. Other conditions contained in the deed dated 27.4.1959 are as under:

"This lease made on 27th day of April, 1959 between the Governor of U.P. (hereinafter called the lessor) on the one part and Shrimati Rani Rajendra Kumari Ba Saheba, wife of Maharao Raja Kamlakar Singh, caste Kshtriya Baghel, resident of Shankargarh, Pargana Bara, Tahsil karchana in the district of Allahabad (hereinafter called the lessee which includes her heirs, legatees or executors) on the other part.

*Whereas the ex-land lord Pushpraj Kripapatra Maharao Raja Kamlakar Singh Ji, Bara Estate had leased out to the lessee by a registered deed dated 25.4.1947, the **quarries of stone, ballasts, Kankar, morrum and sand described in Schedule 'A'** annexed hereto, and whereas **the Government of Uttar Pradesh under G.O. No. 2766 EP/XVIII B-M-53/53 dated December 15, 1956, have ordered for the recognition the said lease in terms of Sec. 108(1) of the U.P. Zamindari** Abolition and Land Reforms Act to the lessee.*

*And whereas the lessee has paid to the lessor the royalty of **Rs. 4000/- per annum** accruing due to the lessor till the Ist day of June, 1957.*

Now this Deed witnesses and the parties hereto agree as follows:-

i) the ***lessee shall hold the premises*** *hereby demised to her from the 18th day of July 1952 in accordance with section 108(i) of the Zamindari Abolition and Land Reforms Act, 1950 in* ***perpetuity****.*

ii) that the lessee shall have liberty and power to enter upon the land mentioned in schedule 'A' hereto and to search for and dig and obtain by excavation and quarrying both open today light and by underground working, the demised stone, ballast, kankar, morun and sand and to carry away and dispose of the same for her own benefit.

iii) the lessee shall have the liberty and power to take lead and carry away from the said land the stone, ballast, kankar, morrum and sand to be obtained as aforesaid and dispose of the same at her will and pleasure.

iv) the lessee shall have power and liberty to erect buildings necessary for the purpose of carrying out the business of the quarries.

v) the lessee shall, at all times, upon finding in the demised premises any mineral or products other than stone, ballast, Kankar, Morrum and sand immediately report such find to the District Magistrate, Allahabad with full particulars of the nature and position of each find.

vi) ***during the term of this demise, the lessee shall pay a royalty at the rate of Rs. 4000/- (rupees four thousand only), annually payable in two equal instalments, on Ist.*** *June and on Ist. December every year irrespective of the fact whether the lessee quarries or carries on any operations or not during the year.*

vii) the lessee may export stone, ballast, kankar, morrum and sand from the quarries hereby demised all the year round.

viii) the ***lessee shall be entitled to sublet the premises*** *hereby demised or any part thereof or any right or privileges under this lease to* ***any person without the consent in writing of the lessor*** *but she shall not assign her rights under this deed without such consent first had and obtained.*

ix) the lessee shall not remove any stone, ballast, kankar, morrum and sand etc. from the limits of the demised premises during such time as any money payable by her as royalty under clause (vi) shall be in arrears or any fine or liability incurred by her under the provisions of the lease may be unpaid or unsatisfied and the lessor may stop further export in such cases.

x) ***At the end of every fifty years from the date of the execution hereof it will be open to the lessor to increase the amount of annual royalty payable by the lessee in accordance with the terms of the lease by 10% in which case the royalty so fixed at the time of*** *revision*

thereof by the lessor shall be payable by the lessee and all the terms with regard to payment-therefor shall apply to the amount so fixed.

Schedule 'A'

1	Shankargarh	17	Lakhanpur	33	Lohgara
2	Talapar	18	Kaitha	34.	Gadhamar
3	Kapari	19	Sheorajpur	35	Chandra
4	Barui	20	Osa	36	Lalai
5	Khansemra	21	Atari Kapson	37	Baisa
6	Beonra	22	Charihari	38	Laund Khurd
7	Raipatna	23	Gobra Sangram	39	Baghla
8	Matarwar	24	Pagwar	40	Pandua
9	Gorkha	25	Majhiari Bahelia	41	Parvezabad alia Burhi
10	Gheodora	26	Gobra Hewar	42	Basahra Tarahar
11	Chak Arazi Garhwa	27	Barhaiya	43	Lalapur
12	Gara	28	Bhonri	44	Manduri
13	Benipur	29	Ghoghar	45	Partappur
14	Ledar	30	Bokuliha	46	Surwal
15	Biharia	31	Mabaiya Raksel		
16	Abhaipur	32	Mehaiya Pahalwan		

(All the villages situated in Pargana Bara, Tahsil Karchana, District Allahabad.)

In witness whereof Sri S.S.L. Kakkar for and on behalf of the Governor and the lessee have signed this deed on the day and year first above written."

(Emphasis added)

152. It is not disputed before us that the minerals mentioned in the said lease are all "major minerals". The primary mineral which is being quarried, extracted and transported is "silica sand" in respect thereto, even Court below has held that it is a "major mineral", as is evident from following finding recorded by Court below in the impugned judgment:

"That being so plaintiff's lease deeds dated 16.4.1947 and 27.4.1959 are for ***Silica sand which is a major mineral."***

(Emphasis added)

153. The term "minerals, mineral oils and minor minerals" are defined in Section 3(a),(b) and (e) of MMRD Act, 1957 and read as under :

"Definitions- In this Act, unless the context otherwise requires-

(a) "minerals" includes all minerals except mineral oils;

(b) "mineral oils" includes natural gas and petroleum;

(e) "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral."

154. Admittedly, we have no concern with "mineral oil" in the case in hand. All "minerals" other than "minor minerals" can be termed as "major minerals". Section 2 of MMRD Act, 1957 says that Union of India should take under its control regulation of mines and development of minerals to the extent hereinafter provided. The Court in **Sandur Manganese & Iron Ores Ltd. V. State of Karnataka & Ors., JT 2010 (10)SC 157** has held that by virtue of Section 2, State Legislature is denuded of its legislative power to make any law in respect of regulations of mines and mineral development to the extent provided in the Act i.e. MMRD Act, 1957.

155. It appears that when lease deed dated 27.04.1959 was executed, concerned authorities did not consider provisions of MMRD Act, 1957, probably for the reason that before enforcement of said Act, a Government Order was issued on 15.12.1956, directing field officials to execute lease in recognition of lease rights under Section 108 of U.P. Act, 1951 and in pursuance thereto instrument of lease was executed on 27.04.1959, ignoring the fact that during this period Parliamentary enactment, i.e., MMRD Act, 1957 has already come into picture and now entire

scenario has completely changed. After enforcement of MMRD Act, 1957, it was not open to State Government to execute a lease in respect to a major mineral and mining operations controlled and governed by provisions of MMRD Act, 1957, without following the provisions thereof. This exercise was wholly ultra vires and beyond the authority of State of U.P.

156. The only reason assigned by Court below to exclude operation of MMRD Act, 1957 is that by virtue of Section 108 of U.P.Act, 1951, subsisting lease of plaintiff became a statutory lease and, therefore, MMRD Act, 1957 is not applicable. However, the view we have already taken above holding that this reason assigned by Court below is not correct, results in collapse of the entire edifice to hold MMRD Act, 1957 inapplicable. The very basis of holding that MMRD Act, 1957 will apply only in such cases where leases are granted by government to another person being bad and erroneous falls to ground.

157. After vesting of 'Estate' in State of U.P. and in view of specific provisions, as discussed above, contained in U.P.Act, 1951, continuance of lease dated 16.4.1947 was, as if, granted by State of U.P. After enactment of MMRD Act, 1957, matters which came within the ambit of aforesaid Act, could have continued to operate only in accordance with provisions of MMRD Act, 1957 and not otherwise.

158. Section 9, as already discussed above, governs all kind of leases whether contractual or statutory as the case may be. It also apply to mining leases whether granted before commencement of MMRD Act, 1957 or after its enforcement. If a person is carrying on any mining operation and is holder of a mining lease, whether contractual or statutory, he is/was liable to pay royalty as per rates specified in Second Schedule of MMRD Act, 1957 in respect to such minerals. The liability is absolute and could not have been obstructed by plaintiff-respondent in any manner. Even transportation of mineral was not permissible without permission of authorities concerned and in terms of Rules, framed under MMRD Act, 1957. With regard to other terms and conditions of leases regarding area, tenure etc., we find various restrictions contained in Section 5, 6, 7 and 8 of MMRD Act, 1957 and the same were also applicable to plaintiff-respondent's mining operations. It could not have continued with such operations for indefinite period giving a complete go-bye to the provisions of MMRD Act, 1957. In any case, by virtue of Section 16 it was incumbent upon State to modify terms and conditions of lease, even if it was statutory, so as to bring it in consonance with the provisions of MMRD Act, 1957.

159. Moreover, in the present case, deemed statutory lease under Section 108 of U.P. Act, 1951 came to an end on execution of another lease on 27.04.1959, hence statutory lease after enforcement of MMRD Act, 1957 got subjected to that Act, particularly in respect of royalty under Section 9, and thereafter vanished when new agreement was executed by plaintiff with State of U.P. It is a different matter that this new agreement, being in the teeth of MMRD Act, 1957 and Rules framed thereafter was unenforceable, inexecutable and inoperative since inception.

160. Term of lease dated 27.04.1959 noticed above, would show that lease is in perpetuity and not for a fixed tenure. The amount of royalty mentioned therein does not concur to the

provisions of MMRD Act, 1957. It permits lessee to excavate and quarry Stone, Ballast, Kankar, Morrum and Sand. A lessee can work out mining operation throughout the year. He is also entitled to sublet the premises to any person but without consent of lessor it shall not assign. Further right is given to lessee for renewal with limited enhancement of royalty at the end of every 50 years. The MMRD Act, 1957 admittedly came into force on 1.6.1958 i.e. before execution of lease deed dated 27.4.1959. After enforcement of said Act to the extent it is applicable, denudation of power of State is total and not partial, as held in **P. Kannadasan V. State of Tamilnadu (1996) 5 SCC 70 =AIR 1996 SC 2560.**

161. All the items for which mining lease was granted vide lease deed dated 27.4.1959 did satisfy the definition of "minerals" under Section 3(a) and (e) of MMRD Act, 1957. "Minerals" means an organic substance found either on or in the earth which may be garnered and exploited for profits as observed in **V.P. Pithupitchal and Anr. Vs. Special Secretary to the Government of Tamilnadu, AIR 2003 SC 2455**. Neither under provisions of MMRD Act, 1957, mining lease in perpetuity could have been granted nor for more than the area, prescribed as maximum area under Section 6 could have been provided, nor there could have been any occasion to agree for payment of royalty, which is not consistent with Section 9 of MMRD Act, 1957.

162. Thus, in the light of discussion made above, it cannot be doubted that on and after enforcement of MMRD Act, 1957, neither plaintiff-respondent had any right to continue mining on the disputed land nor removal of minerals without payment of royalty. In fact, entire mining operation and removal of minerals on the part of plaintiff-respondent and other sub-lessees was patently illegal, without any authority of law and in flagrant violation of provisions of MMRD Act, 1957. The lease deed dated 27.04.1959 was completely illegal, nullity and void-ab-initio. **Question No. (vii)** is answered accordingly.

163. The above findings make it clear that demand of royalty by Collector for the period from 01.01.1952 till 31.05.1958, when MMRD Act, 1957 came into force, being an amount outside statutory lease was not justified and valid. To that extent, impugned demand dated 31.05.1968, by Collector, demanding royalty for the period prior to 01.06.1958, was not valid. However, on and after 01.06.1958 entire mining operation carried out by plaintiff-respondent or sub-lessees including removal of minerals from land in dispute is/was wholly illegal. We also hold that State Government vide letter dated 14.02.1966 rightly informed plaintiff-respondent that he had been quarrying silica sand etc. from disputed villages illegally and in violation of provisions of MMRD Act, 1957. The demand of royalty by Collector for the period 01.06.1958 and onwards is absolutely legal and plaintiff-respondent was/is liable to pay the same.

164. In the result, we set aside impugned judgment and decree dated 02.07.1979 passed by Civil Judge/Judge Small Causes Court at Allahabad in Original Suit No. 107 of 1969 except to the extent that plaintiff-respondent was not liable to pay royalty from 01.07.1952 to 31.05.1958 to Collector as demanded by him under the provisions of MMRD Act, 1957 and Rules framed thereunder vide order dated 31.5.1968, but in respect of all other aspects and all other reliefs sought by plaintiff-respondent including liability on and after 01.06.1958, plaintiff-respondent was/is not

entitled for any relief, whatsoever. The suit of plaintiff-respondent, therefore, is also liable to be dismissed in this regard.

165. However, since plaintiff-respondent has continued with mining operations initially under interim injunction granted by Court below and thereafter in the light of final judgment, it is our duty to put defendant-appellant in a position so that it may not stand permanently suffered for the act of the Court by issuing such direction as may restore State to its position in which it would have been. We find it appropriate to decide the appeal in following manner:

(i) Demand of Collector vide letter dated 31.05.1968 for payment of royalty from 01.07.1952 to 31.05.1958 is hereby declared illegal.

(ii) In respect to all other reliefs sought by plaintiff, impugned judgment and decree dated 02.07.1979 is hereby set aside and the suit hereby is dismissed to that extent.

(iii) The defendant-appellant shall henceforth proceed to recover entire amount of royalty payable by plaintiff-respondent on and after 01.06.1958 till the date of this decision along with interest, if provided in the statute, as per the rates prescribed therein, and if not provided in Statute at the rate of 9 per cent per annum forthwith and without any further delay.

(iv) Plaintiff-respondent shall not carry out mining operations henceforth and defendant-appellant shall forthwith take steps to restrict defendant-appellant and its sub-lessees from undergoing any mining operation in the aforesaid 46 villages in respect to the minerals stated in this judgment and shall proceed to grant lease in accordance with provisions of MMRD Act, 1947 and Rules framed thereunder and only thereafter shall allow mining operations.

166. Appeal is partly allowed in the manner aforesaid.

167. Defendant-Appellant shall be entitled to cost throughout to the extent it has succeeded in this appeal.

(2016) 9 ILRA 1150
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Reference No.- 5 Of 2009

Commissioner Income Tax Delhi V1 ...Applicant

Versus

S.R.M. Foundation Of India , New Delhi ...Opposite Party

Counsel for the Applicant:
R.K.Upadhyaya

Counsel for the Opposite Party:
C.S.C., Ashish Bansal, S.K. Garg

Civil law – Income Tax Act, 1961 – Section 10(22) – educational institution – meditation – educational activity – exemption – solely for educational purposes – not for purposes of profit – memorandum of association – objects of trust – systematic instruction – training – institution not required to be recognized by University – benefit of exemption allowed – reference answered in favour of assessee

Pursuant to this Court's order dated 29th August, 2006 passed in ITA No. 148 of 1999, Income Tax Appellate Tribunal, Delhi Bench 'B' New Delhi (hereinafter referred to as 'Tribunal'), under Section 256(2) of Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961') has referred following two questions of law for our opinion :-

"1. Whether training people in 'Meditation' is an educational activity within the meaning of Section 10(22) of I.T. Act, 1961 ?

2. Whether in view of the multifarious objects of the Trust,some of which are non educational including the ones mentioned in item no. 8 of the Memorandum of Association (reproduced in the last para of ITAT's order), the Assessee would be entitled to the exemption u/s 10(22) ?"(Para 3)

HELD:(Paras 17-22)

1.In case in hand, Tribunal has decided the dispute by delving into facts holding that institution should be recognized by University of Central or State Govt. is not a prerequisite under Section 10(22) of Act, 1961. This insistence by Assessing Authority was not justified. The term 'Institution' has not been defined in the Act, 1961.

2.Assessee foundation did not come into existence or it does not carry out any activity of imparting education for the purpose of profit, is clear from the object clause of Assessee's Memorandum of Association and in more specific terms, under item 8 of pages 6 & 7 of the said Memorandum of Association, which is in the following terms :

"(B) To undertake and promote any activities that enables the progress of the societies programme to be self sufficient through Agriculture Horticulture, Dairy Farming or conducting house hold, cottage, small and large scale industries etc. with the sole motive of bringing fulfillment to the goals of the society and without any profit motive".

3.The decision of Madras High Court in Additional Commissioner of Income Tax Vs. Aditanar Educational Institution, (1979) 118 ITR 235 which has been affirmed by Apex Court in Aditanar Educational Institution Vs. Additional Commissioner of Income Tax (supra) will enure for the Respondent -Assessee. The said decision holds that for getting the benefit under Section 10(22) following pre-requisites are followed or not are to be ascertained which are as follow :
"(i) The assessee foundation should be an educational institution;
It should be existing solely for educational purposes : and
It should not be existing for purposes of profit. "20. Considering the facts and our discussion on facts the said decision as followed by Tribunal will apply in all force to this case as the institution fulfills the criterion enumerated for getting benefit.

4.We answer the reference against the Revenue and in favour of Assessee . Income Tax Reference is disposed accordingly.

Case Law discussed:

1.Sole Trustee, Loka Shikshana Trust v. Commissioner of Income Tax, (1975) 101 ITR 234 (SC) — para 14

2.Saurashtra Education Foundation v. Commissioner of Income Tax, (2005) 273 ITR 139 (Guj) — para 16

3.Aditanar Educational Institution v. Additional Commissioner of Income Tax, (1997) 224 ITR 310 (SC) — paras 5, 19

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Pursuant to this Court's order dated 29th August, 2006 passed in ITA No. 148 of 1999, Income Tax Appellate Tribunal, Delhi Bench 'B' New Delhi (hereinafter referred to as 'Tribunal'), under Section 256(2) of Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961') has referred following two questions of law for our opinion :-

"1. Whether training people in 'Meditation' is an educational activity within the meaning of Section 10(22) of I.T. Act, 1961 ?

2. Whether in view of the multifarious objects of the Trust, some of which are non educational including the ones mentioned in item no. 8 of the Memorandum of Association (reproduced in the last para of ITAT's order), the Assessee would be entitled to the exemption u/s 10(22) ?"

2. Sri Ashish Bansal, learned counsel appearing on behalf of Revenue did not dispute that Assessee-S.R.M. Foundation of India is an educational institution and to that extent there is no dispute. He also could not dispute that under Section 10(22) of Act, 1961, as it then was, an income of Educational Institution, working solely for educational purpose and not for the purpose of profit, shall not be included in total income.

3. Thus Assessee being an Educational Institution, comes within purview of Section 10(22) which has been established solely for educational purposes and not for the purposes of yielding profit.

4. Learned counsel for Revenue however submitted that an institution by itself cannot be said to be an educational institution unless activities of Assessee foundation satisfies requirement of law laid down in **Sole Trustee, Loka Shikshana Trust Vs. Commissioner of Income Tax, Mysore, 1975 (101) ITR 234 (SC)** which has also been followed by Gujrat High Court in **Saurashtra Education Foundation Vs. Commissioner of Income Tax, (2005) 273 ITR 139 (Guj).**

5. On the contrary, Counsel for Assessee submitted, when systematic activities are carried out by teaching students, it is certainly an educational activity and in absence of any material to show that it was for the purpose of profit, Assessee is entitled to get benefit of Section 10(22). He relied on the findings of fact of Commissioner of Income Tax (Appeals) [(hereinafter referred to as "CIT(A))]"and Tribunal and has relied on the decision in **Aditanar Educational Institution Vs. Additional Commissioner of Income Tax, 1997 (224) ITR 310 (S.C)**. It is submitted that Tribunal has based its decision on the decision of Madras High Court **in Aditanar Educational Institution Vs. Additional Commissioner of Income Tax (supra)** which has now been affirmed by Apex Court in the aforesaid decision and, therefore, this reference also requires to be answered likewise.

6. Brief facts necessary to understand the dispute raised in this Reference are as under.

7. Assessee- Spiritual Regeneration Movement Foundation of India (hereinafter referred to as 'SRM Foundation') is a society registered under Societies Registration Act, 1860 (hereinafter referred to as 'Act, 1860') . It was founded in 1963, by Maharishi Mahesh Yogi. Memorandum of association of SRM Foundation (Society) contains following objects:

*"i) To spread the **system of Transcendental Deep Mediation as** pronounced by His Holiness Maharishi Mahesh Yogi,*

*iii) **To conduct research in the field of physical and mental health and social behaviour.***

*iv) **To improve the physical and mental health and social behaviour of the people.***

v) To advance the study of, and propagate , Indian Culture all over the world.

vi) Holding of lectures for the purpose of instructing the people all over the world.

vii) To conduct research into the physical and psychological effects of Transcendental Deep Meditation.

viii) ***To establish Academics of Meditation****.*

ix) To alleviate fears and tensions of the people and to promote peace of mind."

(emphasis added)

8. For Assessment Years 1974-75, 1975-76, 1976-77, 1978-79 and 1979-80, it claims exemption on its income under Section 10(22) claiming itself to be an educational institution. It also said that SRM Foundation is registered under Section 12A of Act, 1961 with Commissioner of Income tax, Lucknow (hereinafter referred to as "CIT"). A certificate under Section 80G was also issued in its favour.

9. Exemption claimed by Assessee under Section 10(22) however was negatived by Inspecting Assistant Commissioner (Assessment) [hereinafter referred to as "IAC(A)]" taking a view that Assessee was neither a 'University' nor 'Other Educational Institution' recognized by any University or any State or Central Government. It also held that activities of SRM Foundation did not satisfy requirements enunciated in **Sole Trust Lok Shikshan Trust Vs. Commissioner of Income Tax, Mysore (supra).** IAC(A) noticed that Assessee had charged fee for education and received donation, hence was not entitled for exemption under Act, 1961.

10. Assessee preferred appeal before CIT(A) who allowed the same vide order dated 2.11.1982 and reversed the view taken by Assessing Authority in respect to Assessee's claim for exemption under Section 10(22).

11. Revenue preferred appeal before Tribunal. Appeal preferred by Revenue was dismissed by Tribunal vide order dated 14.4.1987.

12. Revenue preferred a writ petition for a direction to Tribunal to make Reference to this Court. At the instance of Revenue, this Reference has been made requiring our opinion on above mentioned two questions of law.

13. On the facts of this case provisions of Section 10(22) as it then was applicable, read as under :

"10. ***In computing the total income of a previous year of any*** *person, any income falling within any of the following clauses* ***shall not be included*** *--*

*(22) any income of a **University or other educational institution** existing solely for educational purposes and not for purposes of profit."*

(emphasis added)

14. In **Sole Trust Lok Shikshan Trust Vs. Commissioner of Income Tax, Mysore (supra)** meaning of the word 'education' used in the definition of 'Charitable purpose' under Section 2(15) of Act, 1961 came to be considered. Object of Trust in that case, as contained in para 2 of trust deed, (quoted in the judgment) read as under :

"2. The object of the Trust shall be to educate the people of India in general and of Karnatak in particular by

(a) establishing, conducting and helping directly or indirectly institutions calculated to educate the people by spread of knowledge on all matters of general interest and welfare:

(b) founding and running reading rooms and libraries and keeping and conducting printing houses and publishing or aiding the publication of books, booklets, leaf lets, pamphlets, magazines etc., in Kannada and other languages, all these activities being started, conducted and carried on with the object of educating the people:

*(c) **supplying the Kannada speaking people with an organ or organs of educated public opinion** and conducting journals in Kannada and other language for the dissemination of useful news and information and for the ventilation of public opinion on matters of general public utility; and*

(d) helping directly or indirectly societies and institutions which have all or any of the aforesaid objects in view."

(emphasis added)

15. Court, as a matter of fact found that though a number of objects, including setting up of educational institutions, were mentioned in trust deed` as objects of trust, including supplying Kannada speaking people with an organ of educated public opinion, but sole trustee in communication sent to Income Tax Officer clearly admits that at the point of time, during period of assessment, Trustee was carrying out only last mentioned objects of Trust namely, supplying Kannada speaking people with an organ or organs of educated public opinion. In other word 'concentration' so far as activities of Trust was only on the object, pursuant to clause 6 of Trust deed, according to which original Trustee shall have power and authority to spend and utilise money and property of Trust for any purposes of Trust in such manner as may appear proper to him. It is this context, Court considered the meaning of word "education" used in Section 2(15) of Act, 1961 and said that sense in which the word, "education" has been used in aforesaid provision,

is systematic instruction, schooling or training given to young in preparation for work of life. It also connotes the whole course of scholastic instruction which a person has received. Word "education" was not used in Section 2(15) in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. Court further held as under :

"According to this wide and extended sense, travelling is education, because as a result of travelling you acquire fresh knowledge. Likewise, if you read newspapers and magazines, see pictures, visit art galleries, museums and zoos, you thereby add to your knowledge. Again, when your grow up and have dealings with other people, some of whom are not straight, you learn by experience and thus add to your knowledge of the ways of the world. If you are not careful, your wallet is liable to be stolen or you are liable to be cheated by some unscrupulous is liable to be stolen or you are liable to be cheated by some unscrupulous person. The thief who removes your wallet and the swindler who cheats you teach you a lesson and in the process make you wiser though poorer. If you visit a night club, you get acquainted wit and add to your knowledge about some to the not much revealed realities and mysteries of life. All this in a way is education in the great school of life. ***But, that is not the sense in which the word "education" is used in clause (15) of section 2****. What education connotes in that clause is the process of training and developing the knowledge, skill mind, and character of students by normal schooling."*

(emphasis added)

16. The decision of Gujrat High Court in **Saurashtra Education Foundation Vs. Commissioner of Income Tax(supra**) will not apply to the facts of this case as in the said decision it was held that "although the activities of the assessee was imparting education but the same was being given by other institutions running schools or colleges. The assessee itself did not run any composite or integrated course of organized and systematic training. The assessee was not affiliated to, or registered by any authority. The assessee did not have any control over the recipients of training being given by the assessee. The example of the Institute of Chartered Accountants of India given on behalf of the assessee was not apposite and the assessee was not at all comparable to the said Institute. Likewise, open universities possess all the three indicia of an educational institution "imparting formal training, accountability to an authority and control over students". The assessee could not compare itself with any open university either. Thus, the Tribunal was right in holding that the assessee was not an educational institution established solely for educational purposes and was, therefore, not entitled to exemption as contemplated under section 10(22). The opinion of the Court for the assessment year 1981-82 was rendered in the context of the activities which were then being carried on by the Assessee". This decision will not help the Revenue as the facts are quite different in the present case.

17. In case in hand, Tribunal has decided the dispute by delving into facts holding that institution should be recognized by University of Central or State Govt. is not a prerequisite under Section 10(22) of Act, 1961. This insistence by Assessing Authority was not justified. The term 'Institution' has not been defined in the Act, 1961.

18. Assessee foundation did not come into existence or it does not carry out any activity of imparting education for the purpose of profit, is clear from the object clause of Assessee's Memorandum of Association and in more specific terms, under item 8 of pages 6 & 7 of the said Memorandum of Association, which is in the following terms :

"(B) To undertake and promote any activities that enables the progress of the societies programme to be self sufficient through Agriculture Horticulture, Dairy Farming or conducting house hold, cottage, small and large scale industries etc. with the sole motive of bringing fulfillment to the goals of the society and without any profit motive".

19. The decision of Madras High Court in Additional **Commissioner of Income Tax Vs. Aditanar Educational Institution, (1979) 118 ITR 235** which has been affirmed by Apex Court in **Aditanar Educational Institution Vs. Additional Commissioner of Income Tax (supra)** will enure for the Respondent -Assessee. The said decision holds that for getting the benefit under Section 10(22) following pre-requisites are followed or not are to be ascertained which are as follow :

"(i) The assessee foundation should be an educational institution;

(ii) It should be existing solely for educational purposes : and

(iii) It should not be existing for purposes of profit. "

20. Considering the facts and our discussion on facts the said decision as followed by Tribunal will apply in all force to this case as the institution fulfills the criterion enumerated for getting benefit.

21. We answer the reference against the Revenue and in favour of Assessee .

22. Income Tax Reference is disposed accordingly.

(2016) 9 ILRA 1157
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

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

Misc. Bench No.- 9643 Of 2016
&
Misc. Bench No.- 15259 Of 2016

Pichhda Jan Kalyan Samiti,Baba. Bhimrao Ambedkar Univ. & Ors. ...Petitioners
Versus
Union Of India,Thru. The Secy., Ministry Of H.R.D. & Ors. ...Respondents

Counsel for the Petitioners:
Amit Bose, Abhishek Bose, Nilaya Gupta

Counsel for the Respondents:
A.S.G., J.P.Tripathi, Jai Prakash Tripathi, Rajat Rajan Singh, Rajesh Tiwari, Sameer Kalia

Constitutional law —Other Backward Classes – Scheduled Castes/Scheduled Tribes – 50% reservation – 27% reservation – Central Educational Institutions (Reservation in Admission) Act, 2006 – Article 15 (5) – provisos – Amendment Act, 2012 – Central University – First Academic Ordinances – implied repeal – subordinate legislation – overriding effect – extent of reservation – exclusion of OBC.-dismissed.

Competing claims of reservation, the Other Backward Classes who are the petitioners and the Scheduled Castes/Scheduled Tribes whose cause is represented by the respondent-Babasaheb Bhimrao Ambedkar University and defended by the intervenors of the same category, has brought forth at the forefront another issue of social dimension, namely the right to get admitted against a fixed reserve quota in an educational institution imparting higher education. (Para 1)

Writ Petition No.9643 (MB) of 2016 is by an association arrayed as petitioner No.1 professing to espouse the cause of students aspiring to seek admission in the respondent-university by way of reservation under the Other Backward Classes (OBC) category. The petitioner Nos.2 to 15 claim themselves to be of the Other Backward Classes and urge that 27% quota reserving seats for admission in the respondent-Babasaheb Bhimrao Ambedkar University be implemented and to that extent, provisions of Clause 9 of Chapter VII of the First Academic Ordinances of the University be declared as ultra vires the provisions of Section 3 of the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act No:5 of 2007), hereinafter referred to as the 2006 Act. It is also urged that the percentage of reservation as fixed in Section 3 of the 2006 Act be directed to be implemented for which an interpretation is sought from this Court to read the provisos added to Section 3 in the 2006 Act by the amendment inserted under the Central Educational Institutions (Reservation in Admission) Amendment Act, 2012, hereinafter referred to as the 2012 amending Act so as to give effect to 27% reservation in favour of OBC's. It is urged that denying reservation as already provided for under the main Section 3 of the 2006 Act which has neither been repealed nor rescinded, the same amounts to curtailing

the rights of the petitioners that was constitutionally enabled under Article 15 (5) of the Constitution of India. It is therefore urged that the said provisos added by the 2012 amending Act be read in a manner so as to give effect to the reservation of 27% to the Other Backward Category candidates that has been entirely denied by the respondent-University under the garb of the said provisos as well as the provisions of reservation made under the First Ordinances referred to here-in-above for Scheduled Castes and Scheduled Tribes. (Para 2)

Another Writ Petition No.15259 (MB) of 2016 has been filed raising the same issue but this writ petition is by an individual. (Para 3)

A preliminary objection had been raised on behalf of the Union of India as well as by the University that the writ petition filed by a Society would not be maintainable for which we had granted time to the learned counsel for the petitioners to file a response deserves disposal at outset. Affidavits have been filed to that effect. A reply to the said preliminary objection has been filed on record and the Memorandum of Association and the Byelaws have also been appended alongwith the same which indicate that Clause – 13 of the Memorandum of Association read with Clause – 2 thereof clearly defines the objects and reasons for the upliftment and advancement of the children and women of the Other Backward Classes. Thus, it cannot be said that the petitioner No.1-Society of Writ Petition No.9643 (MB) of 2016 is a stranger so as to raise this issue as involved in the present case, as it clearly is an issue relating to the opportunity for children of the Other Backward Classes to receive higher education in an university. The action taken by the University in not providing the benefits of reservations to the OBC's has been challenged which is directly in the interest of all students aspiring to seek admission by way of reservation. This cause therefore, in our opinion, is clearly connected with the educational achievements of children of the Backward Classes in an university which appears to have been established for under the objects as spelt out in the Memorandum of Association. Secondly, as the petitioners 2 to 15 are candidates of the Other Backward Classes they have the locus and also the grievance to maintain this petition. The other petition is in an individual capacity but in public interest for the cause of backward classes. The preliminary objection therefore raised has no substance and is overruled and the writ petitions so filed are held to be maintainable. (Para 4)

The issue primarily raised is, that if by invoking Article 15 (5) of the Constitution of India, the Parliament enacted a special law, namely, the Central Educational Institutions (Reservation in Admission) Act, 2006, then the same has to be given effect to, and any device either by way of a proviso or otherwise to deny the benefits granted under the 2006 Act would be an amendment in violation of Article 15 (5) of the Constitution of India and the consequential action would also be arbitrary being violative of Article 14 of the Constitution of India. It is contended by the petitioners that when the Parliament itself has consciously extended the benefit of 27% reservation to the Other Backward Classes under the 2006 Act, then fixing a percentage of 50% so as to exhaust reservation only in favour of Scheduled Castes/Scheduled Tribes would be discrimination between the oppressed backward classes and other weaker sections that is contrary to the theme and philosophy of Article 15 (5) of the Constitution of India which essentially aims at providing an opportunity of education to all socially and educationally backward classes apart from the Scheduled Castes and Scheduled Tribes. By introducing the provisos in Section 3 of the 2006 Act, the advancement of the other backward classes to their exclusion as envisaged under Article 15 (5) of the Constitution of India is being clearly impeded. The respondentUniversity under the garb of the amending Act 2012 cannot insist on denying the benefits of extending 27% reservation to the Other Backward Category classes as provided for in Section 3 of the 2006 Act(Para 5)

Held: (65-74)

1.In the instant case, if the 2006 Act was brought into force to cater to reservation to other classes apart from Scheduled Castes/Scheduled Tribes that is constitutionally protected under Article 15 (5) of the Constitution of India and therefore, the argument of the respondents cannot be countenanced. The 2006 Act, therefore,

rightly proceeded to engraft the quota of percentage as contained in Section 3 of the 2006 Act. On this score as well, the argument of the respondents that the 1994 Act is a Special Act with special provisions cannot be held to have any overriding affect over the 2006 Act.

2.A natural corollary to this conclusion drawn by us is also supported by the fact that had this been not the impediment, there was no necessity of amending Section 3 through the provisos that have been introduced and are subject matter of challenge before us. At this stage, we may now quote the provisos that came to be added by way of an amendment under Section that is the bone of contention between the parties. The said provisions as amended under the 2012 Act are extracted hereunder:-

"Provided that the State seats, if any, in a Central Educational Institution situated in the tribal areas referred to in the Sixth Schedule to the Constitution shall be governed, by such reservation policy for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, as may be specified, by notification in the Official Gazette, by the Government of the State where such institution is situated:

Provided further that if there are no State seats in a Central Educational Institution and the seats reserved for the Scheduled Castes exceed the percentage specified under clause (i) or the seats reserved for the Scheduled Tribes exceed the percentage specified under clause (ii) or the seats reserved for the Scheduled Castes and the Scheduled Tribes taken together exceed the sum of percentages specified under clauses (i) and (ii), but such seats are-

(a)less than fifty per cent of the annual permitted strength on the date immediately preceding the date of commencement of this Act, the total percentage of the seats required to be reserved for the Other Backward Classes under clause (iii) shall be restricted to the extent such sum of percentages specified under clauses (I) and (ii) falls short of fifty per cent of the annual permitted strength;

(b)more than fifty per cent of the annual permitted strength on the date immediately preceding the date of commencement of this Act, in that case no seat shall be reserved for the Other Backward Classes under clause (iii) but the extent of the reservation of seats for the Scheduled Castes and the Scheduled Tribes shall not be reduced in respect of Central Educational Institutions in the specified north-eastern region".

3.The aforesaid provisos particularly the second proviso with clause (b) clearly nail down any scope for admission by way of a reservation to the Other Backward Classes. The exclusion in the second proviso was therefore clearly designed to cater to the peculiar situation of the status of the University keeping in mind the object of catering to Scheduled Castes/Scheduled Tribes. Clause (a) to the second proviso does create a space for Other Backward Classes, but virtually restricts it by providing full play to the extent of 50% reservation in favour of Scheduled Castes and Scheduled Tribes. Thus, the Other Backward Classes can seek benefit of Section 3 only if there is a shortfall in the number of candidates seeking admission of the category of Scheduled Castes/Scheduled Tribes against 50% reservation.

4.The percentage of reservation to other categories as provided for in the main Section is therefore clearly disturbed as it gives full reservation to the Scheduled Castes and Scheduled Tribes to the extent of 50%. It is for this reason that this 50% reservation as existed in the First Academic Ordinances in Clause 9 was challenged and is pending consideration in Writ Petition No.3569 (MS) of 2009. The full play of 50% reservation to Scheduled Castes/Scheduled Tribes therefore does not harmonise with Section 3, which provides for reservation to Other Backward Classes as well. The question is, does it end in discrimination and arbitrariness. It is here that we have to mention that the petitioners have given up the challenge of the vires of the Sections as noted at the very outset. The issue of discrimination or arbitrariness has to be looked into from the point of view of the enabling power under Article 15 (5) of the Constitution of India and the purpose underlying the same. There is a distinction which has to be kept in mind, namely, reservation in employment that has a different connotation as against reservation for opportunity of admission in educational institutions. The former is designed to secure the social and economic backwardness in matters of employment whereas the latter is the real upliftment of an individual of the oppressed classes so as to make him capable to compete in all spheres of life which may also include future employment. Thus, to provide reservation in

admission to the oppressed classes even, beyond a permissible percentage in the background of social circumstances cannot be said to be excessive or to prohibit this benefit to others. The same has to be balanced, more so when it comes to providing reservation in admission to educational institutions to competing oppressed classes, like in the present case, the Backwards versus the Scheduled Castes. The decisions which have been cited at the Bar on behalf of the petitioners do indicate that the Courts can intervene when excessiveness is detected in protective discrimination laws. In the instant case, the ratio of 50% is the outer limit of reservation and therefore, the reservation is not in excess of permissible limits. However, this is a peculiar situation, where in an inter se contest between the reserved classes, the other backward category is being denied the benefit of reservation as provided for in the main Section by virtually elbowing it through the aid of the provisos under challenge.

5.As noted above, since the vires challenge has been given up, the interpretation as sought for by Sri Amit Bose, learned Counsel for the petitioners would not be possible without entertaining arguments on the issue of striking down the impugned provisos. The other side of the coin is that the background of this 50% reservation for Scheduled Castes/Scheduled Tribes is clearly for the cause of the advancement and promotion of education. This purpose and cause has to be read in favour of the Scheduled Castes/Scheduled Tribes, but at the same time what we find is that such a cause or a purpose should be based on an extensive exercise to be undertaken by the authority extending the benefit of reservation through objective surveys and not merely on the social philosophy of Article 15 (5) of the Constitution of India. An exercise has to be undertaken in order to find out as to whether such reservation can be objectively sustained and at the same time, the reservation to the other categories of the oppressed classes can be justifiably denied. The Parliamentary debates or the discussions that have been placed before the Court are clearly aimed at maintaining 50% reservation on the strength of the purpose, objects and reasons for which the University was established.

6.The Parliament may have taken a myopic view by narrowing down the discussion for a single institution, and the statement of the Hon'ble Minister during the debates that the respondent University was established only for Scheduled Castes and Scheduled Tribes may not be matching with the object and reasons of the University which declares it to be open for admission to all creeds and classes, but the wisdom of the Parliament is not open to adjudication before this Court. It has also to be kept in mind that the 2006 Act widens the scope of admission through reservation throughout the country in all central educational institutions. Thus viewed from the top of the hill, and not standing in the valley, the reserved category aspirants are assured of more seats throughout the country. While assessing the need for reservation, the balance therefore from the point of view of centrally aided institutions, Section 3 without the impugned proviso can be successfully implemented. If that is feasible, it is still open for the Parliament to discuss and reassess the same on an objective study upon a survey of ground realities. With reservation in admissions with the aid of Article 15 (5) of the Constitution, and with a wider opportunity of exposure under Section 3 of the 2006 Act, any possible argument of discrimination and different standards of reservation inter se between the different reserved categories can be avoided by adopting a balanced approach.

7.We therefore find it necessary that if the Parliament has made a law, then should not an exercise be taken for an objective assessment of the requirement of the Other Backward Classes. To extend favour entirely to the Scheduled Castes/ Scheduled Tribes and completely overlooking the claim of the Other Backward Classes therefore does require an objective assessment. The presumption of legislative wisdom cannot be doubted, but unless the vires of the Act on such grounds is assailed with facts and figures to substantiate the same, this Court by way of an interpretation cannot read down the provisos to reflect a different meaning. To extend such a benefit would amount to enforcing Section 3 as against the provisos that have been subsequently added by way of an amendment. To our mind, the same would be permissible only if provisos can be struck down as ultra vires and not otherwise. The Parliament has full authority and is also otherwise obligated to review any percentage of reservation on such objective study, but we cannot issue any direction as prayed for unless the provisions are questioned accordingly as observed here-in-above.

8.The Other Backward Classes may be near equals and the provisos may result in an unequal treatment but the rationality of such an argument can only be tested provided there is material to substantiate the same and is otherwise challenged as observed here-in-above.

9.Accordingly, for all the reasons aforesaid, we are unable to come to the aid of the petitioners without prejudice to the rights of any person to the issues raised in Writ Petition No.3569 (MS) of 2009, that is stated to be still pending consideration and further without prejudice to the rights of the Other Backward Classes to raise an appropriate challenge in the light of what has been observed here-in-above.

10.Both the writ petitions are therefore accordingly **dismissed** subject to the above observations.

Case Law discussed:

1.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170 — para 47
2.Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd., AIR 1963 SC 90 — para 47
3.Pradip Port Trust v. Workmen, (1977) 2 SCC 339 — para 47
4.U.P. State Electricity Board v. Hari Shankar Jain, (1978) 4 SCC 16 — para 47
5.Life Insurance Corporation of India v. D. J. Bahadur, (1981) 1 SCC 315 — para 47
6.Ashoka Marketing Ltd. v. Punjab National Bank, (1990) 4 SCC 406 — para 47
7.R. S. Raghunath v. State of Karnataka, (1992) 1 SCC 335 — para 47
8.Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra, (1993) 2 SCC 144 — para 47
9. S. Prakash v. K. M. Kurian, (1999) 5 SCC 624 — para 47
10.Talcher Municipality v. Talcher Regulated Market Committee, (2004) 6 SCC 178 — para 47
11.Bharat Petroleum Corporation Ltd. v. P. Kesavan, (2004) 9 SCC 772 — para 47
12.Ghaziabad Zila Sahkari Bank v. Addl. Labour Commissioner, (2007) 11 SCC 756 — para 47
13.Suresh Nanda v. Central Bureau of Investigation, (2008) 3 SCC 674 — para 47
14.P. Raghava Kurup v. V. Ananthakumari, (2007) 9 SCC 179 — para 47
15.Tata Motors Ltd. v. Pharmaceutical Products of India Ltd., (2008) 7 SCC 619 — para 47
16.Commercial Tax Officer v. Binani Cements Ltd., (2014) 8 SCC 319 — para 47
17.Maya Mathew v. State of Kerala, (2010) 4 SCC 498 — para 47
18.Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 — para 47
19.Mary Seward v. Owner of 'Vera Cruz', (1884) LR 10 AC 59 (HL) — para 47
20.Barker v. Edger, (1898) AC 748 — para 47
21.Ajit Singh (III) v. State of Punjab, (2000) 1 SCC 430 — para 50
22.Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209 — para 50
23.Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 — para 50
24.M.R. Balaji v. State of Mysore, 1963 Supp (1) SCR 439 — para 50
25.Namit Sharma v. Union of India, (2013) 1 SCC 745 — para 50
26.Jalan Trading Co. Pvt. Ltd. v. Mill Mazdoor Sabha, 1967 (1) SCR 15 — para 50
27.Raja Bala v. State of Haryana, (2016) 2 SCC 456 — para 50
28.Keshavji Ravji & Co. v. Commissioner of Income Tax, (1990) 2 SCC 231 — para 50
29.Prakash v. Phulavati, (2016) 2 SCC 36 — para 50
30.S. Sundaram Pillai v. V.R. Pattabhiraman, (1985) 1 SCC 591 — para 50
31.Gobind Sugar Mills Ltd. v. State of Bihar, (1999) 7 SCC 76 — para 50
32.U.P. State Electricity Board v. Hari Shankar Jain, (1978) 4 SCC 16 — para 50

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&

Hon'ble Dr. Vijay Laxmi, J.)

1. Competing claims of reservation, the Other Backward Classes who are the petitioners and the Scheduled Castes/Scheduled Tribes whose cause is represented by the respondent-Babasaheb Bhimrao Ambedkar University and defended by the intervenors of the same category, has brought forth at the forefront another issue of social dimension, namely the right to get admitted against a fixed reserve quota in an educational institution imparting higher education.

2. Writ Petition No.9643 (MB) of 2016 is by an association arrayed as petitioner No.1 professing to espouse the cause of students aspiring to seek admission in the respondent-university by way of reservation under the Other Backward Classes (OBC) category. The petitioner Nos.2 to 15 claim themselves to be of the Other Backward Classes and urge that 27% quota reserving seats for admission in the respondent-Babasaheb Bhimrao Ambedkar University be implemented and to that extent, provisions of Clause 9 of Chapter VII of the First Academic Ordinances of the University be declared as ultra vires the provisions of Section 3 of the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act No:5 of 2007), hereinafter referred to as the 2006 Act. It is also urged that the percentage of reservation as fixed in Section 3 of the 2006 Act be directed to be implemented for which an interpretation is sought from this Court to read the provisos added to Section 3 in the 2006 Act by the amendment inserted under the Central Educational Institutions (Reservation in Admission) Amendment Act, 2012, hereinafter referred to as the 2012 amending Act so as to give effect to 27% reservation in favour of OBC's. It is urged that denying reservation as already provided for under the main Section 3 of the 2006 Act which has neither been repealed nor rescinded, the same amounts to curtailing the rights of the petitioners that was constitutionally enabled under Article 15 (5) of the Constitution of India. It is therefore urged that the said provisos added by the 2012 amending Act be read in a manner so as to give effect to the reservation of 27% to the Other Backward Category candidates that has been entirely denied by the respondent-University under the garb of the said provisos as well as the provisions of reservation made under the First Ordinances referred to here-in-above for Scheduled Castes and Scheduled Tribes.

3. Another Writ Petition No.15259 (MB) of 2016 has been filed raising the same issue but this writ petition is by an individual.

4. A preliminary objection had been raised on behalf of the Union of India as well as by the University that the writ petition filed by a Society would not be maintainable for which we had granted time to the learned counsel for the petitioners to file a response deserves disposal at outset. Affidavits have been filed to that effect. A reply to the said preliminary objection has been filed on record and the Memorandum of Association and the Bye-laws have also been appended alongwith the same which indicate that Clause - 13 of the Memorandum of Association read with Clause - 2 thereof clearly defines the objects and reasons for the upliftment and advancement of the children and women of the Other Backward Classes. Thus, it cannot be said that the petitioner No.1-Society of Writ Petition No.9643 (MB) of 2016 is a stranger so as to raise this issue as involved in the present case, as it clearly is an issue relating to the opportunity for children of the Other Backward

Classes to receive higher education in an university. The action taken by the University in not providing the benefits of reservations to the OBC's has been challenged which is directly in the interest of all students aspiring to seek admission by way of reservation. This cause therefore, in our opinion, is clearly connected with the educational achievements of children of the Backward Classes in an university which appears to have been established for under the objects as spelt out in the Memorandum of Association. Secondly, as the petitioners 2 to 15 are candidates of the Other Backward Classes they have the locus and also the grievance to maintain this petition. The other petition is in an individual capacity but in public interest for the cause of backward classes. The preliminary objection therefore raised has no substance and is overruled and the writ petitions so filed are held to be maintainable.

5. The issue primarily raised is, that if by invoking Article 15 (5) of the Constitution of India, the Parliament enacted a special law, namely, the Central Educational Institutions (Reservation in Admission) Act, 2006, then the same has to be given effect to, and any device either by way of a proviso or otherwise to deny the benefits granted under the 2006 Act would be an amendment in violation of Article 15 (5) of the Constitution of India and the consequential action would also be arbitrary being violative of Article 14 of the Constitution of India. It is contended by the petitioners that when the Parliament itself has consciously extended the benefit of 27% reservation to the Other Backward Classes under the 2006 Act, then fixing a percentage of 50% so as to exhaust reservation only in favour of Scheduled Castes/Scheduled Tribes would be discrimination between the oppressed backward classes and other weaker sections that is contrary to the theme and philosophy of Article 15 (5) of the Constitution of India which essentially aims at providing an opportunity of education to all socially and educationally backward classes apart from the Scheduled Castes and Scheduled Tribes. By introducing the provisos in Section 3 of the 2006 Act, the advancement of the other backward classes to their exclusion as envisaged under Article 15 (5) of the Constitution of India is being clearly impeded. The respondent-University under the garb of the amending Act 2012 cannot insist on denying the benefits of extending 27% reservation to the Other Backward Category classes as provided for in Section 3 of the 2006 Act.

6. To begin with Sri Amit Bose, learned Counsel for the petitioners had advanced the aforesaid submissions and had also amended the petition with a prayer to declare the provisos introduced into Section 3 of the 2006 Act by the 2012 amending Act as being ultra vires and quashing the same, but during the course of arguments, he gave up the aforesaid relief that stands recorded in our order dated 11.7.2016 which is extracted hereunder:-

"Heard Sri Amit Bose learned counsel for the petitioners. The writ petition had been amended questioning the second proviso to Section 3 of the Central Education Institution Reservation in Appointment Act, 2006 as inserted by the Amendment Act of 2012 and had sought its declaration as ultra vires to the provisions of the 2006 Act as well as Article 15(5) of the Constitution of India.

Sri Bose submits that the petitioners do not press the aforesaid relief nor are they questioning the vires of the second proviso to section 3 of the Amendment Act of 2012. He submits

that the issue which is being raised is based entirely on the existing provisions and treating the 2012 Act to be intra vires.

The Union of India has filed a counter affidavit in a connected Writ Petition No. 14259(MB) of 2016 to which a reply has been filed today.

Put up tomorrow."

7. He accordingly advanced his submissions to urge that even if the second proviso has come into existence still the provisions of Section 3, as it originally stood, can be given effect to by interpreting the same to continue to extend the benefit of reservation to the Other Backward Category classes for admission in the respondent-University.

8. Before the dispute arose, the respondent-University had come to be established through a Central Act, namely, Babasaheb Bhimrao Ambedkar University Act, 1994 being Act No.53 of 1994, hereinafter referred to as the 1994 Act. Section 4 of the Act indicates the objects & the purpose for which the University was established. The same is extracted hereunder:-

"The objects of the University shall be to promote advanced knowledge by providing instructional and research facilities in such branches of learning as it may deem fit; to make provisions for integrated courses in Science and key frontier areas of Technology and other allied disciplines in the educational programmes of the University; to offer appropriate courses relevant for the development of socially and economically depressed sections of the people, including agricultural technology and rural crafts; to promote the study of the principles for which Babasaheb Bhimrao Ambedkar worked during his life time, namely, national integration, social justice and democratic way of life, and also study of the Constitutions of the world to take appropriate measures for promoting innovations in teaching learning processes in inter-disciplinary studies and research and pay ***special attention to the promotion of educational and economic interests and welfare of the people in general and members belonging to the Scheduled Castes and the Scheduled Tribes*** *in particular by providing adequate percentage of seats for the Scheduled Castes and the Scheduled Tribes and the University shall, in organising its activities, have due regard to the objects specified in the First Schedule."*

9. The University was conferred with powers under Section 5 of the Act with a specific power to fix quota for students belonging to the Scheduled Castes/Scheduled Tribes for admission to the courses run by the University. Section 5 (xxi) is extracted hereunder:-

"(xxi) to fix quota for students belonging to the Schedule Castes and the Schedule Tribes for admission purposes;"

10. The University was however open for all persons irrespective of any prohibitions subject to the powers of the University to make special provisions for the promotion of educational interests of women, physically handicapped or of persons belonging to the weaker sections of the

society and in particular of the Scheduled Castes and the Scheduled Tribes. Section 7 of the Act is extracted hereunder:-

"7. The University shall be open to all persons of either sex and of whatever caste, creed, race, class, place of domicile and it shall not be lawful for the University to adopt or impose on any person, any test whatsoever of religious belief or profession in order to entitle him to be appointed as a teacher of the University or to hold any other office therein or be admitted as a student in the University or to graduate thereat or to enjoy or exercise any privilege thereof.

Provided ***that nothing in this section shall be deemed to prevent the University from making special provisions for the employment or promotion of educational interests of women, physically handicapped or of persons belonging to the weaker sections of the society and, in the particular, of the Scheduled Castes and the Scheduled Tribes."***

11. Section 27 of the Act makes a provision for the powers to frame Ordinances. Sub-Section (2) of Section 27 entails that the First Ordinances shall be made by the Vice-Chancellor with the previous approval of the Central Government and such Ordinances can be amended, repealed or added by the Board of Management in the manner prescribed by the Statutes. Section 27 (1) (a) provides for making of Ordinances for admission of students and their enrolment as such. Section 27 (1) (a) and Sub-Section (2) of Section 27 are extracted hereunder:-

"27. (1) Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely:-

(a) the admission of students to the University and their enrolment as such;"

"(2) The first Ordinances shall be made by the Vice-Chancellor with the previous approval of the Central Government and the Ordinances so made may be amended, repealed or added to at any time by the Board of Management in the manner prescribed by the Statutes."

12. The First Ordinances of the University are provided for in the Second Schedule of the Act. The framing of Ordinances after the establishment of the University are provided for in Statute - 40 to the Second Schedule.

13. It is to be noted that the First Academic Ordinances of the respondent-University that had been framed in October, 1996 and had been despatched to the Human Resources Development Ministry, Government of India, New Delhi on 16.10.1996 was approved by the Ministry on 28.1.1997. However, the same was published for the first time in the Gazette on 23.12.2004. A copy of the said Gazette is Annexure - 1 to the writ petition. In Chapter - VII of the said Ordinance, a provision was made in Clause 9 as follows:-

"9. For the purpose of admission to all courses of study in the University, ***50% of the seats shall be reserved for SC/ST students****."*

14. Thus, the University in exercise of it's powers of framing Ordinances for admission and providing reservation allocated 50% reservation of the seats in all courses of the University in favour of SC/ST students.

15. This was obviously done in the light of the objects of the 1994 Act which was reiterated by incorporating the same in the First Schedule of the Statutes which is as follows:-

"THE FIRST SCHEDULE
(See section 4)
THE OBJECTS OF THE UNIVERSITY

The University shall endeavour to promote advanced Knowledge by providing instructional and research facilities in Science and key and frontier areas of Technology and other allied disciplines and to offer appropriate courses relevant for the development of socially and economically depressed section of the people, including agricultural technology and rural crafts; to promote the study of the principles for which Babasaheb Bhimrao Ambedkar worked during his lifetime, namely, national integration, social justice and democratic way of life, and also study of the constitutions of the world. It would take appropriate measures for promoting innovation in teaching-learning processes in inter-disciplinary studies and research and pay ***special attention to the promotion*** *of educational and economic interests and welfare of the people in general and* ***of members belonging to Scheduled Castes and Scheduled Tribes in particular by providing adequate percentage of seats for Scheduled Castes and Scheduled Tribes.*** *The University shall, in organising its activities, have due regard to the objects specified in the First Schedule."*

16. The aforesaid provisions were made in the Act, Statutes and Ordinances of the respondent-University in the light of Article 29 (2) of the Constitution of India read with Article 15 (4) of the Constitution of India. Article 29 (2) of the Constitution of India is extracted hereunder:-

"(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving out of State funds on grounds only of religion, race, caste, language or any of them."

17. Article 15 (4) of the Constitution of India is extracted hereunder:-

"(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the ***advancement of any socially and educationally backward classes*** *of citizens* ***or for the Scheduled Castes*** *and the* ***Scheduled Tribes****."*

18. Then came the enabling provision through the Constitution (Ninety-third Amendment) Act, 2005 enforced w.e.f. 21.1.2006 and Sub-Article (5) was added in Article 15 which is extracted hereunder:-

"(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the ***advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes*** *in so far as such special provisions* ***relate to their admission*** *to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."*

19. Thus, came into being a special constitutional enabling provision under Part III of the Constitution for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes/Scheduled Tribes for framing any special law relating to admission to educational institutions other than minority institutions referred to under Article 30 (1). With this enabling constitutional authority conferred on the State, the Parliament enacted Act No.5 of 2007 being the Central Educational Institutions (Reservation in Admission) Act, 2006.

20. The Bill which was introduced that narrated the statement of objects and reasons of the said Act which is extracted hereunder:-

"THE CENTRAL EDUCATIONAL INSTITUTIONS (RESERVATION IN ADMISSION) ACT, 2006

Part IV of the Constitution containing the Directive Principles of State Policy, in Article 46, lays down that the State shall promote with special care the educational and economic interests of the **weaker sections of the people,** and**, in particular, of the Scheduled Castes and the Scheduled Tribes**, and shall protect them from social injustice. Access to education is of utmost importance in insuring advancement of persons belonging to the Scheduled Castes, the Scheduled Tribes, and the **socially and educationally backward classes of citizens,** who are also referred to as the Other Backward Classes (OBCs).

2. The Constitution (93rd Amendment) Act, 2005, inserted clause (5) in Article 15 of the Constitution, with a view to promote the educational advancement of the socially and educationally backward classes of citizens, the Scheduled Castes and the Scheduled Tribes through special provisions relating to admission of students belonging to these categories in all educational institutions, including private educational institutions, whether aided or unaided by the State. In terms of this provision, Parliament as well as the State Legislatures are empowered to make appropriate laws for the educational advancement of the weaker sections of the people.

3. With a view to give effect to the Constitutional provisions, it is expedient and necessary to make statutory provisions in the proposed Bill for reservation in matters of admissions for the students belonging to the **Scheduled Castes** (SCs), the Scheduled Tribes (STs) and the **socially and educationally backward classes of citizens (OBCs)** in the Central Educational Institutions, including institutions deemed to be Universities established, maintained or aided by the Central Government. The provisions of the proposed Bill, inter alia, will not apply to the minority educational institutions referred to in clause (1) to Article 30.

4. The Bill seeks to achieve the above objective.

21. ACT 5 of 2007

The Central Educational Institutions (Reservation in Admission) Bill was passed by the Lok Sabha on 14th December, 2006 and by the Rajya Sabha on 18th December, 2006 and received the assent of the President on 3rd January, 2007. It came on the Statute Book as THE CENTRAL EDUCATIONAL INSTITUTIONS (RESERVATION IN ADMISSION) ACT, 2006 (5 OF 2007)."

22. A copy of the Act has been filed as Annexure - 5 to the writ petition. Section 2 (d) of the said Act made the provisions of the Act applicable to all Central Educational Institutions defined therein. The same is extracted hereunder:-

"(d) "Central Educational Institution" means --

(i) a university established or incorporated by or under a Central Act;

(ii) an institution of national importance set up by an Act of Parliament:

(iii) an institution, declared as a deemed university under section 3 of the University Grants Commission Act, 1956, and maintained by or receiving aid from the Central Government;

(iv) an institution maintained by or receiving aid from the Central Government, whether directly or indirectly, and affiliated to an institution referred to in clause (i) or clause (ii), or a constituent unit of an institution referred to in clause (iii);

(v) an educational institution set up by the Central Government under the Societies Registration Act, 1860;"

23. Section 2 (g) defines Other Backward Classes which is extracted hereunder:-

"(g) "Other Backward Classes" means the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government."

24. Section 3, as it then stood in 2006 and which still continues to be on the Statute, is extracted hereunder:-

"3. The reservation of seats in admission and its extent in a Central Educational institution shall be provided in the following manner, namely:-

(i) out of the annual permitted strength in each branch of study or facility, fifteen percent seats shall be reserved for the Scheduled Castes;

(ii) out of the annual permitted strength in each branch of study or facility, seven and one-half percent seats shall be reserved for the Scheduled Tribes;

(iii) out of the annual permitted strength in each branch of study or faculty ***twenty-seven percent seats shall be reserved for the Other Backward Classes****."*

25. Section 4 of the Act provides that Section 3 shall not apply to certain classes of institutions which is extracted hereunder:-

"4. The provisions of Section 3 of this Act shall not apply to --

(a) a Central Educational Institution established in the tribal area referred to in the Sixth Schedule to the Constitution;

(b) the institutions of excellence, research institutions, institutions of national and strategic importance specified in the Schedule to this Act;

Provided that the Central Government may, as and when considered necessary, by notification in the Official Gazette, amend the Schedule;

(c) a Minority Educational Institution as defined in this Act;

(d) a course or programme of at high levels of specifications, including as the post-doctoral level, within any branch of study or faculty, which the Central Government may, in consultation with the appropriate authority, specify."

26. Section 5 of the Act empowers every Central Educational Institution with prior approval of the appropriate authority to increase the number of seats in a branch of study or faculty over and above it's annual permitted strength so that the number of seats, excluding those which are reserved not less than the number of such seats available for the academic sessions immediately preceding the commencement of the Act. The Central Government in consultation with the appropriate authority is empowered to grant such permission including extending reservation for Other Backward Classes as well.

27. The Central Educational Institutions, by virtue of Section 6 of the 2006 Act, are under an obligation to take all necessary steps to give effect to the provisions of Sections 3, 4 and 5 of the Act for the purpose of reservation. The Schedule appended to the said Act also names the institutions of excellence that are excluded from the applicability of reservation under Section 4. The respondent-University is not excluded from the operation of the Act and also falls within the definition of a Central Educational Institution as defined therein.

28. The University issued an advertisement for admission that was challenged in Writ Petition No. 3569 (MS) of 2009 contending that since there is no mention of giving reservation benefit to the Other Backward Category of candidates to the extent of 27%, the provisions of Section 3 of the 2006 Act should be enforced upon which the Court passed an interim order on 8.7.2009 directing the University to proceed with the admissions but to reserve six seats for the six individual petitioners therein that were directed not to be filled up except with the leave of the Court.

29. Then came the challenge raised to the Constitution 93rd Amendment Act, 2005 and the 2006 Act (Act No.5 of 2007) before the Supreme Court in ***Ashoka Kumar Thakur v. Union of India and others [2008 (6) SCC Page 1].*** The order of the Court in the aforesaid Constitution Bench decision is summarized in paragraphs 688 to 672 which is extracted hereunder:-

"668. ***The Constitution (Ninety-third Amendment) Act, 2005 is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions****. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned.*

669. ***Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2 (g) of Act 5 of 2007 being clarified as follows****: If the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the " creamy layer" among such caste.*

670. ***Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal****.*

671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the ***review should be made as to the need for continuance of reservation at the end of 5 years****.*

672. The writ petitions are disposed of in the light of majority judgment. However, in Contempt Petition No.112 of 2007 in WP (C) No.265 of 2006, no orders are required."

30. The constitutional validity of the 93rd Amendment and 2006 Act (Act No.5 of 2007) having been upheld in the aforesaid decision of the Supreme Court by a constitution bench therefore paved the way for reservation to be provided to the socially and educationally Backward Classes to seek admission by way of reservation.

31. The respondent-University does not appear to have made any provision for the Other Backward Category candidates and it continued with 50% reservation in favour of Scheduled Caste/Scheduled Tribe students. The petitioners have categorically asserted that the respondent-University never implemented the reservation as per Section 3 of the 2006 Act to which no denial has been made by the University. The implementation of the 2006 Act was however being reviewed particularly in the North-Eastern States where the reservation was required more for the Scheduled Tribes as Other Backward Category candidates were not available against State seats.

32. The respondent-University also appears to be resisting such reservation in favour of Other Backward Category candidates on account of it's existing reservation of 50% for SC's and ST's. A Bill was mooted in Parliament in the year 2010 captioned as Central Educational Institutions (Reservation in Admission) Amendment Bill, 2010 proposing to introduce certain changes in the definition clause particularly with regard to the North-Eastern Region but mainly the insertion of two provisos in Section 3 of the Principal Act. The aforesaid Bill was introduced by the then Minister of Human Resource Development Sri Kapil Sibal that has been placed before the Court by Sri S. K. Kalia, learned Senior Counsel who has appeared on behalf of the intervenors, namely, the Scheduled Caste/Scheduled Tribe students whose reservation of 50% is protected for admission in the respondent-University. The compilation provided by Sri Kalia includes the deliberations of the Standing Committee of the Parliament after the introduction of the said Bill that has been described as the 234th report. The preface of the said Report introduced by the Chairman of the Standing Committee is extracted hereunder:-

"PREFACE

I, the Chairman of the Department-related Parliamentary Standing Committee on Human Resource Development, having been authorized by the Committee, present this Two Hundred and Thirty Fourth Report of the Committee on the Central Educational Institutions (Reservation in Admission) Amendment Bill, 2010*.

2. The Central Educational Institutions (Reservation in Admission) Amendment Bill, 2010 was introduced in the Rajya Sabha on 6 August, 2010. In pursuance of Rule 270 relating to Department-related Parliamentary Standing Committee, the Chairman, Rajya Sabha referred** the Bill to the Committee on 10 August, 2010 for examination and report.

3. The Committee considered the Bill in two sittings held on 10 December, 2010 and 14th February, 2011.

4. On 10 December, 2010, the Committee heard the Secretary, Department of Higher Education on various provisions of the Bill.

5. The Committee, while drafting the Report, relied on the following:-

(i) Background Note on the Bill and Note on the clauses of the Bill received from the Department of Higher Education.

(ii) Presentation made and clarifications given by the Secretary, Department of Higher Education; and

(iii) Feedback received from the Department on the questionnaire and the issues raised by the Members during the course of the oral evidence of the Secretary.

6. The Committee considered the Draft Report on the Bill and adopted the same in its meeting held on 14th February, 2011.

7. For facility of reference, observations and recommendations of the Committee have been printed in bold letters at the end of the Report.

NEW DELHI; Oscar Fernandes
FEBRUARY 14, 2011 Chairman,
MAGHA 11, 1932 (Saka) Department-related
Parliamentary Standing Committee on Human
Resource Department

(ii)

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* Published in Gazettee of India Extraordinary Part II Section 2 dated the 6th August, 2010.

** Rajya Sabha Parliamentary Bulletin Part II No. 47556 dated the 10th August, 2010"

33. What is more important to be noted is the statement of the objects and reasons that were appended to the said amendment Bill. The same is extracted in clause 1.3 of the said report which is reproduced hereunder:-

"1.3 Statement of Objects and Reasons appended to the Bill states as follows:

"Some of the Central Educational Institutions, particularly those situated in the North-Eastern States including Sikkim (but excluding the non-tribal areas of Assam) inhabited significantly, and in some cases predominantly by tribal population and ***Babasaheb Bhimrao Ambedkar University, Lucknow, which have been reserving fifty percent seats for the Scheduled Castes and Scheduled Tribes, in keeping with the objects specified in the Act establishing that University, have been showing their inability to reduce the extent of reservation of seats for the Scheduled Castes and the Scheduled Tribes prevailing therein, in order to give way for reservation of twenty-seven per cent of seats for the Other Backward Classes as stipulated under the Act.*** *Further, the existing provisions of the Act exempt the Central Educational Institutions*

situated in the tribal areas referred to in the Sixth Schedule to the Constitution from reservation for the Scheduled Castes and the Scheduled Tribes, if any. But this was not intended while enacting the aforesaid Act, except in case of Minority Educational Institutions which are exempt in terms of clause (5) of Article 15 of the Constitution. Moreover, some of the Central Educational Institutions have been finding it difficult to adhere to the time-limit of three years for creation of the requisite physical and academic infrastructure owing to various reasons beyond their control.

***In order to remove the aforesaid practical difficulties** being faced by the various Central Educational Institutions in giving effect to the provisions of the Central Educational Institutions (Reservation in Admission) Act, 2006, **it has become necessary to amend certain provisions of the Act**. It is also proposed to clarify that implementation of the Act has, in fact taken effect from the calendar year 2008 and not from the year 2007 as specified in section 6 of the Act."*

The Committee in it's report then went on put on record the practical difficulties summarized by the Department of Higher Education in clause 1.4 wherein a particular reference was made to the respondent-Babasaheb Bhimrao Ambedkar University as follows:-

"1.4 The Department of Higher Education in their Background Note on the Bill summarized the practical difficulties experienced by some of the CEIs in giving effect to the provisions of the Central Educational Institutions (Reservation in Admission) Act, 2006 as under:-

*(i) **Babasaheb Bhimrao Ambedkar University (BBAU), Lucknow established as an institution intended to pay special attention to the promotion of educational and economic interests and welfare of the members belonging to the SCs and STs, has been providing 50 per cent reservations for the SCs/STs. Provision for reservation of 27 percent seats for the OBCs over and above the existing 50 per cent limit for SCs and STs the total reserved seats would exceed the 50 per cent limit stipulated by the Supreme Court in the Indra Sawhney case**."*

34. The same was elaborated in clauses 1.5 and 1.6 that are extracted hereunder:-

*"1.5 The Secretary, Department of Higher Education, during her presentation before the Committee, dwelt upon the practical difficulties being experienced by different Central Educational Institutions during the last three years in giving effect to the provisions of the Act, especially with regard to 50 per cent ceiling and existing demographic patterns in the North-East States. **It was stated that Babasaheb Himrao Ambedkar University, Lucknow already has 50 per cent reservation for the Scheduled Castes and Scheduled Tribes** and institutions in the North-East States viz. Arunachal Pradesh, Meghalaya, Mizoram and Nagaland predominantly inhabited by the tribal population, were already providing higher percentage of reservation for Scheduled Tribes, **the provision for 27 per cent OBC reservation would be breaching the ceiling of 50 per cent reservation as laid down under the Supreme Court directive providing for 27 per cent OBC reservation by lowering the existing reservation in the University would prove to be detrimental to its character** as visualized in its Statute. Another significant anomaly noticed was in respect of Sixth Schedule States where 50 per cent ceiling of reservation had already been reached and OBC*

reservation would lead to complications. North-East States having a predominantly Scheduled Tribe population needed separate dispensation for the OBC reservation. The Committee was also given to understand that time-limit of three years for the implementation of the Act had proved to be insufficient inspite of Oversight Committees working in coordination with UGC and AICTE. Attention of the Committee was also drawn to special problem areas experienced in respect of Central Educational Institutions in Delhi due to permission required from different agencies for building up the required infrastructure.

1.6 On a specific query with regard to general experience in the implementation of the Act so far, it was informed that before the Central Educational Institutions (Reservation in Admission) Act, 2006 came into force, reservation in admission in Central Educational Institutions was confined to Scheduled Castes and Scheduled Tribes only through executive orders and provision of the respective Statements or Rules governing the institution. Following the amendment to Article 15 of the Constitution (93rd amendment Act), provision was made for the first time, through the CEI Act, 2006, for reservation in favour of OBC's as well as the SCs and STs. After the Act came into operation, reservation for SC/ST/OBC students in admission in Central Educational Institutions has been accomplished to a great extent and the candidates from the aforesaid categories were able to get admitted in these institutions in much larger number, nor only due to the percentage of seats reserved but also due to increase in the absolute number of seats."

35. The said Committee in relation to the introduction of the provisos in the Bill which have now taken shape of the 2012 Act noted the following in clauses 3.4 and 3.4 that are extracted hereunder:-

"3.4 The Committee takes note of the following clarifications given by the Department for bringing the proposed amendment in Section 3:-

(i) State Seats, if any, in a Central Educational Institution (CEI) situated in the tribal areas referred to in the Sixth Schedule to the Constitution shall be governed by the reservation policy of the concerned State Government in the matter of admission of SCs, STs and OBCs to that CEI.

(ii) In a CEI with no State seats, if the seats reserved for the SCs exceed 15 per cent or the seats reserved for the STs exceed 7.5 per cent or the seats reserved for the SCs and the STs taken together in a CEI exceed 22.5 per cent but fall short of 50 per cent of the annual permitted strength, the percentage of seats reserved for the OBCs shall be restricted to such shortfall.

(iii) In a CEI with no State Seats, if the seats reserved for SCs or the STs or both taken together in a CEI exceed 50 per cent of the annual permitted strength, that CEI shall be exempt from making any reservation for the OBCs. Further, if such a CEI is situated in the north-eastern States, including Sikkim but excluding the non-tribal areas of Assam, the percentage of seats reserved for the SCs or the STs shall not be reduced from the level obtaining on the date immediately preceding the date of the commencement of the Act; while in case of a CEI situated in

other areas the percentage of seats reserved for the SCs and STs in that CEI shall stand reduced to 50 per cent.

3.5 ***While the Committee is convinced with the proposed amendment in Section 3, it would like to point out that there are conceptual difficulties in determining the OBC reservation in the States. While the SC/ST reservation may be definite, it is the OBC reservation which may differ from State to State. The Committee is also aware of the fact that reconciliation has to be made between 50 per cent cap on reservation and 27 per cent OBC quota. The Committee is of the view that OBC percentage is to be decided by taking SC and ST reservation as a compulsory component. Since the extent of reservation is 50 per cent whatever remaining after fulfilling the SC/ST reservation may go to OBCs.*** *"*

36. During consultations in relation to Section 3, the following observations were made by the Committee that are extracted hereunder:-

"Clause 3: Section 3: Reservation of seats in Central Educational Institutions

With the Committee is convinced with the proposed amendment in Section 3, it would like to point out that there are conceptual difficulties in determining the OBC reservation in the States. While the SC/ST reservation may be definite, it is the OBC reservation which may differ from State to State. The Committee is also aware of the fact that reconciliation has to be made between 50 per cent cap on reservation and 27 per cent OBC quota. The Committee is of the view that OBC percentage is to be decided by taking SC and ST reservation as a compulsory component. Since the extent of reservation is 50 per cent whatever remaining after fulfilling the SC/ST reservation may go to OBCs.

(Para 3.5)

Regarding adhering to the limit of 50 per cent reservation, the Committee would like to point out the case of Tamil Nadu, where 69 per cent reservation to backward classes has been allowed by the apex court. The apex court has permitted the State to increase the 50 per cent limit in case the qualification of data about OBC in the State as determined by the State Backward Class Commission justified such increase. In the light of the above Committee feels that the Department may take a view in the context of those States where data is available.

(Para 3.6)"

37. When the Bill was tabled in the Lok Sabha, the debates therein, copies whereof have also been provided to us, indicate that the then Minister of Human Resource Development, Government of India, Sri Kapil Sibal stated as follows:-

"Then, with reference to ***Dr. Baba Saheb Bhimrao Ambedkar University*** *in Uttar Pradesh, it was established, as you know****, much prior to the coming into force of this Act and there the reservation for the Scheduled Castes and Scheduled Tribes itself is 50 per cent. So, then***

it was not possible for us to give any reservation to the OBCs there. *So, because of historical reasons, those anomalies had to be corrected. So, the essence of his amendment is* ***to correct those anomalies to preserve the reservation in States where reservations have been given much beyond the stipulated percentage*** *in terms of the Constitution for institutions that have been set up prior to the coming into force of this Act, where reservations are granted to a particular category that reservation must be preserved.* ***This, of course, applies to very few institutions. In rest of the institutions, all the policies required under the Act has been implemented."***

38. During the said debate, the Minister again reiterated the following words:-

"If we have had a University, which is giving 50 percent reservation of seats to the Scheduled Castes and Scheduled Tribes, Dr. Babasaheb Ambedkar University, ***let that be protected***. *Let not those, who are vested with certain rights through statute or otherwise be deprived of those rights. That is the heart of this legislation. So, it is consistent with the original intent of the original Act of 2006."*

39. When the Bill reached the Rajya Sabha, the Hon'ble Minister made a special reference to the respondent-University as follows:-

"Then with reference to the Ambedkar University, which is a particular ***university only for Scheduled Castes and Scheduled Tribes*** *in Uttar Pradesh, the statute provided a reservation of 50 per cent only for Scheduled Castes and Scheduled Tribes. So, there was no occasion for OBC reservation there. So, we had to propose an amendment that is reservation of Scheduled Castes and Scheduled Tribes in Ambedkar University must maintained.*

... ...

Therefore, we needed to bring an amendment to ensure that whatever reservations were applicable to those State institutions, which later became Central Institutions, whatever reservations were available immediately before they became Central Institutions, would still be intact and those would not be disturbed. That is mother amendment which is for the consideration of the hon. Members of this House.

... ...

Then with reference to the ***Ambedkar University, which is a particular university only for Scheduled Castes and Scheduled Tribes in Uttar Pradesh,*** *the statute provided a reservation of 50 per cent only for Scheduled Castes and Scheduled Tribes. So, there was no occasion for OBC reservation there. So, we had to propose an amendment that is reservation of Scheduled Castes and Scheduled Tribes in Ambedkar University must be maintained."*

40. Thus, before the Rajya Sabha, the stand appears to have been taken as if the respondent-Babasaheb Bhimrao Ambedkar University was only for the Scheduled Caste/Scheduled Tribe

candidates as is evident from the statement made by the Minister concerned. It is thus clear that the 2012 amending Act was brought about to give protection to the universities in the North-Eastern States and in particular to the Babasaheb Bhimrao Ambedkar University, Lucknow which was probably the only university the fact whereof was being discussed separately before both the Houses of Parliament and was also a subject matter of assessment by the Standing Committee of the Parliament.

41. We have heard Sri Amit Bose at length on behalf of the petitioners in both the writ petitions and Sri Raghvendra Kumar Singh, learned Senior Counsel assisted by Sri Rajesh Tiwari for the respondent-University. Sri Ashok Mehta, learned Additional Solicitor General of India assisted by Sri Alok Mathur advanced his arguments on behalf of the Central Government and Sri S. K. Kalia, learned Senior Counsel introduced his arguments on behalf of the intervenors, namely, the Scheduled Caste/Scheduled Tribe candidates.

42. Sri Amit Bose contends that reservation of 50% in favour of Scheduled Castes/Scheduled Tribes is contrary to Article 15 (4) of the Constitution of India and the action of the University in proceeding to issue advertisements therefore violates Article 14 of the Constitution of India as well. He then submits that the right to 27% reservation in favour of Other Backward Castes has been conferred by Section - 3 of the 2006 Act which is in conformity with Article 15 (5) of the Constitution of India hence Clause 9 of Chapter VII of the First Academic Ordinances of the University violates Section - 3 of the 2006 Act. He submits that Section 3 substantively contains 27% reservation in favour of Other Backward Classes in matters of any Central Educational Institutions which provision has neither been repealed nor eliminated by the Parliament. Thus, to deny the said benefit is a violation of Article 15 (5) of the Constitution of India.

43. He then submits that the 2012 amendment Act which inserts the provisos will not apply to the respondent-University as it was clearly tailored to cater to the requirement of North-Eastern States where there is excessive reservation in favour of Scheduled Tribes and there are no Other Backward Classes in such States. The object and intent of the 2012 Act does not amount to denial of benefits of reservation to the Other Backward Classes who will enjoy reservation in admission throughout the country as such there was no valid reason to deny this benefit in a discriminatory manner for admission in the respondent-University.

44. He also submits that the objects and reasons of the 1994 Act which has established the University does not indicate that it was an University exclusively for Scheduled Castes/Scheduled Tribes. The same only asserts that while providing a certain percentage or quota to reservation in favour of socially and educationally backward classes, the benefits in favour of Scheduled Caste/Scheduled Tribe shall be taken care of in particular. This therefore has now to be read in the light of Section 3 (3) of the 2006 Act as well as the definition of the Central Educational Institutions as extracted here-in-above which does not exclude the applicability of the Act to the respondent-University. He submits that the respondent-University even though may have been established in 1994, that is prior to the 2006 Act, yet by virtue of the definition of Central

Educational Institutions as contained in Section 2 (d) of the 2006 Act, the University is bound to implement the reservation in favour of Other Backward Classes as well who are also defined in the 2006 Act under Section 2 (g) extracted here-in-above. Thus, merely because the University was established in 1994 through a special Act, the same does not become a University of any extraordinary status so as to exclude itself from providing reservation to Other Backward Classes as imposed under the 2006 Act. If this interpretation of exclusion as urged by the respondents is accepted, then this would result in discrimination and would violate Articles 14 and 15 (5) of the Constitution of India.

45. He submits that negation of rights already conferred under the Statute and also constitutionally protected cannot be taken away under the garb of the provisos to Section 3 of the 2006 Act, inasmuch as this would amount to taking away by the right hand given by the left. He therefore submits that this Court should interpret the provisos to be not applicable in the respondent-University which otherwise also talk about less than 50% and more than 50%, but not of 50%.

46. He contends that the enactment is a denial of rights of reservation for admission in Educational Institutions which is not only violative of part III but also the Directive Principles of State Policy. The Other Backward Classes are also oppressed classes who still require the opportunity of higher education for their upliftment and advancement and therefore to give a particular status to a university which is entirely funded by the Central Government and the University Grants Commission would amount to denial of opportunity to those who are otherwise entitled to, and are being extended the benefit of reservation in all other Universities throughout the country under the 2006 Act. He therefore submits that the two provisos of Section 3 which have been inserted should be read in a manner so as not to deprive reservation benefits to the aspirants of Other Backward Classes for admission in the respondent-University.

47. Sri Bose has relied on several judgments to contend that the principles of statutory interpretation as spelt out in the following decisions should be taken into consideration for the said purpose:-

(i) J. K. Cotton Spinning & Weaving Mills Co. Ltd. Vs State of U.P. [AIR 1961 SC 1170]

(ii) Waverly Jute Mills Co. Ltd. Vs Raymon & Co. (India) (P) Ltd. [AiR 1963 SC 90]

(iii) Pradip Port Trust Vs Workmen [(1977) 2 SCC 339]

(iv) U. P. State Electricity Board Vs Hari Shankar Jain [(1978) 4 SCC 16]

(v) Life Insurance Corporation of India Vs D. J. Bahadur [(1981) 1 SCC 315]

(vi) Ashoka Marketing Ltd. Vs Punjab National Bank [(1990) 4 SCC 406]

(vii) R. S. Raghunath Vs State of Karnataka [(1992) 1 SCC 335]

(viii) Maharashtra Tubes Ltd Vs State Industrial & Investment Corporation of Maharashtra [(1993) 2 SCC 144]

(ix) S. Prakash Vs K. M. Kurian [(1999) 5 SCC 624]

(x) Talcher Municipality Vs Talcher Regulated Market Committee [(2004) 6 SCC 178]

(xi) Bharat Petroleum Corporation Ltd. Vs P. Kesvan [(2004) 9 SCC 772]

(xii) Ghaziabad Zila Sahkari Bank Vs Addl. Labour Commissioner [(2007) 11 SCC 756]

(xiii) Suresh Nanda Vs Central Bureau of Investiation [(2008) 3 SC 674]

(xiv) P. Raghava Kurup Vs V. Annathakumari [(2007) 9 SCC 179]

(xv) Tata Motors Ltd. Vs Pharmaceutical Products of India Ltd. [(2008) 7 SCC 619]

(xvi) Commercial Tax Officer Vs Binani Cements Ltd. [(2014) 8 SCC 319]

(xvii) Maya Mathew Vs State of Kerala [(2010) 4 SCC 498]

(xviii) Anvar P. V. Vs P. K. Basheer [(2014) 10 SCC 473]

(xix) Mary Seward Vs The Owner of the 'Vera Cruz' [(1884) LR 10 AC 59 (HL)

(xx) Barker Vs Edger [(1898) AC 748]

48. Sri Ashok Mehta, learned Additional Solicitor General of India assisted by Sri Alok Mathur has urged that there is a presumption of constitutionality of any enactment and the Court should endeavour to uphold it and would not look into the reasonableness of the Statute. He submits that the respondent-University has a special status as it was established to cater to the needs of Scheduled Castes/Scheduled Tribes in particular. The 2006 Act with the introduction of Section - 3 did bring about a change in the quota of reservation by introducing a separate quota for backwards and it is for realigning the same that the Parliament undertook the exercise of amending the Act in 2012. He contends that the petitioners did not have any fundamental right of reservation and Article 15 (5) of the Constitution of India is an enabling provision giving liberty to the

Legislature to make special provisions for reservation. The 2012 Act therefore being inconformity with the same cannot be criticized as being in violation of any of the provisions of the Part - III of the Constitution of India. He further submits that the petitioners have already given up the stand of questioning the vires of the 2012 Act and therefore, as per the literal interpretation of the amending Act the same has to be understood as it stands. The Parliament had the legislative competence and in matters of admission to Educational Institutions, the Parliament has the power to modulate the extent of reservation or to restrict the scope of the application of the rights conferred by it. The amendment in 2012 therefore clearly conforms to the aforesaid principles and which is also evident from the debates of the Parliament as well as the statement of objects and reasons for introducing the amendment. Thus, the same cannot be described as arbitrary and the wisdom of the legislative choice cannot be questioned. He further submits that as a matter of fact, there is no complete prohibition or denial of reservation to the Other Backward Classes which is evident on a literal interpretation of the provisos appended to Section 3.

49. The literal meaning of the provisos clearly indicate that where in any Central Educational Institution the seats reserved for Scheduled Caste and Scheduled Tribe exceeds the reservation provided in Sub-Section (i) and (ii) of Section 3 of their sum taken together exceed the sum of percentages under (i) and (ii), then as per proviso (a) only those seats would be reserved for Other Backward Classes which falls short of 50% of the reservation provided to Scheduled Castes and Scheduled Tribes and proviso (b) states that where the reservation provided to Scheduled Castes and Scheduled Tribes exceeds 50% prior to commencement of the 2006 Act, then no seats would be reserved for Other Backward Classes. His contention is that there is no ambiguity so as to give a different interpretation.

50. He has relied on several decisions to substantiate his submissions further contending that the provisos which have been introduced being an exception to the main Section can independently exist as the functioning of the provisos are to limit the main part of the Section and to provide something, which but for the provisos would not have been within the operative part. The judgments relied on by Sri Ashok Mehta are as under:-

(i) Ajit Singh (III) Vs State of Punjab [(2000) 1 SCC 430]

(ii) Ajit Singh (II) Vs State of Punjab [(1999) 7 SCC 209]

(iii) Indra Sawhney Vs Union of India [1992 Supp (3) SCC 217]

(iv) M.R. Balaji Vs State of Mysore [1963 Supp (I) SCR 439]

(v) Namit Sharma Vs Union of India [2013 (1) SCC 745]

(vi) Jalan Trading Co. Pvt. Ltd. Vs Mill Mazdoor Sabha [1967 (1) SCR 15]

(vii) Raja Bala Vs State of Haryana [(2016) 2 SCC 456]

(viii) Keshavji Ravji and Co. etc. Vs Commissioner of Income Tax [1990 (2) SCC 231]

(ix) Prakash and others v. Phulavati and others [2016 (2) SCC 36]

(x) S. Sundaram Pallai Vs V. R. Pattabhiraman [1985 (1) SCC 591]

(xi) Gobind Sugar Mills Ltd. Vs State of Bihar [1999 (7) SCC 76]

(xii) U. P. State Electricity Board Vs Hari Shankar Jain [1978 (4) SCC 16]

51. Sri Raghvendra Kumar Singh, learned Senior Counsel for the respondent-University has invited the attention of the Court to the entire material relating to parliamentary debates, the deliberations of the Standing Committee of the Parliament and the objects and reasons to contend that firstly, the University was established under a special Act, namely, the 1994 Act. The said Act clearly provided for special reservation for Scheduled Castes/Scheduled Tribes and accordingly, the First Academic Ordinances provide for 50% reservation to such classes. He therefore submits that this stood protected and could not be abrogated by the general provisions of the 2006 Act. His contention is that the 1994 special Act continues to hold the field and any exercise of framing of Ordinances under the said Act that provides for 50% reservation could not have been taken away for which the amendment in the 2012 Act came to be introduced. He submits that the respondent-University being a special university meant to uplift the cause of Scheduled Castes/ Scheduled Tribes in particular is fully justified in providing 50% reservation which stands protected under Article 15 (5) of the Constitution of India. He submits that even if the validity of the 2006 Act has been upheld the same does not abrogate the provisions of the 1994 Act that can still exist independently and which now stands even otherwise protected with the 2012 amending Act. He contends that the petitioners having not challenged the competence of the Parliament or prayed for declaring the said provisos as ultra vires to Part - III of the Constitution of India, the wisdom of the legislature in introducing the statutory limitations cannot be said to be violative of Article 14 of the Constitution of India. He submits that the provisos simply preserve and contain what was provided under the 1994 parent Act of the University and hence all the arguments advanced on behalf of the petitioners deserve to be rejected. He has also questioned the locus standi of the petitioners on the ground that reservation is not a fundamental right and no such rights can be enforced by the petitioners. He then submits that the University Ordinances were also laid before the Parliament and there is a presumption of the validity of the 50% reservation provided for in the Ordinances. On the issue of interpretation, he submits that the provisos, if literally as they stand, carve out an exception which does not in any way violate either the main clause of Section 3 being an exception to the same and once having been included, the wisdom of the Parliament or the reasonableness thereof cannot be questioned by the petitioners. He submits that the purpose of a proviso is to make a provision which but for the proviso would not be in the main Section and the same can also simultaneously stand with the main Section. There is a presumption against implied repeal as such the 2006 Act does not override the 1994 Act, which is a special Act. He has relied on the following judgments to substantiate his submissions:-

(i) State of Uttaranchal Vs Balwant Singh Chaufal [2010 AIR SCW 1029]

(ii) Jasbhai Motibhai Desai Vs Rohan Kumar, Haji Basher Ahmed [1976 (1) SCC 671]

(iii) Chattar Singh Vs State of Rajasthan [(1996) 11 SCC 741 Paras 11, 17, 18 and 19]

(iv) Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs Subbash Chandra Yograj Sinha [AIR 1961 SC 1596 Paras 9 and 10]

(v) Commissioner of Commercial Taxes, Board of Revenue, Madras Vs Ramkishan, Shri Kishan Jhaver etc., [AIR 1968 SC 59 Paras 8, 10, 11 and 15]

(vi) Ashok Kumar Thakur Vs Union of India [2008 (6) SCC 1 Pages 316, 318 and 323]

(vii) Lohia Machines Ltd. Vs Union of India [1985 (2) SCC 197 Page 225]

52. Sri S. K. Kalia, learned Senior Counsel for the intervenors contends that the amending Act of 2012 does not in any way affect the status of the respondent-University or the reservation to the extent of 50% provided by it under the 1994 Act which is a special Act. He submits that this special Act would exist and any action taken thereunder cannot be questioned on the ground of any provision being made later on through another act of Parliament. There is neither any repeal nor a presumption of implied repeal. The First Ordinances of the University have the status of law and have come to form part of the Statute itself. The 1994 Act being a special law would override the general provisions of the 2006 Act as amended in 2012. The statement of objects and reasons as well as the legislative debates leave no room for doubt that the 2012 amending Act clearly intends to preserve the status of the University and also the extent of reservation in favour of Scheduled Castes/Scheduled Tribes as was existing prior to the 2006 Act. He submits that the 2006 Act cannot be read so as to impliedly repeal the reservation which the University was empowered to make under the 1994 Act and it's Ordinances to the extent of 50%. There is a strong presumption against implied repeal. He therefore submits that once there is no challenge raised to the vires of the provisos and the prayer for striking it down having been given up, then nothing remains to be considered either on the test of reasonableness or questioning the wisdom of the legislature. He therefore contends that the challenge raised is therefore to be dismissed. He has relied on the following judgments to substantiate his submissions:-

(i) Municipal Council Palai through the Commissioner of Municipal, Palai Vs T. J. Joseph and others [AIR 1963 SC 1561]

(ii) Tansukh Rai Jain Vs Nilratan Prasad Shaw and others [AIR 1966 SC 1780]

(iii) Northern India Caterers (Private) Ltd. and others Vs State of Punjab and others [AIR 1967 SC 1581]

(iv) Municipal Corporation of Delhi Vs Shiv Shanker [1971 (1) SCC 442]

(v) Ratan Lal Adukla Vs Union of India [(1989) 3 SCC 537]

(vi) Union of India & another Vs Venkateshan S. & another [(2002) 5 SCC 285]

(vii) State of M. P. Vs Kedia Leather & Liquor ltd. and others [(2003) 7 SCC 389]

(viii) P. Rajan Sandhi Vs Union of India & another [(2010) 10 SCC 338]

(ix) J. K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. State of U.P. & others [AIR 1961 SC 1170]

(x) General Manager, Telecom Vs M. Krishnan and another [(2009) 8 SCC 481]

(xi) Chairman, Thiruvalluvar Transport Corporation Vs Consumer Protection Council [(1995) 2 SCC 479]

(xii) Utkal Contractors and Joinery Pvt. Ltd. and others Vs State of Orissa and others [(1987) 3 SCC 279]

(xiii) M/s Doypack Systems Pvt. Ltd. Vs Union of India and others [(1988) 2 SCC 299]

(xiv) State of U.P. and another Vs Pawan Kumar Tiwari and others [(2005) 2 SCC 10]

(xv) Anoop Mishra Vs State of U.P. and another, Writ-A No.28565 of 2012

53. We have considered all the submissions raised by the learned counsel for the respective parties and we may at the very outset clarify that the issue raised in these petitions is clearly confined to the dispute of 50% reservation provided by the respondent-Babasaheb Bhimrao Ambedkar University in favour of Scheduled Castes/Scheduled Tribes to the exclusion of Other Backward Classes. This is evident from the fact that the case of the respondent-University was exclusively discussed and dealt with in the proceedings prior to the Act being passed by the Parliament both in the respective Committees as well as in both the Houses of Parliament. The cause of the respondent-University had been individually represented pointing out that this was the only Central University established in the State of U.P. for the purpose of catering particularly to Scheduled Castes/Scheduled Tribes and therefore, the reservation as introduced by the 2006 Act under Section 3 thereof should not diminish the percentage of Scheduled Caste/Scheduled Tribe

reservation which according to the University would run counter to the objects and reasons of the 1994 Act under which the University was established.

54. Consequently, we are proceeding to interpret the provisions on the facts of the present case and confine our judgment to that extent only.

55. The argument of the respondent that the 1994 Act is an independent Act is correct, inasmuch as the said Act was passed to establish a University that was open to all castes and creed but at the same time, the objects and reasons for establishment of the said University clearly indicate that it was for the special attention for promoting educational advancement of the members belonging to the Scheduled Castes/Scheduled Tribes aspiring to receive higher education. To that effect, the objects also categorically provide that this should be achieved by providing adequate percentage of seats to such category. Accordingly, the Act itself empowered the University under Section 2 (xxi) to fix the quota of percentage of such reservation. To achieve this object, the University in it's First Academic Ordinances introduced Clause 9 making a provision for 50% reservation for Scheduled Castes/Scheduled Tribes. The said percentage of reservation continued in the respondent-University and can be termed to be protected in view of the empowerment as conferred under the 1994 Act itself.

56. The matter took a turn when the Constitution (93rd Amendment) Act, 2005 was enforced w.e.f. 21.1.2006 whereby Sub-Article (5) was added in Article 15 enabling the State to make special provisions for the ***advancement of any Socially and Educationally Backward Classes of citizens or for the Scheduled Castes and Scheduled Tribes*** particularly with regard to the admission in Educational Institutions other than minority institutions.

57. The Parliament under the aforesaid enabling constitutional authority passed another Act, namely, the Central Educational Institutions (Reservation in Admission) Act, 2006. It is to be noted that this Act was specifically for reservation in admissions in Central Educational Institutions. Section 2 (d) of the Act includes within it's fold Central Educational Institutions including any University established or incorporated by or under a Central Act. It is here that we proceed to record that the respondent-Babasaheb Bhimrao Ambedkar University has been established under a Central Act of 1994 and therefore it squarely stands covered by the provisions of the 2006 Act. The argument of the respondents is, that the 1994 Act being a Special Act and an independent Act of Parliament, continues to hold the field, and the enforcement of the 2006 Act not having repealed the said Act, there would be a clear presumption against any implied repeal.

58. We are unable to agree with this proposition, inasmuch as the subject matter of legislation admittedly is within the competence of Parliament and therefore, the 2006 Act will be presumed to have been passed to give effect to the reservations as entailed therein. Not only this, there is an obligation cast on all Central Educational Institutions under Sections 3, 4 and 5 of the 2006 Act to give effect to the reservation as provided under Section 3 thereof. The field of reservation and it's percentage therefore having been categorically re-defined for all Central Educational Institutions alike, would therefore impliedly repeal any existing provision on the date

of the enforcement of the 2006 Act. It is correct that there is a presumption against implied repeal but the said presumption clearly stands rebutted in the present case, inasmuch as the Parliament did not draw any distinction between the Universities established or incorporated under a Central Act. It includes all Universities established under a Central Act and therefore, the respondent-Babasaheb Bhimrao Ambedkar University being a Central University under the 1994 Act was clearly covered under the aforesaid definition.

59. The second reason to not accept the arguments of the respondents on this score is that the 2006 Act is a Special Act for reservation that came into effect under a constitutionally enabling provision of Article 15 (5) which was not in existence when the 1994 Act had been passed. The Parliament thus was empowered by the Constitution to bring about the change by way of providing proportionate reservation in relation specifically to admission in Educational Institutions. This becomes more specific with the words ***Socially Educationally Backward Classes of citizens*** being categorically used in Article 15 (5) of the Constitution of India. Thus, the State was enabled to make special provisions relating to reservation in admission in Educational Institutions for Other Backward Classes as well. This was therefore a constitutional goal envisaged in Part III of the Constitution of India that was sought to be enforced through the 2006 Act. This introduction of reservation for Other Backward Classes being made constitutionally permissible was consciously engrafted in Section 3 of the 2006 Act. This legislation will therefore have an overriding effect over the First Academic Ordinances of the respondent-University where 50% reservation was confined for Scheduled Castes/Scheduled Tribes. It is to be remembered that the 1994 Act itself does not fix any percentage and only empowered the University to fix the quota. The University by way of subordinate legislation in the shape of First Academic Ordinances had introduced 50% reservation. Thus, the quantitative fixation of quota was not under the primary Act of 1994, but under a subordinate legislation through the First Academic Ordinances that was notified in the Gazette in the year 2004, even though it had been dispatched earlier in 1996. The first ordinances may have been tabled before the Parliament and were having the status of law, but once a Special Central Act specifically for reservation in admission to all Central Educational Institutions as defined came to be enforced, the 50% quota under the Ordinances of the University stood superseded by the quota prescribed in Section 3 of the 2006 Act. The 2006 Act would be presumed to have been consciously passed enabled by Article 15 (5) that was not there when the 1994 Act came into existence.

60. The third reason is that the validity of the Constitution (93rd Amendment) Act, 2005 came to be challenged in the case of ***Ashoka Kumar Thakur*** (supra). The Apex Court upheld the validity of the Act including reservation in favour of Other Backward Classes as contained in Article 15 (5) of the Constitution of India in the State Maintained Institutions and aided Educational Institutions. The challenge raised to the 2006 Act (Act No.5 of 2007) was also upheld and thus, reservation in favour of Other Backward Classes was constitutionally recognized by a judicial pronouncement. The same would be binding on the respondent-Babasaheb Bhimrao Ambedkar University as a matter of declaration of law under Article 141 of the Constitution of India and therefore, the 2006 Act would prevail over and above the percentage of reservation as contained in the First Academic Ordinances of the University.

61. Fourthly, it will not be incorrect to reiterate that the 2006 Act under Sections 3, 4 and 5 has been clearly designed to enforce the quota of reservation as defined under Section 3. This being an act of Parliament with specific powers of enforcement of reservation in admission would therefore even otherwise prevail over the First Academic Ordinances of the respondent-University, insofar as it fixes the quota of reservation. These being specific provisions would therefore govern and control the quota of reservation and hence, the respondents are not correct in submitting that the 1994 Act being special, the quota of 50% fixed for Scheduled Castes/Scheduled Tribes under the Ordinances will still continue to prevail in matters of reservation in admissions.

62. It is here, we may record that Sri Amit Bose, learned Counsel for the petitioners is correct in his submissions of the prevalence of the 2006 Act over the 1994 Act. It will also have to be noticed that Sri Ashok Mehta, learned Additional Solicitor General of India, instead of advancing the argument that the 1994 Act is a Special Act, contributed to the submissions by modifying it to the effect that the status of the University is a special status, and in view of the special status of the University to cater to particularly the Scheduled Castes/Scheduled Tribes, justifies the amendments brought about through the 2012 amendment Act.

63. The argument of Sri Ashok Mehta for the Union of India that the University enjoys a special status cannot be doubted as per the objects and reasons disclosed at the time of the establishment of the University but merely because it had a special status, the University could not have acted contrary to an act of Parliament specially enacted for reservation in admission in relation to the quota prescribed for other backward classes and the validity whereof is no longer questionable in terms of the judgment in the case of ***Ashoka Kumar Thakur*** (supra). The introduction of percentage of reservation of 27% to Other Backward Classes having been introduced under the enabling powers of Article 15 (5) cannot be negated through Ordinances framed by the University that was allowed to prevail even after the 2006 Act came into force. This would amount to placing a subordinate legislation on a higher pedestal than the 2006 Act which would not be permissible in the hierarchy of legislations. Needless to repeat that the percentage was not prescribed in the 1994 Act at all. The 1994 Act does not also say that admissions would be denied to other classes of people. To the contrary, it is a University open to all castes and creed. The 2006 Act would therefore be presumed to have been enacted with all this in the background and not in ignorance thereof. The quota as fixed by the First Academic Ordinances of the University therefore stood eclipsed to the extent as defined under Section 3 of the 2006 Act prior to the 2012 amendment.

64. There is yet another argument which has been advanced by the respondents contending that the Other Backward Classes have no fundamental right to claim reservation. It is either way, not the fundamental right of any class, to claim reservation in admission as a fundamental right. Reservation for admission is enabled by either a constitutional or a statutory provision. Once this argument is accepted, then if the State has the power to reserve, it also has the right to withdraw such reservation or modify it as per the need of the Society at large.

65. In the instant case, if the 2006 Act was brought into force to cater to reservation to other classes apart from Scheduled Castes/Scheduled Tribes that is constitutionally protected under Article 15

(5) of the Constitution of India and therefore, the argument of the respondents cannot be countenanced. The 2006 Act, therefore, rightly proceeded to engraft the quota of percentage as contained in Section 3 of the 2006 Act. On this score as well, the argument of the respondents that the 1994 Act is a Special Act with special provisions cannot be held to have any overriding affect over the 2006 Act.

66. A natural corollary to this conclusion drawn by us is also supported by the fact that had this been not the impediment, there was no necessity of amending Section 3 through the provisos that have been introduced and are subject matter of challenge before us. At this stage, we may now quote the provisos that came to be added by way of an amendment under Section that is the bone of contention between the parties. The said provisions as amended under the 2012 Act are extracted hereunder:-

"Provided that the State seats, if any, in a Central Educational Institution situated in the tribal areas referred to in the Sixth Schedule to the Constitution shall be governed, by such reservation policy for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, as may be specified, by notification in the Official Gazette, by the Government of the State where such institution is situated:

Provided further that if there are no State seats in a Central Educational Institution and the seats reserved for the Scheduled Castes exceed the percentage specified under clause (i) or the seats reserved for the Scheduled Tribes exceed the percentage specified under clause (ii) or the seats reserved for the Scheduled Castes and the Scheduled Tribes taken together exceed the sum of percentages specified under clauses (i) and (ii), but such seats are-

(a) less than fifty per cent of the annual permitted strength on the date immediately preceding the date of commencement of this Act, the total percentage of the seats required to be reserved for the Other Backward Classes under clause (iii) shall be restricted to the extent such sum of percentages specified under clauses (l) and (ii) falls short of fifty per cent of the annual permitted strength;

(b) more than fifty per cent of the annual permitted strength on the date immediately preceding the date of commencement of this Act, in that case no seat shall be reserved for the Other Backward Classes under clause (iii) but the extent of the reservation of seats for the Scheduled Castes and the Scheduled Tribes shall not be reduced in respect of Central Educational Institutions in the specified north-eastern region".

67. The aforesaid provisos particularly the second proviso with clause (b) clearly nail down any scope for admission by way of a reservation to the Other Backward Classes. The exclusion in the second proviso was therefore clearly designed to cater to the peculiar situation of the status of the University keeping in mind the object of catering to Scheduled Castes/Scheduled Tribes. Clause (a) to the second proviso does create a space for Other Backward Classes, but virtually restricts it by providing full play to the extent of 50% reservation in favour of Scheduled Castes and Scheduled Tribes. Thus, the Other Backward Classes can seek benefit of Section 3 only if there is a shortfall in the number of candidates seeking admission of the category of Scheduled Castes/Scheduled Tribes against 50% reservation.

68. The percentage of reservation to other categories as provided for in the main Section is therefore clearly disturbed as it gives full reservation to the Scheduled Castes and Scheduled Tribes to the extent of 50%. It is for this reason that this 50% reservation as existed in the First Academic Ordinances in Clause 9 was challenged and is pending consideration in Writ Petition No.3569 (MS) of 2009. The full play of 50% reservation to Scheduled Castes/Scheduled Tribes therefore does not harmonise with Section 3, which provides for reservation to Other Backward Classes as well. The question is, does it end in discrimination and arbitrariness. It is here that we have to mention that the petitioners have given up the challenge of the vires of the Sections as noted at the very outset. The issue of discrimination or arbitrariness has to be looked into from the point of view of the enabling power under Article 15 (5) of the Constitution of India and the purpose underlying the same. There is a distinction which has to be kept in mind, namely, reservation in employment that has a different connotation as against reservation for opportunity of admission in educational institutions. The former is designed to secure the social and economic backwardness in matters of employment whereas the latter is the real upliftment of an individual of the oppressed classes so as to make him capable to compete in all spheres of life which may also include future employment. Thus, to provide reservation in admission to the oppressed classes even, beyond a permissible percentage in the background of social circumstances cannot be said to be excessive or to prohibit this benefit to others. The same has to be balanced, more so when it comes to providing reservation in admission to educational institutions to competing oppressed classes, like in the present case, the Backwards versus the Scheduled Castes. The decisions which have been cited at the Bar on behalf of the petitioners do indicate that the Courts can intervene when excessiveness is detected in protective discrimination laws. In the instant case, the ratio of 50% is the outer limit of reservation and therefore, the reservation is not in excess of permissible limits. However, this is a peculiar situation, where in an inter se contest between the reserved classes, the other backward category is being denied the benefit of reservation as provided for in the main Section by virtually elbowing it through the aid of the provisos under challenge.

69. As noted above, since the vires challenge has been given up, the interpretation as sought for by Sri Amit Bose, learned Counsel for the petitioners would not be possible without entertaining arguments on the issue of striking down the impugned provisos. The other side of the coin is that the background of this 50% reservation for Scheduled Castes/Scheduled Tribes is clearly for the cause of the advancement and promotion of education. This purpose and cause has to be read in favour of the Scheduled Castes/Scheduled Tribes, but at the same time what we find is that such a cause or a purpose should be based on an extensive exercise to be undertaken by the authority extending the benefit of reservation through objective surveys and not merely on the social philosophy of Article 15 (5) of the Constitution of India. An exercise has to be undertaken in order to find out as to whether such reservation can be objectively sustained and at the same time, the reservation to the other categories of the oppressed classes can be justifiably denied. The Parliamentary debates or the discussions that have been placed before the Court are clearly aimed at maintaining 50% reservation on the strength of the purpose, objects and reasons for which the University was established.

70. The Parliament may have taken a myopic view by narrowing down the discussion for a single institution, and the statement of the Hon'ble Minister during the debates that the respondent University was established only for Scheduled Castes and Scheduled Tribes may not be matching with

the object and reasons of the University which declares it to be open for admission to all creeds and classes, but the wisdom of the Parliament is not open to adjudication before this Court. It has also to be kept in mind that the 2006 Act widens the scope of admission through reservation throughout the country in all central educational institutions. Thus viewed from the top of the hill, and not standing in the valley, the reserved category aspirants are assured of more seats throughout the country. While assessing the need for reservation, the balance therefore from the point of view of centrally aided institutions, Section 3 without the impugned proviso can be successfully implemented. If that is feasible, it is still open for the Parliament to discuss and reassess the same on an objective study upon a survey of ground realities. With reservation in admissions with the aid of Article 15 (5) of the Constitution, and with a wider opportunity of exposure under Section 3 of the 2006 Act, any possible argument of discrimination and different standards of reservation inter se between the different reserved categories can be avoided by adopting a balanced approach.

71. We therefore find it necessary that if the Parliament has made a law, then should not an exercise be taken for an objective assessment of the requirement of the Other Backward Classes. To extend favour entirely to the Scheduled Castes/ Scheduled Tribes and completely overlooking the claim of the Other Backward Classes therefore does require an objective assessment. The presumption of legislative wisdom cannot be doubted, but unless the vires of the Act on such grounds is assailed with facts and figures to substantiate the same, this Court by way of an interpretation cannot read down the provisos to reflect a different meaning. To extend such a benefit would amount to enforcing Section 3 as against the provisos that have been subsequently added by way of an amendment. To our mind, the same would be permissible only if provisos can be struck down as ultra vires and not otherwise. The Parliament has full authority and is also otherwise obligated to review any percentage of reservation on such objective study, but we cannot issue any direction as prayed for unless the provisions are questioned accordingly as observed here-in-above.

72. The Other Backward Classes may be near equals and the provisos may result in an unequal treatment but the rationality of such an argument can only be tested provided there is material to substantiate the same and is otherwise challenged as observed here-in-above.

73. Accordingly, for all the reasons aforesaid, we are unable to come to the aid of the petitioners without prejudice to the rights of any person to the issues raised in Writ Petition No.3569 (MS) of 2009, that is stated to be still pending consideration and further without prejudice to the rights of the Other Backward Classes to raise an appropriate challenge in the light of what has been observed here-in-above.

74. Both the writ petitions are therefore accordingly ***dismissed*** subject to the above observations.

(2016) 9 ILRA 1190
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.09.2016

BEFORE

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

Misc. Bench No.- 23145 Of 2016

Sew Lsy Highwayas Ltd. Thru Authorized Representative ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Asim Kumar Singh, Amit Saxena

Counsel for the Respondents:
C.S.C., D.K. Pathak, Vivek Raj Singh

Civil Law – termination of Concession Agreement – dispute resolution – conciliation – arbitration – writ petition – Article 226 – delay in execution of the project – environmental clearance – withdrawal of funds – abandonment of the work – disputed questions – assessment of facts – writ jurisdiction – dismissed with liberty to invoke arbitration clause.

The petitioner-company has come up questioning the termination of Concession Agreement dated 1.8.2011 vide communication dated 25.7.2016 by the Uttar Pradesh State Highways Authority/respondent No.2 herein thereby terminating the contract for the project of the construction and repair of a 4lane road, namely, State Highway No.57 in the DelhiUttarakhand Border section. The agreement dated 1.8.2011 has been filed on record as Annexure – 3.(Para 1)

The petition has been opposed by Sri Vivek Raj Singh for the respondent No.2/Authority, the learned Standing Counsel for the respondent No.1/State of U.P. and Sri D.K. Pathak, learned Counsel for the respondent No.3/Punjab National Bank, which is the leading Banker of the Consortium of Banks that has been funding the petitioner-company in the aforesaid project. (Para 2)

The grievance of the petitioner is that the termination of the contract has been done arbitrarily on the strength of an ex parte report of an Independent Engineer who was to submit the appraisal of the work to be executed on the basis of whereof action was to be taken by the respondents under the terms of the agreement.(Para 3)

Held: (16-19)
1.We have considered all these submissions and what we find is that the impugned decision to terminate the contract proceeds on the fact of the withdrawl of the petitioner-company, the fact relating to the delay caused in the commencement of the work, the actual physical completion of work to the tune of 13.33% and the allegations of excessive withdrawl of the funds from the lending agency by the petitioner-company without proportionately spending it against the estimated cost of project. Thus, there is a clear dispute between the

parties, namely, the petitioner-company and the U.P. State Highways Authority that resulted in the delay in the project and it's non-performance. The liability, the responsibility and the accountability of the parties on this score therefore is dependent on all the aforesaid factors that can be assessed on the strength of the various contentions that have been raised in this regard.

2.Consequently, we are of the opinion that where such complicated questions are required to be assessed and cannot be assumed on the basis of the allegations on their face value, it would be appropriate that the remedy of arbitration is invoked. We also find that conciliation had been attempted, but in the absence of any agreement having been arrived at, the U.P. State Highways Authority proceeded to terminate the agreement which apart from the issue of excessive withdrawal is also based on the allegation of the petitioner-company having abandoned the work in 2014 itself. The issue of delay in the commencement of the project due to non-clearance by the Environmental Ministry is not the sole factor to govern the assessment of the act of the parties, inasmuch as the U.P. State Highways Authority has taken a stand that ample extension of period was given, but in spite of that, the petitioner-company failed to live up to it's commitments. Thus, in these circumstances, this would be a fit case for arbitration.

3.In the background aforesaid, we uphold the preliminary objections raised by Sri Vivek Raj Singh and decline to exercise our jurisdiction under Article 226 of the Constitution of India for the above mentioned reasons. Whether the decision making process was whimsical and the consequential action of termination of the agreement was arbitrary would depend on the establishment of the allegations with material to substantiate the same. This would require an intense exercise of fact finding and cannot be assumed on the basis of mere allegations and counter-allegations in the exercise of writ jurisdiction.

4.In view of the above, we are not inclined to interfere in the matter and the writ petition is accordingly **dismissed** with liberty to the parties to invoke the arbitration clause under the agreement.

Case Law discussed:

1.Union of India v. Tantia Constructions, (2011) 5 SCC 697 — para 8
2.Manoj Agarwal v. Union of India, (2016) 115 ALR 610 — para 8
3.Navin Filling Station v. Indian Oil Corporation — para 8
4.ABL International Ltd. v. Export Credit Guarantee Corporation of India, (2004) 3 SCC 553—para 8
5.M/s Surya International Pvt. Ltd. v. Union of India, 2014 (103) ALR 349 — para 8
6.Soma Isolux NH One Tollway Ltd. v. Harish Kumar Puri, (2011) 5 SCC 697 — para 8
7.U.P. State Bridge Construction Corporation Ltd. v. Bangalore Development Authority — para 8
8.State of Kerala v. K. A. Yoosaf — para 8
9.McNally Bharat Engineering Company v. Bihar State Electricity Board — para 8
10.State of A.P. v. Goverdhanlal Pitti, (2003) 4 SCC 739 — para 8
11.Ratnagiri Gas Ltd. v. RDS Projects Ltd., (2013) 1 SCC 534 — para 8
12.Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd., 2016 SCC OnLine SC 855 — para 9

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

1. The petitioner-company has come up questioning the termination of Concession Agreement dated 1.8.2011 vide communication dated 25.7.2016 by the Uttar Pradesh State Highways Authority/respondent No.2 herein thereby terminating the contract for the project of the

construction and repair of a 4-lane road, namely, State Highway No.57 in the Delhi-Uttarakhand Border section. The agreement dated 1.8.2011 has been filed on record as Annexure - 3.

2. The petition has been opposed by Sri Vivek Raj Singh for the respondent No.2/Authority, the learned Standing Counsel for the respondent No.1/State of U.P. and Sri D.K. Pathak, learned Counsel for the respondent No.3/Punjab National Bank, which is the leading Banker of the Consortium of Banks that has been funding the petitioner-company in the aforesaid project.

3. The grievance of the petitioner is that the termination of the contract has been done arbitrarily on the strength of an ex parte report of an Independent Engineer who was to submit the appraisal of the work to be executed on the basis of whereof action was to be taken by the respondents under the terms of the agreement.

4. Dr. L.P. Mishra submits that the said report was prepared without the participation of the petitioner-company and without giving any opportunity to give a reply to the allegations that now form the basis of the passing of the impugned order. He further submits that the calculation, as reflected in the impugned communication dated 25.7.2016, particularly in Clause 9 thereof about the act of the petitioner-company being involved in overdrawing with a criminal intent of defalcation, was never intimated to the petitioner to explain the same and even otherwise the entire calculation is erroneous. Hence, the conclusion drawn being patently incorrect the action is arbitrary.

5. Dr. Misra then urged that there was ample material on record to demonstrate that the entire delay had been caused on account of the unavailability of the environmental clearance that was the obligation of the State Highways Authority and which admittedly took more than a year to communicate. The aforesaid delay in the execution of the project and otherwise all the hindrances were totally attributable to the respondent No.2 that have been completely ignored while passing the impugned order and therefore, the decision making process is clearly vitiated being arbitrary and whimsical. He has further submitted that these facts about the breach on the part of the respondent No.2 were not even brought to the notice of the High Court nor was the petitioner a party in Public Interest Litigation (PIL) No.15147 of 2015 where directions were issued for completion of the project vide judgment dated 21.4.2015. It is submitted that the information given about the meeting chaired by the Chief Secretary and the resolutions passed therein, as quoted in the said judgment, were totally incorrect informations giving an impression as if the petitioner-company had voluntarily without any justification abandoned the project. It is therefore urged that taking shelter by the respondent No.2 of the aforesaid judgment is totally unjustified and in such circumstances, in view of the judgments that have been cited at the Bar, the impugned order/communication dated 25.7.2016 is unsustainable and deserves to be quashed.

6. Controverting the aforesaid submissions, Sri Vivek Raj Singh has raised a preliminary objection with regard to the entertaining of the writ petition on the ground that any dispute arising out of the agreement dated 19.5.2011 has to be resolved as per Article 44 of the terms of agreement

initially by conciliation and on failure of mediation, through arbitration. He further submits that so far as the delay part at the initial stage of environmental clearance is concerned, the same was suitably compensated by providing more time to the petitioner-company through a revised memorandum of time-schedule and therefore, no prejudice was caused on account of any such delay in obtaining environmental clearance. He further submitted that as a matter of fact, the petitioner-company voluntarily abandoned the project as a result whereof the entire project was put in jeopardy that gave rise to the filing of a PIL and then consequential action by the State Highways Authority. It is urged that the Independent Engineer had been assessing the work and on that basis, the petitioner had been intimated of completing the project within time, but having failed to do so and having found that the petitioner had overdrawn a huge amount from the consortium of banks, which was in excess of what had been actually spent, there was no option but to terminate the agreement. He further submits that there is a provision for substitution of the contractor by negotiations through the consortium of the funding agency, but that too entails a condition that the amount of funds already withdrawn and loan taken by the contractor will be taken over as a liability by the substituted company for which no one is coming forward to undertake the said burden. The offer of the consortium is not supported by any offer of the petitioner in relation to the introduction of new partners and the same being not viable the only option left was to terminate the agreement. He therefore submits that the only resolution dispute mechanism left now available to the petitioner is by way of arbitration and none of the grounds raised in the writ petition is available so as to establish even a prima facie case for finding a fault in the decision making process. Consequently, the writ petition is not maintainable and deserves to be dismissed.

7. We may at the very outset quote the provisions for the resolution of disputes between the parties, namely, Article 44 of the Agreement that is extracted hereunder:-

"ARTICLE 44
44 DISPUTE RESOLUTION

44.1 Dispute resolution

44.1.1 ***Any dispute, difference, or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement*** *(including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute")* ***shall, in the first instance, be attempted*** *to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.*

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Secretary, PWD and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 ***Any Dispute which is not resolved*** *amicably by conciliation, as provided in Clause 44.2,* ***shall be finally decided by reference to arbitration*** *by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Lucknow, and the language of arbitration proceedings shall be English.*

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

44.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law."

8. Dr. Misra has cited the following decisions to contend that if there is an element of arbitrariness in the decision making process, then the remedy of arbitration need not be resorted to and this Court in the exercise of powers under Article 226 of the Constitution of India can invoke and correct the error with a direction to take an appropriate decision:-

(1) Union of India v. Tantia Constructions [(2011) 5 SCC 697 Paras 31, 33 and 34]

(2) Manoj Agarwal v. Union of India [(2016) 115 ALR 610 Paras 15-17]

(3) Navin Filling Station v. Indian Oil Corporation [MANU/UP/0791 Paras 17, 25 and 27]

(4) ABL International Ltd. v. Export Credit Guarantee Corporation of India [(2004) 3 SCC 553 paras 19 and 27]

(5) M/s Surya International Pvt. Ltd. v. Union of India [2014 (103) ALR 349, MANU/UP/0401/2014 Paras 52-59]

(6) Soma Isolux NH One Tollway Ltd. v. Harish Kumar Puri [(2011) 5 SCC 697]

(7) Uttar Pradesh State Bridge Construction Corporation Limited v. Bangalore Development Authority [MANU/KA/0284/2005 paras 26, 31, 51 and 55]

(8) State of Kerala v. K. A. Yoosaf [MANU/KE/0185/2015 Paras 13 and 15]

(9) McNally Bharat Engineering Company v. Bihar State Electricity Board [MANU/BH/1196/2015 paras 7, 10 and 12]

(10) State of A.P. v. Goverdhanlal Pitti [(2003) 4 SCC 739 paras 12 and 14]

(11) Ratnagiri Gas Ltd. v. RDS Projects Ltd. [(2013) 1 SCC 534 Paras 30 and 32]

9. Sri Vivek Raj Singh has cited the following decision to counter the aforesaid submissions:-

10. Sasan Power Limited v. North American Coal Corporation India Private Limited [2016 SCC Online SC 855]

11. On an assessment of the facts, it appears that the delay in execution of the project had commenced way back in 2012 itself when the State Highways Authority had itself been communicating with the Ministry of Environment, Government of India seeking clearance for felling of trees and removal of such obstructions for completion of the project. This is evident from the letter of the Government of India dated 28.5.2014 addressed to the Principal Secretary (Forests),

Government of Uttar Pradesh, Lucknow, a copy whereof is Annexure - 28 to the writ petition. Dr. Misra has also invited the attention of the Court to Annexure - 37 to the writ petition, which is the letter dated 27.7.2015 to the lead bank of the consortium where also the letter dispatched to the Ministry of Finance, Department of Economic Affairs (PPP Cell), Government of India dated 19.6.2015 by the State Highways Authority was appended. The said letter also informs that almost all the trees have been cut and a large front is available for construction of the road work. It also mentions the delay that had occurred in the forest clearance which took almost two years and had also resulted in the increased cost of the project.

12. The petitioner-company had withdrawn the sums that were released to it but on account of the escalation of the cost of the project, the petitioner did not commence the work at the site and also complained of financial constraints.

13. It is in between these communications that the Public Interest Litigation Petition No.15147 (MB) of 2015 was filed in the High Court at Allahabad and a direction was issued on 21.4.2015 to conclude the project clearly noting therein the absence of the petitioner as a party and leaving that issue open to be dealt with separately.

14. The letters also however indicate that very little physical progress had been made to the extent of 13.33% only. It is the case of the petitioner that the lead bank dispatched a letter on 6.6.2015 to the U.P. State Highways Authority indicating that the petitioner-company had made a proposal that was discussed in the meeting of all the stakeholders on 19.5.2015 where it was agreed to favourably examine the request of the petitioner for diluting the existing sponsor stake by 74% in favour of prospective investors and also extension of the completion of the project upto 31.3.2017. The letter of the Punjab National Bank was sent to the State Highways Authority but according to the learned counsel for the Bank, no further information was received from the State Highways Authority in this regard.

15. It appears that the respondent-State Highways Authority according to the terms of the agreement called upon a report from the Independent Engineer who under the terms of the agreement was to supervise and report about the work progress and who dispatched his report on 25.1.2016. A copy of the said report is on record.

16. Sri Vivek Raj Singh has however countered the submissions about no action having been taken on the offers made and about the default on the part of the petitioner. He has placed before the Court a letter of the State Highways Authority dated 27.5.2016 addressed to all the Banks of the consortium intimating them about the intention to terminate the agreement of the petitioner as the time period for completion of the work as extended was coming to a close on 16.7.2016. He also submits that the petitioner had already withdrawn itself way back in 2014 with no intention to execute the work after having excessively withdrawn the funds from the funding agencies. For this, he has urged that as against 13.33% of work actually performed, the amount of withdrawals against the cost project was many-fold without any work having been performed and therefore this clearly amounted to a defrauding practice adopted by the petitioner-company of

having withdrawn the funds without utilizing it for the project. This disproportionate withdrawal as against a very minimal performance of the work, therefore, led to the termination about which the petitioner had full knowledge.

17. We have considered all these submissions and what we find is that the impugned decision to terminate the contract proceeds on the fact of the withdrawl of the petitioner-company, the fact relating to the delay caused in the commencement of the work, the actual physical completion of work to the tune of 13.33% and the allegations of excessive withdrawl of the funds from the lending agency by the petitioner-company without proportionately spending it against the estimated cost of project. Thus, there is a clear dispute between the parties, namely, the petitioner-company and the U.P. State Highways Authority that resulted in the delay in the project and it's non-performance. The liability, the responsibility and the accountability of the parties on this score therefore is dependent on all the aforesaid factors that can be assessed on the strength of the various contentions that have been raised in this regard.

18. Consequently, we are of the opinion that where such complicated questions are required to be assessed and cannot be assumed on the basis of the allegations on their face value, it would be appropriate that the remedy of arbitration is invoked. We also find that conciliation had been attempted, but in the absence of any agreement having been arrived at, the U.P. State Highways Authority proceeded to terminate the agreement which apart from the issue of excessive withdrawal is also based on the allegation of the petitioner-company having abandoned the work in 2014 itself. The issue of delay in the commencement of the project due to non-clearance by the Environmental Ministry is not the sole factor to govern the assessment of the act of the parties, inasmuch as the U.P. State Highways Authority has taken a stand that ample extension of period was given, but in spite of that, the petitioner-company failed to live up to it's commitments. Thus, in these circumstances, this would be a fit case for arbitration.

19. In the background aforesaid, we uphold the preliminary objections raised by Sri Vivek Raj Singh and decline to exercise our jurisdiction under Article 226 of the Constitution of India for the above mentioned reasons. Whether the decision making process was whimsical and the consequential action of termination of the agreement was arbitrary would depend on the establishment of the allegations with material to substantiate the same. This would require an intense exercise of fact finding and cannot be assumed on the basis of mere allegations and counter-allegations in the exercise of writ jurisdiction.

20. In view of the above, we are not inclined to interfere in the matter and the writ petition is accordingly ***dismissed*** with liberty to the parties to invoke the arbitration clause under the agreement.

(2016) 9 ILRA 1198
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.09.2016

BEFORE

THE HON'BLE ABHAY MAHADEO THIPSAY, J.

Application U/S 482/378/407 No.- 6255 Of 2016

Kripa Shankar & Ors. **...Applicants**
Versus
State Of U.P. **...Opposite Party**

Counsel for the Applicants:
Rajendra Pratap Singh, Surendra Pratap Singh

Counsel for the Opposite Party:
Govt. Advocate

Criminal law—Code of Criminal Procedure—Section 482 of Cr.P.C.Section 2(d)—Explanation—"report made by police officer"—"non-cognizable offence"—"deemed to be a complaint"—Section 173—"police report"—"chargesheet"—not found in Code—Section 204—"summoning order"—"case instituted on police report"—"case instituted on complaint"—"no different standard"—Section 200—"examination of complainant"—proviso (a)—"no necessity"—Section 482—"inherent powers"—"quashing"—order taking cognizance—Section 427 Indian Penal Code—"non-bailable warrants"—"non-appearance"—"petition rejected"

The petitioners are the accused in criminal case no.506 of 2016 pending before the Additional Chief Judicial Magistrate, Sultanpur. The allegation against the petitioners is that they have committed an offence punishable under Section 427 of the Indian Penal Code. The petitioners are aggrieved by the order dated 4.2.2014 passed by the Magistrate whereby cognizance of the alleged offence was taken and the petitioners were summoned to appear before the Magistrate. They have, therefore, approached this court by filing the present petition praying that by invoking the inherent powers of this court, the order taking cognizance of the alleged offence be quashed and set aside.(Para 2)

The argument that is advanced by the learned counsel for the petitioners in support of his contention that the order taking cognizance and summoning the petitioners is bad in law is that 'the police have filed a charge-sheet against the petitioners in respect of an offence punishable under Section 427 of the Indian Penal Code, which is noncognizable' and, therefore, the summoning order based on that 'charge-sheet' is bad in law. He submits that by virtue of the definition of a 'complaint' as given under Section 2(d) of the Code of Criminal Procedure [the 'Code'], such a report filed by the police shall be deemed to be a complaint and the police officer by whom such report is made, shall be deemed to be the complainant(Para 3)

When this aspect of the matter was discussed, an attempt was made to suggest that 'since the case was instituted on a complaint, examination of the complainant under the provisions of Section 200 of the Code was necessary before issuing process'. This contention cannot be accepted. What the police officer has laid before the court is a report made by him after investigation and merely because it is declared in the explanation to Section 2(d) of the Code, that it shall be 'deemed' to be a complaint, it does not mean that the police officer is required to be examined on oath under the provisions of Section 200 of the Code before summoning the

accused persons. The instant case would be clearly covered by clause (a) of the proviso to Section 200 of the Code and as such, there would be no necessity of examining the complainant before issuing process.(Para 5)

Held: Para-(7-11)

(1) I do not find that this judgment is applicable to the present case. A reading of the said judgment indicates that in that case, the cognizance was taken by the Magistrate 'as a State case'. There is nothing in the present case, to show that the Magistrate has taken cognizance of the alleged offence as a 'State case', or that he has ignored the explanation to Section 2(d) of the Code. At the cost of repetition, it may be observed that the summoning oder would be passed under Section 204 of the Code only, irrespective of whether the case is one instituted 'on police report' or 'otherwise than on police report'. Ironically, the procedure for trial of cases instituted 'on police report' would be favourable to the accused, - if at all the Magistrate adopts it in this case - as the accused would be entitled to get copies of the statements recorded during investigation as a matter of right, which they would not be entitled to get in a case instituted 'on complaint'. In the later case, they would get only a copy of the complaint-i.e. the report in this case- and will have to make a prayer to the Magistrate, for obtaining copies of the statements recorded during investigation.

(2) Interestingly, the order summoning the accused was passed on 4.2.2014. On 26.2.2014 the petitioner appeared before the Magistrate, applied for bail and were duly granted bail. The case was then adjourned from time to time and was fixed on 6.4.2016 for framing of charge. Thereafter, the case was transferred to another court and when it was taken up on 6.6.2016, as the petitioners were not present before the court, non-bailable warrants of arrest were issued against the petitioners. It appears that thereafter, the petitioners did not remain present before the court and again non-bailable warrants of arrest have been issued. Now, interestingly, the petitioners had not taken any objections to the order issuing process, but had duly obeyed the same by remaining present before the court.The petitioners had shown their readiness to proceed with the trial without raising any contentions about the correctness of the order issuing process. It is only when the nonbailable warrants of arrest were issued, it dawned upon the petitioners that they had been wrongly summoned. The petitioners then imagined that they had been summoned on a 'police report' or 'chargesheet' and not on a 'complaint'. Apart from the fact that there is no basis for this imagination, it is rather interesting that till the non-bailable warrants were issued, they had not bothered about it.

(3) There is no substance in the petition.

(4) When the petition was being rejected, the learned counsel for the petitioners made some submissions with respect to an order issuing non-bailable warrants of arrest against the petitioners. Admittedly, the warrants have been issued because of the nonappearance of the petitioners before the court on a given date. If the contention of the petitioners is that there was justification for their non-appearance before the Magistrate on that date, that justification can be put forth before the Magistrate and a prayer for cancellation of non-bailable warrants of arrest, can be made.

(5) The petition is **rejected**.

Case Law discussed:

1. Ghanshyam Dubey @ Litile & others v. State of U.P. & Anr. — (para 6–7)

(Delivered by Hon'ble Abhay Mahadeo Thipsay, J.)

1. Heard Shri Rajendra Pratap Singh, learned counsel for the petitioners and the learned Additional Government Advocate.

2. The petitioners are the accused in criminal case no.506 of 2016 pending before the Additional Chief Judicial Magistrate, Sultanpur. The allegation against the petitioners is that they have committed an offence punishable under Section 427 of the Indian Penal Code. The petitioners are

aggrieved by the order dated 4.2.2014 passed by the Magistrate whereby cognizance of the alleged offence was taken and the petitioners were summoned to appear before the Magistrate. They have, therefore, approached this court by filing the present petition praying that by invoking the inherent powers of this court, the order taking cognizance of the alleged offence be quashed and set aside.

3. The argument that is advanced by the learned counsel for the petitioners in support of his contention that the order taking cognizance and summoning the petitioners is bad in law is that 'the police have filed a charge-sheet against the petitioners in respect of an offence punishable under Section 427 of the Indian Penal Code, which is non-cognizable' and, therefore, the summoning order based on that 'charge-sheet' is bad in law. He submits that by virtue of the definition of a 'complaint' as given under Section 2(d) of the Code of Criminal Procedure [the 'Code'], such a report filed by the police shall be deemed to be a complaint and the police officer by whom such report is made, shall be deemed to be the complainant.

4. This argument is without any basis apart from being clearly misleading. In the first place, term 'charge-sheet' is not found in the Code of Criminal Procedure at all. It is basically used to denote the police report under Section 173 of the Code disclosing commission of certain offences by some person or persons. The explanation to Section 2(d) of the Code provides that 'a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint'. *Now, no body has said that the report submitted by the police in this case shall* ***not*** *be deemed to be a complaint and, therefore, the argument has to be treated as misleading. The learned counsel for the petitioner simply assumes that the report in the present case is* ***not*** *being treated as a 'complaint' by the Magistrate and is being treated as 'charge-sheet'; and then argues how it cannot be treated as a 'charge-sheet' and how it has to be treated as a complaint*. There is nothing in the summoning order which indicates that the Magistrate is treating the case as if instituted on a police report, by ignoring the provisions of the explanation to Section 2(d) of the Code. Moreover, this aspect cannot be brought into play for challenging the order of summoning the petitioners. The case in hand is to be tried as a summon case and, there is no different standard or different grounds, or different degree of satisfaction prescribed for summoning the accused persons, in cases instituted on police report and cases instituted on complaints, or 'deemed complaints'. The summoning order would be passed under the provisions of Section 204 of the Code in all the cases.

5. When this aspect of the matter was discussed, an attempt was made to suggest that 'since the case was instituted on a complaint, examination of the complainant under the provisions of Section 200 of the Code was necessary before issuing process'. This contention cannot be accepted. What the police officer has laid before the court is a report made by him after investigation and merely because it is declared in the explanation to Section 2(d) of the Code, that it shall be **'deemed'** to be a complaint, it does not mean that the police officer is required to be examined on oath under the provisions of Section 200 of the Code before summoning the accused persons. The instant case would be clearly covered by clause (a) of the proviso to Section 200 of the Code and as such, there would be no necessity of examining the complainant before issuing process.

6. The learned counsel for the petitioners has relied on a decision delivered by a learned Single Judge of this court in the case of Ghanshyam Dubey @ Litile & others v. State of U.P. & Anr.

7. I do not find that this judgment is applicable to the present case. A reading of the said judgment indicates that in that case, the cognizance was taken by the Magistrate 'as a State case'. There is nothing in the present case, to show that the Magistrate has taken cognizance of the alleged offence as a 'State case', or that he has ignored the explanation to Section 2(d) of the Code. At the cost of repetition, it may be observed that the summoning oder would be passed under Section 204 of the Code only, irrespective of whether the case is one instituted 'on police report' or 'otherwise than on police report'. Ironically, the procedure for trial of cases instituted 'on police report' would be favourable to the accused,- if at all the Magistrate adopts it in this case-as the accused would be entitled to get copies of the statements recorded during investigation as a matter of right, which they would not be entitled to get in a case instituted 'on complaint'. In the later case, they would get only a copy of the complaint-i.e. the report in this case- and will have to make a prayer to the Magistrate, for obtaining copies of the statements recorded during investigation.

8. Interestingly, the order summoning the accused was passed on 4.2.2014. On 26.2.2014 the petitioner appeared before the Magistrate, applied for bail and were duly granted bail. The case was then adjourned from time to time and was fixed on 6.4.2016 for framing of charge. Thereafter, the case was transferred to another court and when it was taken up on 6.6.2016, as the petitioners were not present before the court, non-bailable warrants of arrest were issued against the petitioners. It appears that thereafter, the petitioners did not remain present before the court and again non-bailable warrants of arrest have been issued. Now, interestingly, the petitioners had not taken any objections to the order issuing process, but had duly obeyed the same by remaining present before the court.The petitioners had shown their readiness to proceed with the trial without raising any contentions about the correctness of the order issuing process. It is only when the non-bailable warrants of arrest were issued, it dawned upon the petitioners that they had been wrongly summoned. The petitioners then imagined that they had been summoned on a 'police report' or 'charge-sheet' and not on a 'complaint'. Apart from the fact that there is no basis for this imagination, it is rather interesting that till the non-bailable warrants were issued, they had not bothered about it.

9. There is no substance in the petition.

10. When the petition was being rejected, the learned counsel for the petitioners made some submissions with respect to an order issuing non-bailable warrants of arrest against the petitioners. Admittedly, the warrants have been issued because of the non-appearance of the petitioners before the court on a given date. If the contention of the petitioners is that there was justification for their non-appearance before the Magistrate on that date, that justification can be put forth before the Magistrate and a prayer for cancellation of non-bailable warrants of arrest, can be made.

11. The petition is rejected.

(2016) 9 ILRA 1202
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABD 30.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Writ B No.- 2859 Of 2016

Sriram & Ors. ...Petitioners

Versus

Deputy Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioners:
A.K. Rai, S.N. Singh, Vishnu Kumar Singh

Counsel for the Respondents:
C.P. Srivastava, S.C., V.K. Singh

Civil law — Hindu Law—"joint family"—"joint family property"—"self-acquired property"—"presumption"—"burden"—"joint family nucleus"—"nucleus"—"member of joint family"—"property purchased in the name of one member"—"onus shifts"—"coparcenary property"—"sufficient nucleus"—"acquired without the aid of joint family property/fund"—"Khata No. 9"—"mutation"—"name of only Shiv Nandan recorded"—"no evidence"—"partly allowed"—"impugned order set aside"—"orders restored and confirmed".

Sri Singh has confined his relief only in respect to Khata No. 9 and submitted that it was admittedly purchased only in the name of Shiv Nandan though he was member of joint family but there was no evidence to show that the aforesaid property was purchased as joint family property and this is fortified from the fact that in mutation, despite there were two brothers alive at that time, i.e., Shiv Nandan and Gopal, but in the revenue record, name of only Shiv Nandan was recorded. No evidence was adduced by respondents with respect to factum that Khata No. 9 was purchased by Shiv Nandan from the funds of joint family.(Para-2)

Learned counsel for respondents, however, submitted that since Shiv Nandan was admittedly member of a joint family, therefore, presumption lies that Khata No. 9 was purchased by Shiv Nandan from funds of joint family.(Para-3)

Held:(Paras 15-17)
1. In D.S. Lakshmaiah and Anr. Vs. L. Balasubramanyam and Anr. (2003) 10 SCC 310, in para 18 of the judgment the Court, after a retrospect of various earlier decisions, said:
"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available." (emphasis added)

2.Following the above authorities, this Court has already taken the same view Second Appeal No. 336 of 2013 (Harey Krishna Agrawal And Others Vs. Jairaj Krishna (Dead) And Others) and others decided on 30.05.2013, Second Appeal No. 935 of 1995 (Kunj Bihari & Others
2. Vs. Ganga Sahai Pandey & others) decided on 03.07.2013 and First Appeal No. 629 of 2005 (Amar Nath Kapoor And Others. Vs. Krishna Gopal Kapoor And Others) decided on 25.05.2016 and learned counsel for respondents could not persuade this Court to take a different view.

3.In view of above, the writ petition is **partly allowed**. Impugned order dated 30.11.1970 passed by Deputy Director of Consolidation so far as it relates to Khata No. 9 allotting shares to the respondents therein is hereby set aside and orders passed by Assistant Settlement Officer (Consolidation) and Consolidation Officer, so far as they relate to Khata No. 9, are hereby restored and confirmed.

Case Law discussed:
1.Appalaswami v. Suryanarayanamurti and others, AIR 1947 PC 189 — paras 5, 10
2.Srinivas Krishnarao Kango v. Narayan Devji Kango, AIR 1954 SC 379 — para 6
3.Rukhmabai v. Lala Laxminarayan, AIR 1960 SC 335 — para 8
4.Achuthan Nair v. Chinnammu Amma and others, AIR 1966 SC 411 — para 9
5.Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh, (1969) 1 SCC 386 — para 10
6.Baikuntha Nath Paramanik v. Sashi Bhusan Pramanik and others, (1973) 2 SCC 334 — para 11
7.Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe, AIR 1986 SC 79 — para 12
8.Surendra Kumar v. Phoolchand, (1996) 2 SCC 491 — para 13
9.Appasaheb Peerappa Chandgade v. Devendra Peerappa Chandgade, (2007) 1 SCC 521 — para 14
10.D.S. Lakshmaiah and another v. L. Balasubramanyam and another, (2003) 10 SCC 310 —para 15
11.Harey Krishna Agrawal and others v. Jairaj Krishna (Dead) and others, Second Appeal No. 336 of 2013 decided on 30.05.2013 — para 16
12.Kunj Bihari and others v. Ganga Sahai Pandey and others, Second Appeal No. 935 of 1995 decided on 03.07.2013 — para 16
14.Amar Nath Kapoor and others v. Krishna Gopal Kapoor and others, First Appeal No. 629 of 2005 decided on 25.05.2016 — para 16

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

1. Heard Sri Vishnu Kumar Singh, Advocate for petitioner and Sri M.N. Singh, Advocate, for respondent 14 (since deceased and substituted by legal heirs).

2. Sri Singh has confined his relief only in respect to Khata No. 9 and submitted that it was admittedly purchased only in the name of Shiv Nandan though he was member of joint family but there was no evidence to show that the aforesaid property was purchased as joint family property and this is fortified from the fact that in mutation, despite there were two brothers alive at that time, i.e., Shiv Nandan and Gopal, but in the revenue record, name of only Shiv Nandan was recorded. No evidence was adduced by respondents with respect to factum that Khata No. 9 was purchased by Shiv Nandan from the funds of joint family.

3. Learned counsel for respondents, however, submitted that since Shiv Nandan was admittedly member of a joint family, therefore, presumption lies that Khata No. 9 was purchased by Shiv Nandan from funds of joint family.

4. However, I find no force in the submission inasmuch there is no such presumption in law.

5. In **Appalaswami Vs. Suryanarayanamurti and Ors., AIR 1947 PC 189,** it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that fact. But where it is established that the family possessed some joint property which, from its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition, to establish affirmatively that the property was acquired without the aid of joint family property/fund.

6. Again in **Srinivas Krishnarao Kango Vs. Narayan Devji Kango AIR 1954 SC 379**, it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property.

7. The legal proposition which emerges therefrom is that initial burden is on the person who claims that it is joint family property but after initial burden is discharged, the burden shifts to the party claiming that the property was self acquired and without the aid of joint family property/fund.

8. In **Rukhmabai Vs. Lala Laxminarayan AIR 1960 SC 335**, the Court said:

"There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need. not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis- a-vis the family property, A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. ***But there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property.*** *The burden lies upon the person who asserts that a particular property is joint family property. to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired,*

the burden shifts to the member of the family setting up the claim that it is his personal property…" (emphasis added)

9. In **Achuthan Nair v. Chinnammu Amma and Ors. AIR 1966 SC 411**, their Lordships said:

"Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law."

10. In **Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh (1969) 1 SCC 386,** the Court noticed the observation of Sir John Beaumont in Appalaswami **(supra)** and reiterated that burden of proving that any particular property is joint family property, in the first instance, is, upon the person who claims it as coparcenary property. But, if possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of joint family is presumed to be joint family property. This is however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

11. In **Baikuntha Nath Paramanik Vs. Sashi Bhusan Pramanik and Ors. (1973) 2 SCC 334**, this Court again held, when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisitions standing in the names of the person who were in the management of the family properties, are family acquisitions.

12. In **Bhagwant P. Sulakhe Vs. Digambar Gopal Sulakhe AIR 1986 SC 79,** the Court observed that character of any joint family property does not change with the severance of status of joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of joint family to convert any joint family property into his personal property.

13. In **Surendra Kumar Vs. Phoolchand (1996) 2 SCC 491**, the Court said:

"It is no doubt true that there is no presumption that a family because it is joint possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired. But such a presumption is a presumption of fact which can be rebutted."

14. In **Appasaheb Peerappa Chandgade Vs. Devendra Peerappa Chandgade (2007) 1 SCC 521**, the Court said:

"... there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family property and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence."

15. **In D.S. Lakshmaiah and Anr. Vs. L. Balasubramanyam and Anr. (2003) 10 SCC 310**, in para 18 of the judgment the Court, after a retrospect of various earlier decisions, said:

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property*. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available." (emphasis added)*

16. Following the above authorities, this Court has already taken the same view **Second Appeal No. 336 of 2013 (Harey Krishna Agrawal And Others Vs. Jairaj Krishna (Dead) And Others) and others** decided on 30.05.2013, **Second Appeal No. 935 of 1995 (Kunj Bihari & Others Vs. Ganga Sahai Pandey & others)** decided on 03.07.2013 and **First Appeal No. 629 of 2005 (Amar Nath Kapoor And Others. Vs. Krishna Gopal Kapoor And Others)** decided on 25.05.2016 and learned counsel for respondents could not persuade this Court to take a different view.

17. In view of above, the writ petition is partly allowed. Impugned order dated 30.11.1970 passed by Deputy Director of Consolidation so far as it relates to Khata No. 9 allotting shares to the respondents therein is hereby set aside and orders passed by Assistant Settlement Officer (Consolidation) and Consolidation Officer, so far as they relate to Khata No. 9, are hereby restored and confirmed.

(2016) 9 ILRA 1207
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 7897 Of 2009
&
Connected with Other Matters

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

Counsel for the Petitioner:
K.M. Mishra, H.R. Misra

Counsel for the Respondents:
C.S.C., A.S. Rana.

Land Acquisition—Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965—Section 49—modify—annul—scheme—vested in the State—possession of acquired land—fraud—misrepresentation—recall/revoke/cancel—no power of review—administrative power—once land is vested—could not have been divested—reverted to erstwhile owners—notification dated 28.1.2009—notification dated 7.2.2009—urgency—public purpose—all three writ petitions lack merits and are dismissed

Since all these writ petitions relate to same scheme notified by Uttar Pradesh Avas Evam Vikas Parishad (hereinafter referred to as "UPAEVP") and relate to land acquired under same acquisition notifications dated 2.8.1997 and 4.12.1997, hence have been heard together and are being decided by this common judgment.(Para 2)

Held:(Paras 38-43)
1.Counsel for petitioners have referred to a number of authorities on the question that quasi-judicial or judicial power in absence of any provision for review would not be permissible. Aforesaid authorities relied on behalf of learned counsel for petitioners are Patel Narshi Thakershi and others vs. Shri Pradyumansinghji Arjunsinghji 1971(3) SCC 844;State of Bihar vs. D.N. Ganguly & others AIR 1958 SC 1018;Raghunath Thaku r vs. State of Bihar and others (1989) 1 SCC 229;State of Kerala and others vs. K.G. Madhavan Pillai and others (1988) 4 SCC 669;H.C. Suman and another vs. Rehabilitation Ministry Employees' Cooperative House Building Society Ltd., New Delhi and others (1991) 4 SCC 485; Indian National Congress(I) vs. Institute of Social Welfare 2002 AIR(SC)
2158; Mansoor Khan and others vs. State of U.P. and others (1973) 2 SCC 227 and Harbhajan Singh vs. Karam Singh and others AIR 1966 SC 641.

2.We have examined said authorities and have no quarrel with exposition of law laid down, rather it is binding on us. We find that such proposition has no application in case in hand. Firstly, as we have already

said, earlier notification dated 28.1.2009 was result of fraud and misrepresentation, hence did not prevent State Government from cancelling the same and secondly power of modification or annulling a scheme under Section 49 is not a quasijudicial power but an administrative power.

3.We may also notice here that as judgment of this Court dated 11.5.2004 did prevail after dismissal by Supreme Court and it has been admitted by Dheeraj Singh in writ-C No.7897 of 2009, still these facts have not been brought before State Government as a result thereof notification dated 28.1.2009 got issued and the same now has rightly been revoked/cancelled.

4.We, therefore, find no legal or factual infirmity in notification dated 7.2.2009. Land in khasra no. 254 area 2.730 Hectare once vested in the State, could not have been divested or reverted to erstwhile owners and hence relief otherwise sought by petitioners cannot be granted.**All three writ petitions lack merits and are dismissed**. However, there shall be no order as to costs

Case Law discussed:

1.Patharoo v. U.P. Avas Evam Vikas Parishad, 2002 (5) AWC 3665 — para 10
2.Ram Jeevan v. Secretary, U.P. Avas Evam Vikas Parishad, Writ Petition No. 13786 of 2002 decided on 15.03.2004 — para 10
3.Kaloo Ram v. State of U.P., Writ Petition No. 27317 of 2001 decided on 05.03.2004 — para 10
4.U.P. Avas Evam Vikas Parishad v. Friends Cooperative Society Ltd., AIR 1996 SC 114 — para 10
5.U.P. Avas Evam Vikas Parishad v. Ram Kishan, AIR 2002 SC 1056 — para 10
6.Sarva Hitkari Sahkari Avas Samiti Ltd. v. State of U.P., Writ Petition No. 23552 of 1999 decided on 05.03.2004 — para 10
7.State of U.P. v. Pista Devi, AIR 1986 SC 2025 — para 10
8.S.P. Chengalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by LRs. and others, (1994) 1 SCC 1 — para 22
9.United India Insurance Co. Ltd. v. Rajendra Singh and others, (2000) 3 SCC 581 — para 23
10.Shamsuddin and others v. Addl. District Judge, Azamgarh, Civil Misc. Writ Petition No. 14824 of 1990 decided on 31.10.2011 — para 24
11.Lt. Governor of Himachal Pradesh and another v. Sri Avinash Sharma, (1970) 2 SCC 149— para 26
12.Laxmi Devi v. State of Bihar and others, (2015) 10 SCC 241 — para 27
13.Vibhuti Singh Yadav and another v. State of U.P. and others, Writ-C No. 5895 of 2010 decided on 04.05.2016 — para 37
14.Patel Narshi Thakershi and others v. Shri Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844 — para 38
15.State of Bihar v. D.N. Ganguly and others, AIR 1958 SC 1018 — para 38
16.Raghunath Thakur v. State of Bihar and others, (1989) 1 SCC 229 — para 38
17.State of Kerala and others v. K.G. Madhavan Pillai and others, (1988) 4 SCC 669 — para 38
18.H.C. Suman and another v. Rehabilitation Ministry Employees' Cooperative House Building Society Ltd., New Delhi and others, (1991) 4 SCC 485 — para 38
19.Indian National Congress (I) v. Institute of Social Welfare, AIR 2002 SC 2158 — para 38
20.Mansoor Khan and others v. State of U.P. and others, (1973) 2 SCC 227 — para 38
21.Harbhajan Singh v. Karam Singh and others, AIR 1966 SC 641 — para 38

(Delivered by Honble Sudhir Agarwal, J.)

1. Heard Sri H.R. Misra, learned Senior Advocate assisted by Sri K.M. Mishra and Sri Nikhil Agarwal, learned counsel for petitioner in Writ-C No. 7897 of 2009, Sri Ajay Kumar Sharma, learned counsel for petitioners in Writ-C No. 26519 of 2009, Sri Saiful Islam Siddiqui,

learned counsel for petitioner in Writ-C No. 8360 of 2009, learned Standing Counsel for State of U.P. and Sri Madan Mohan, learned counsel for Uttar Pradesh Avas Evam Vikas Parishad.

2. Since all these writ petitions relate to same scheme notified by Uttar Pradesh Avas Evam Vikas Parishad (hereinafter referred to as "UPAEVP") and relate to land acquired under same acquisition notifications dated 2.8.1997 and 4.12.1997, hence have been heard together and are being decided by this common judgment.

3. First of all, we proceed to deal with writ petition no. 7897 of 2009. Petitioner Dheeraj Singh has filed this writ petition under Article 226 of Constitution of India, assailing Notification dated 7.2.2009 issued by State Government cancelling its earlier Notification dated 28.1.2009 in respect of Khasra no. 254 area 2.730 Hectare situated at Village Nawikala, District Saharanpur. Aforesaid land was denotified by Notification dated 28.1.2009 but by means of impugned notification dated 7.2.2009 earlier notification dated 28.1.2009 has been cancelled/revoked.

4. Facts giving rise to present dispute are as under:-

5. UPAEVP proposed and approved a Housing and Improvement Scheme namely, "Delhi-Road Land Development and Residential Scheme No.8 Saharanpur." A notification dated 17.7.1997 under Section 28 of Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965(hereinafter referred to as "UP Act, 1965) was published in U.P. Gazette dated 2.8.1997, inviting objections from concerned land owners whose land was proposed to be acquired. Individual notices were also issued to all concerned land owners. Pursuant thereto, various persons filed objections. They were heard on 11th and 12th of December, 1997 before Planning Committee who submitted a report. Since acquisition of land was urgent, UPAEVP got another notification dated 11.11.1999 published in the Gazette dated 4.12.1999 under Section 32(1) of UP Act, 1965 stating that U.P. Government has sanctioned scheme in exercise of power under Section 31(2) of UP Act, 1965. State Government also issued notice dated 4.1.2000 referring to notification issued under Section 32(1) and in exercise of power under Section 17(1) authorised Collector, Saharanpur to take possession of acquired land within 15 days from the date of notice under Section 9 of Land Acquisition Act, 1894(hereinafter referred to as "Act, 1894").

6. State Government also issued order dated 25.1.2000 authorising Collector under Section 7 of Act, 1894 to take order for acquisition of land. Individual notices under Section 9 of Act, 1894 to all recorded tenure holders were issued on 9.11.2001 and thereafter vide possession memo dated 24.4.2002 possession of acquired land was taken which included disputed land also i.e. khasra no. 254 area 2.730 Hectare.

7. We may point out that khasra no. 254 was mentioned as 254/1 though area was mentioned as 2.730 Hectare which is the area of disputed land. Hence no substantial difference has been shown for mention of khasra no. 254/1 instead of khasra no. 254.

8. Earlier Petitioner Dheeraj Singh alongwith 54 others filed Civil Misc. Writ Petition No. 17094 of 2002 wherein an interim order dated 25.4,2002 was passed that petitioners shall not be dispossessed from the land, if they are still in possession.

9. UPAEVP contested aforesaid writ petition and filed a detailed counter affidavit in which all aforesaid facts were stated and we have also taken aforesaid facts from the record of writ petition no. 17094 of 2002.

10. Matter was heard by this Court and vide judgment dated 11.5.2004 above writ petition was dismissed. Relevant finding recorded by Court, necessary for our consideration is reproduced as under:-

"On the facts of the case we find no merit in this petition. The facts of the case have already been stated above. The land was acquired after due notification under Section 28 and 32 of the U.P. Avas Evam Vikas Parishad Adhiniyam and notices were issued to the landholders including the petitioners inviting objections and the objections were duly considered by the Niyojan Samiti which was delegated power under Section 12 read with Rules of 1968. The State Government vide notification dated 11.11.1999 sanctioned the scheme and thereafter the notification under Section 32 was issued on 4.12.1999. Notice for possession under Section 9 was given on 9.11.2001 and the possession of the land was taken on 24.4.2002 vide possession memo Annexure C.A. 8. The Parishad has deposited the estimated compensation vide Annexure C.A.9.

As regards the contention that in view of Section 11-A of the Land Acquisition Act the acquisition proceedings have lapsed it is now well settled that Section 11 A does not apply to proceedings under the U.P. Avas Evam Vikas Parishad Adhiniyam vide Patharoo vs. U.P. Avas Evam Vikas Parishad, 2002(5) AWC 3665 which has been followed by a Division Bench of this Court in writ petition no. 13786 of 2002, Ram Jeevan vs. Secretary, U.P. Avas Evam Vikas Parishad decided on 15.3.2004. In the said decisions it has been held that the Adhiniyam is a self contained code in itself and therefore the amended provisions of the Land Acquisition Act are not applicable. Moreover, even otherwise Section 11-A does not apply because possession has been taken by the respondents as per possession memo dated 24.4.2002 (Annexure C.A.8) vide Kaloo Ram vs. State of U.P., writ petition no. 27317 of 2001 decided on 5.3.2004. In Kaloo Ram's case(supra) it was also held (following several Supreme Court decisions) that urgency is a matter for the subjective satisfaction of the government.

As regards the submission that the Parishad is not competent to acquire the land within the notified are of Saharanpur Development Authority without the prior permission of the State Government, in our opinion there is no merit in this submission. In fact the State Government granted sanction on 11.11.1999. This point is covered against the petitioner by the decision of the Supreme Court in U.P. Avas Evam Vikas Parishad vs. Friends Cooperative Society Ltd, AIR 1996 SC 114 and U.P. Avas Evam Vikas Parishad vs. Ram Kishan, AIR 2002 SC 1056. It has been held therein that the approval of the scheme by the State Government at any stage is sufficient and that

prior approval is not necessary and once approval is granted all previous acts and actions get validated.

It has been repeatedly held by the Supreme Court and this Court that acquisition for housing purpose is an urgent matter and is for a public purpose vide Sarva Hitkari Sahkari Avas Samiti Ltd. vs. State of U.P., writ petition no. 23552 of 1999 decided on 5.3.2004, State of U.P. v. Pista Devi, AIR 1986 S.C. 2025, etc.

Thus there is no force in this writ petition and it is dismissed."

11. The aforesaid acquisition notifications of UPAEVP were also challenged in Civil Misc. Writ Petition No. 14230 of 2002 filed by four land owners namely, Shiv Kumar son of Atar Singh, Ashok Kumar son of Sri Girwar Singh, Ashok Kumar son of Krishan Lal Kapil and Rajeev Kumar son of Raj Pal Singh. This writ petition was also dismissed in terms of judgment dated 11.5.2004 passed in Civil Misc. Writ Petition No. 17094 of 2002.

12. We may notice here that in Writ-C No. 26519 of 2009 there are three petitioners Bhanwar Singh, Mahendra Singh and Pahal Singh and they were also party in Civil Misc. Writ Petition No. 17094 of 2002 impleaded as petitioners 19,20 and 21. Similarly, in third petition namely, Writ-C No. 8360 of 2009 with which we are concerned here, filed by Shesh Raj Singh, he was also impleaded as petitioner No. 4 in Civil Misc. Writ Petition No. 17094 of 2002.

13. Thus, all these petitioners in three writ petitions, with which we are concerned, are those who earlier challenged acquisition notifications before this Court but failed. They are all co-sharers in khasra no. 254 area 2.730 Hectare.

14. After having lost their challenge to acquisition proceedings, these petitioners, it appears, made representations to State Government for exempting land of khasra no. 254 area 2.730 Hectare. Representation made by Dheeraj Singh addressed to the Chief Minister is dated 12.9.2004 while representation made by Shesh Raj Singh is undated, copy whereof is annexed as annexure 8 to Writ-C No. 8360 of 2009.

15. Government sought report from Collector, Saharanpur. One Dr. Abha Gupta, Additional Collector(Land Acquisition) Avas, Meerut sent a letter dated 18.1.2005 stating that possession of acquired land was transferred to UPAEVP on 24.4.2002. However, she has further said that Amin has submitted a subsequent report dated 24.12.2004 stating that UPAEVP has not taken possession on the spot of khasra no. 254. Said official stated in her letter dated 18.1.2005 that khasra no. 254 being 'Abadi' ought not to have been included in acquisition notifications. State Government relying on aforesaid letter dated 18.1.2005, issued a notification, in purported exercise of power under Section 49 of UP Act, 1965, and exempted khasra no. 254 (area 2.730 Hectare) from aforesaid scheme.

16. Thereafter UPAEVP woke up and Additional Housing Commissioner(Land) sent a letter dated 16.1.2009 to State Government pointing out that khasra 254 was already taken possession and land had vested in State . Therefore, there was no occasion to exempt it from acquisition under Section 49(1) and even otherwise, if aforesaid land is excluded, it will cause serious hindrance and obstruction in development of acquired land and would also create some other problems. Pursuant to aforesaid facts placed by UPAEVP before State Government, notification dated 7.2.2009 has been issued.

17. Learned counsel for petitioner submitted that petitioner's land was already exempted from acquisition vide notification dated 28.1.2009, hence said exemption could not have been withdrawn by subsequent notification dated 7.2.2009; and that too without any opportunity to petitioners. It is also said that it amounts to review of earlier order which is not permissible since there is no power of review.

18. We find that in representation dated 12.9.2004 (Annexure-7 to the counter affidavit), petitioner Dheraj Singh had not said anything regarding writ petition no. 17094 of 2002. Representation of Shesh Raj Singh is also similarly worded and did not disclose anything about challenge to acquisition proceedings and dismissal of writ petition No. 17094 of 2002 by this Court affirming said acquisition.

19. Even letter dated 18.1.2005 sent by Dr. Abha Gupta, Additional Collector(Land Acquisition), Avas, Meerut is completely silent over judicial proceedings wherein acquisition notifications were challenged and upheld by this Court. She has also failed to notice herself and informed State Government that possession of entire land including khasra 254 measuring 2.730 Hectare was taken in possession on 24.4.2002 and transferred to UPAEVP and this was a stand taken by her which was accepted and thereafter writ petition was decided. She blindly and mechanically followed alleged Amin's report dated 24.12.2004.

20. We find nothing on record to show as to on what basis Amin submitted said report and whether he made spot visit under notice to officials of UPAEVP. From perusal of record what we find is that by playing fraud and misrepresentation in respect to actual state of affairs vis-a-vis disputed acquired land, a coordinated effort in collusion was made by petitioner and some officials as a result whereof State Government was kept in dark and for such misrepresentation, the State was persuaded to pass order under Section 49 of UP Act,1965 to exempt khasra no.254 from acquisition.

21. Submission that there is no power of review and therefore once a land is exempted, State Government could not have revoked such order, has no force for the reason that it is well established that fraud vitiates anything and any order which has been obtained on account of fraud or misrepresentation cannot deprive authorities concerned to recall, revoke or cancel such order even if there is no power of review.

22. In **S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. & Ors. (1994) 1 SCC 1**, the Apex Court had an occasion to consider the doctrine of fraud and the effect thereof on the order obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for

final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. Trial court upheld the contention and dismissed application for final decree. High Court, however, set aside the order of the trial court, observing that "there was no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached the Apex Court. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as 'wholly perverse', the Apex Court observed as under:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax- evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation".

23. In **United India Insurance Co. Ltd. Vs. Rajendra Singh & others (2000) 3 SCC 581** the Apex Court observed as under:

"3. Fraud and justice never dwell together. (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper over al these centuries. Lord Denning observed in a language without equivocation that "no Judgment of a Court, no order of Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything" (Lazarus Estate Ltd. Vs. Beasley 1956 (1)QB.702."

24. This is what has been referred to and followed by this Court in **Civil Misc. Writ Petition No. No. 14824 of 1990 (Shamsuddin and others Vs. Addl. District Judge, Azamgarh)** decided on 31.10.2011.

25. Since here is a case where proceedings with respect to acquisition and possession of land having already completed and land already vested in State, are such facts, which were neither mentioned in alleged representation by petitioners nor by Additional Collector(Land Acquisition), Avas, Meerut in her letter dated 18.1.2005. We find that notification dated 28.1.2009 was passed on account of misrepresentation of facts and also fraud played upon State Government and there was no dearth of power with State Government to recall/revoke/cancel such an order. Notification dated 7.2.2009, therefore, cannot be said to be invalid for that reason.

26. There are two more aspects. As already held, acquisition proceedings were completed and acquired land had vested in the State. Once land is vested, it is impermissible for the State to divest and return the land to land owners from whom it was acquired. This question has been considered in one of the earlier judgments in **LT. Governor of Himachal Pradesh and Another vs. Sri Avinash Sharma 1970(2) SCC 149** where in para 8 Court has said as under:-

"8. ..... It is clearly implicit in the observations that after possession has been taken pursuant to a notification under Section 17(1) the land is vested in the Government, and the notification cannot be cancelled under Section 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers under Section 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken under Section 17(1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification."

27. Very recently this aspect has been considered in **Laxmi Devi vs. State of Bihar and others (2015) 10 SCC 241** and it has been observed in paragraph 20 of judgment "This Court has continuously held that once land has vested in the State, the question of re-vesting its possession in the erstwhile landowners is no longer available as an option to the State." Even Section 48 of Act, 1894 could not have been resorted for reverting land to petitioners.

28. Next aspect is that such exemption under Section 49 of Act, 1965 is also impermissible. Section 49 of Act 1965 reads as under:-

"Power of State Government to call for the records of the Board and to modify or annual any scheme:

(1) Notwithstanding anything contained in the foregoing provisions of this Chapter, the State Government may at any time call for and examine the records of the Board relating to any housing or improvement scheme which is proposed to be or has been framed by the Board or which is being executed by it, and modify, annual or remit for reconsideration to the Board any such scheme or direct that the scheme be executed with such modification as may be specified, or issue such other directions as it may deem fit:

Provided that if any modification involves acquisition, otherwise than by agreement, of any land or building not proposed to be acquired in the original scheme, or if owing to any modifications any land not previously liable under the original scheme to payment of betterment fee becomes liable to such payment, the modification shall not be made without giving an opportunity to the persons so affected of making objections against the proposed modification.

(2) The State Government may stay the execution of any such scheme pending the passing of orders under sub-section (1).

(3) Any modification of a scheme under sub-section (1) shall be notified in the Gazette and shall have effect from the date of such notification, so, however, that any modification shall be without prejudice to the validity of anything previously done under the original scheme."

29. Scheme of Act 1965 shows that U.P.A.E.V.P, amongst its various functions, one function is to frame and execute Housing and Improvement Scheme and other projects. Functions of U.P.A.E.V.P

are detailed in Section 15 of Act 1965. Mode of framing scheme is provided in Section 16 which says that Board may frame scheme, of its motion or at the instance of a local authority but when it is so directed by State Government, shall frame the scheme, meaning thereby that of its motion or at the instance of local authority, U.P.A.E.V.P has a discretion to frame a housing or improvement scheme but when directed by State Government it is an under an obligation to frame the same.

30. When a local authority requires Board to frame and execute housing or improvement scheme, sub Section (2) of Section 16 empowers U.P.A.E.V.P to refuse to frame and execute such scheme if it is satisfied that it is unnecessary or not feasible or that funds at its disposal do not permit such scheme. Constituents of housing or improvement scheme are detailed in Section 18.

31. Once a scheme is framed, for the purpose of its execution, if acquisition of land is necessary, at that stage procedure prescribed under Sections 28 to 32 would come into picture.

32. The effect of notifications under Section 28 read with Section 32 can further be examined in the light of Section 55 read with Schedule. Section 55 reads as under:-

"Power to acquire land- (1) Any land or any interest therein required by the Board for any of the purposes of this Act, may be acquired under the provisions of the Land Acquisition Act, 1984 (Act No. 1 of 1984), as amended in its application to Uttar Pradesh, which for this purpose shall be subject to the modifications specified in the Schedule to this Act.

(2) If any land in respect of which betterment fee has been levied under this Act is subsequently required for any of the purposes of this Act, such levy shall not be deemed to prevent the acquisition of land under the Land Acquisition Act, 1894 (Act No. 1 of 1894)."

33. Clause 2 of Schedule explains effect of notice under Section 28 and 32. Besides other sections, it makes clear with notifications under Section 28 and 32 shall have the same effect as that would have been on issuance of notifications under Section 4(1) and 6 of Act 1894. Clause 2 of Schedule is reproduced as under:-

*"**2. Effect of notices under this Act:-***

*(1) The first publication, in the officeial Gazette, of a notice of any housing or improvement scheme under Section 28 or under clause (a) of sub section (3) of Section 31 of the Act shall be substituted for and have, in relation to any land proposed to be acquired under the scheme, **the same effect as publication in the official Gazette, and in the locality, of a notification under sub-section (1) of Section 4 of the said Act, except where a notificaion under Section 4 or a declaration under Section 6 of the said Act** has prviously been made and is still in force, and the provisions of Secion 5-A of the Said Act shall be inapplicable in the case of such land.*

(2) The issue of a notice under clause (c) of sub-section (3) of Section 23 of this Act in the case of land acquired under a Bhavi Sarak Yojana and the publication of a notification under sub-

section (1) or, or as the ***case may be, under sub-section (4) of Section 32 of this Act in the case of land acquired under any other housing or improvement scheme under this Act shall be*** *substituted for and have the same effect as a declaration by the State Government under section 6 of the Said Act, unless a declaration under the last mentioned Section has previously been made and is still in force.*

(3) In a case to which sub-paragraph (1) or sub-paragraph (2) applied, a notification under sub-section (2) of Section 33 or under sub-section (3) of Section 49 of this Act involving alteration of the extent of the land proposed to be acquired shall have the effect of correspondingly modifying the notification under sub-section (1) of Section 4 and the declaration under Section 6 of the said, Act so, however that any such modification shall be without prejudice to the validity of anything previously done under the original notification or declaration. (emphasis added)

34. Sub-clause (3) of Clause 2 also explains and makes it clear that, an alteration if made by issuing notification under Section 49 (3) which has effect of alteration of the extent of land proposed to be acquired, it will have the effect of correspondingly modifying notifications under sub-section (1) of Section 4 and declaration under Section 6 of Act 1894, but such modification shall be without prejudice to the validity of anything previously done under the original notification or declaration.

35. Reading together the aforesaid provisions it is clear that whatever has already been done in respect to acquisition, that cannot be undone. Further when possession of land is taken by State and transferred to U.P.A.E.V.P, Schedule, clause 4, inserting Section 17A in Act 1894 provides for vesting of land in UPAEVP as is evident from the following.

"17-A. ***Transfer to land to Board****. - In every case referred to in Section 16 or Section 17, the collector shall upon payment of the cost of acquisition make over charge of the land to the Housing Commissioner, or an officer authorized in this behalf under the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965, and the land shall, thereupon vest in the Board subject to the liability fo the Board to pay any further costs which may be incurred on account of its acquisition."*

36. Considering the entire scheme of statute it is clear that a scheme framed and under execution can be modified, annulled and remitted for reconsideration to U.P.A.E.V.P by State but that will not have the effect of re-writing events which have already occurred and if certain interests and rights have transferred from one person to another, the same would not stand nullified. The effect of notification under Section 49 (1) would be, moreover, prospective only and not retrospective. The land once taken and vested in State and the Board, will not stand divested and notification under Section 49 cannot have such effect.

37. Interpreting provisions of UP Act, 1965 as also Section 49 similar controversy has also been examined by this Court in **Writ-C No. 5895 of 2010 Vibhuti Singh Yadav & Another vs. State of U.P. & others decided on 4.5.2016** and there also this Court has taken similar view by observing in paragraphs 24 and 25 as under:-

"24. Learned counsel appearing for respondents could not show any provision or binding authority to this Court to support their stand that once scheme is annulled by issuing notification under Section 49 of Act 1965, all exercise done earlier including vesting of land in State etc. would stand nullified and the land would stand reverted to erstwhile owners.

25. We have no hesitation on observing that once land is vested in State it shall not be divested and reverted to erstwhile owners. Hence right of owners of acquired land to claim compensation under the award already given would subsist and is enforceable in law."

38. Counsel for petitioners have referred to a number of authorities on the question that quasi-judicial or judicial power in absence of any provision for review would not be permissible. Aforesaid authorities relied on behalf of learned counsel for petitioners are **Patel Narshi Thakershi and others vs. Shri Pradyumansinghji Arjunsinghji 1971(3) SCC 844;State of Bihar vs. D.N. Ganguly & others AIR 1958 SC 1018;Raghunath Thakur vs. State of Bihar and others (1989) 1 SCC 229;State of Kerala and others vs. K.G. Madhavan Pillai and others (1988) 4 SCC 669;H.C. Suman and another vs. Rehabilitation Ministry Employees' Cooperative House Building Society Ltd., New Delhi and others (1991) 4 SCC 485; Indian National Congress(I) vs. Institute of Social Welfare 2002 AIR(SC) 2158; Mansoor Khan and others vs. State of U.P. and others (1973) 2 SCC 227 and Harbhajan Singh vs. Karam Singh and others AIR 1966 SC 641.**

39. We have examined said authorities and have no quarrel with exposition of law laid down, rather it is binding on us. We find that such proposition has no application in case in hand. Firstly, as we have already said, earlier notification dated 28.1.2009 was result of fraud and misrepresentation, hence did not prevent State Government from cancelling the same and secondly power of modification or annulling a scheme under Section 49 is not a quasi-judicial power but an administrative power.

40. We may also notice here that as judgment of this Court dated 11.5.2004 did prevail after dismissal by Supreme Court and it has been admitted by Dheeraj Singh in writ-C No.7897 of 2009, still these facts have not been brought before State Government as a result thereof notification dated 28.1.2009 got issued and the same now has rightly been revoked/cancelled.

41. We, therefore, find no legal or factual infirmity in notification dated 7.2.2009. Land in khasra no. 254 area 2.730 Hectare once vested in the State, could not have been divested or reverted to erstwhile owners and hence relief otherwise sought by petitioners cannot be granted.

42. All three writ petitions lack merits and are dismissed.

43. However, there shall be no order as to costs.

(2016) 9 ILRA 1218
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE VIPIN SINHA, J.

Writ C No.- 14756 of 2016
&
Connected With Other Matters

Mohd. Atique & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Akash Khare, Hari Om

Counsel for the Respondents:
C.S.C., Vivek Saran, Madan Mohan

Constitution of India—Article 226—Uttar Pradesh Awas Evam Vikas Parishad—E.W.S. scheme—hire purchase agreement—installments—penal interest—18% per annum—default in payment—demand notices—non-statutory contract—rights and obligations—governed only by the terms of the contract—writ petitions are not maintainable—Government Orders dated 19.11.1994 and 25.3.1995—superseded—liable to pay penal interest—demand notices do not suffer from any error of law—all the writ petitions fail and are dismissed.

In this group of petitions, the petitioners have challenged the demand notices for non-payment of the installment along with interest. For facility, the facts of Writ Petition Nos.45579 of 2010 and 14756 of 2016 are being taken into consideration.(Para 1)

The petitioners contend that they belong to the economically weaker section (E.W.S.) of the society. For settlement of the E.W.S. of the society, the Uttar Pradesh Awas Evam Vikas Parishad launched a scheme known as Bhumi Vikas Evam Grihastha Yojna No.7 in early eighties for allotment of small residential houses to the E.W.S. of the society. The allotments were made over a period of time from 1982 to 1998 and, in this fashion, approximately 2700 persons were given residential accommodation.(Para 2)

Under the scheme, the petitioners applied for allotment of E.W.S. residential houses. The respondents processed the papers and accepted the application of the petitioners and an allotment order was issued. A hire purchase agreement was entered into and possession of the house was given between the period 1982 to 1998. In the allotment letter as well as in the agreement, it was stipulated that the petitioners would be required to pay the installment over a period of 20 years in 240 installments. It was specifically stipulated that in case of late payment, penal interest would be charged @ 18% per annum.(Para 3)

The petitioners defaulted in payment of the installments, as a result demand notices were issued against which the petitioners have filed the present writ petition praying for the quashing of the demand.(Para 4)

The contention of the petitioners is basically that charging of penal interest is illegal, inasmuch as, by circulars dated 19.11.1994 and 25.3.1995 the respondents had waived the imposition of penal interest on late payment of the installments. It was thus contended that no penal interest could be charged.(Para 5)

In Writ Petition No.14756 of 2016, it was further contended that under the Regulations known as Uttar Pradesh Awas Evam Vikas Parishad Bhookhandon Tatha Bhawnon Ke Panjikaran Evam Pradeshan Sambandhi Viniyam, 1979, the allotment of residential accommodation for E.W.S. could only be given to those persons who had an annual income of Rs.8400/- or less and that installment @ Rs.240/- per month was only payable whereas in the allotment order the installment is much more than Rs.240/- per month and if the installment is calculated on a yearly basis, it would be more than Rs.8400/- per annum. It was thus contended that the terms and conditions contained in the allotment order and in the agreement was void and not binding upon the petitioners. It was contended that the protests in this regard was given to the authorities to revise the rate of installments, which was not done and, accordingly, the installments were not paid. The petitioners have also contended that imposition of penal interest was against the circulars issued by the respondents.(Para 6)

Held:(Paras 17-22)

1.The contention of the petitioners, that penal interest was waived by the respondents by circular dated 19.11.1994 and 25.3.1995, is patently misconceived. We find that the said circulars were modified by circular dated 22.7.1996, which provided that additional interest @ 3.5% per annum would be charged in addition to the simple interest. By another circular dated 22.9.1999, the Joint Housing Commissioner further clarified that the circular dated 22.7.1996 superseded the Government Orders dated 19.11.1994 and 25.11.1995 and that the earlier circulars of 1994 and 1995 became non-est.

2.In the light of the aforesaid, we are of the opinion that the contention of the petitioners that no penal interest was payable, is patently erroneous. The petitioners are liable to pay penal interest as per the terms and conditions of the allotment letter and agreement, which is deemed to have been modified by circular dated 27.7.1996.

3.The contention of the petitioners, that the installment and the rate of installment fixed in the allotment letter is in violation of the Regulations of 1979, is patently misconceived and cannot be considered at this belated stage. Admittedly, the petitioners accepted the allotment order and thereafter entered into an agreement and was given possession. Majority of the petitioners have not paid a single paisa since getting possession of the house. The petitioners have violated the terms and conditions of the allotment orders and the agreement with impunity and cannot turn around after 20 years, contending that the conditions so fixed in the allotment letter is violative of the Regulations of 1979.

4.We are of the opinion that once an agreement has been executed, the rights and obligations are governed only by the terms of the contract and not by the Regulations. The authorities cannot be compelled to remedy the breach of contract, if any, in terms of the Regulations. The decisions cited by the learned counsel for the petitioner in Anupam Sari Centre vs. Collector, Padrauna, Laws (All)-1998-1169, Iqbal Naseer Usmani vs. Central Bank of India, 2006 Law Suit (SC)45, Mange Ram and another vs. State of U.P. and others, 2010 Law Suit (All) 660, Mirza Javed Murtaza vs. U.P. Financial Corporation Kanpur, 1983 AIR (All)-0-234, Mahrajwa vs. State of U.P., UPLBEC2013-1-56, Writ Petition No.1933 of 2003 Hraidesh Kumar vs. State of U.P. and others, decided on 14.1.2013 and Corporation Bank vs. D.S. Gowda, 1994-SCC-5-213 are not at all applicable to the facts and circumstances of the case and are clearly distinguishable.

5.In the light of the aforesaid, we do not find any error in the impugned demand notices. The demand notices do not suffer from any error of law.**All the writ petitions fail and are dismissed.**

Case Law discussed:

1.Radha Krishna Agarwal v. State of Bihar, AIR 1977 SC 1496 — para 11

2.Premji Bhai Parmar v. Delhi Development Authority, AIR 1980 SC 738 — para 11
3.DFO v. Vishwanath Tea Company Ltd., AIR 1981 SC 1368 — para 11
4.Bareilly Development Authority v. Ajai Pal Singh, AIR 1989 SC 1076 — para 12
5.Tarun Kumar Chabra v. U.P. Avas Evam Vikash Parishad, Lucknow, 1990 (2) UPLBEC 1330 — para 14
6.Punjab Urban Planning and Development Authority and others v. Raghunath Gupta, (2012) 8 SCC 1997 — para 15
7.Prem Lata v. State of U.P. and another, Writ Petition No. 8916 of 2011 decided on 28.02.2011 — para 16
8.Anupam Sari Centre v. Collector, Padrauna, Laws (All)-1998-1169 — para 20
9.Iqbal Naseer Usmani v. Central Bank of India, 2006 Law Suit (SC) 45 — para 20
10.Mange Ram and another v. State of U.P. and others, 2010 Law Suit (All) 660 — para 20
11.Mirza Javed Murtaza v. U.P. Financial Corporation, Kanpur, AIR 1983 All 234 — para 20
12.Mahrajwa v. State of U.P., UPLBEC 2013-1-56 — para 20
13.Hraidesh Kumar v. State of U.P. and others, Writ Petition No. 1933 of 2003 decided on 14.01.2013 — para 20
14.Corporation Bank v. D.S. Gowda, (1994) 5 SCC 213 — para 20

(Delivered by Hon'ble Tarun Agarwala, J.)

1. In this group of petitions, the petitioners have challenged the demand notices for non-payment of the installment along with interest. For facility, the facts of Writ Petition Nos.45579 of 2010 and 14756 of 2016 are being taken into consideration.

2. The petitioners contend that they belong to the economically weaker section (E.W.S.) of the society. For settlement of the E.W.S. of the society, the Uttar Pradesh Awas Evam Vikas Parishad launched a scheme known as Bhumi Vikas Evam Grihastha Yojna No.7 in early eighties for allotment of small residential houses to the E.W.S. of the society. The allotments were made over a period of time from 1982 to 1998 and, in this fashion, approximately 2700 persons were given residential accommodation.

3. Under the scheme, the petitioners applied for allotment of E.W.S. residential houses. The respondents processed the papers and accepted the application of the petitioners and an allotment order was issued. A hire purchase agreement was entered into and possession of the house was given between the period 1982 to 1998. In the allotment letter as well as in the agreement, it was stipulated that the petitioners would be required to pay the installment over a period of 20 years in 240 installments. It was specifically stipulated that in case of late payment, penal interest would be charged @ 18% per annum.

4. The petitioners defaulted in payment of the installments, as a result demand notices were issued against which the petitioners have filed the present writ petition praying for the quashing of the demand.

5. The contention of the petitioners is basically that charging of penal interest is illegal, inasmuch as, by circulars dated 19.11.1994 and 25.3.1995 the respondents had waived the imposition of penal interest on late payment of the installments. It was thus contended that no penal interest could be charged.

6. In Writ Petition No.14756 of 2016, it was further contended that under the Regulations known as Uttar Pradesh Awas Evam Vikas Parishad Bhookhandon Tatha Bhawnon Ke Panjikaran Evam Pradeshan Sambandhi Viniyam, 1979, the allotment of residential accommodation for E.W.S. could only be given to those persons who had an annual income of Rs.8400/- or less and that installment @ Rs.240/- per month was only payable whereas in the allotment order the installment is much more than Rs.240/- per month and if the installment is calculated on a yearly basis, it would be more than Rs.8400/- per annum. It was thus contended that the terms and conditions contained in the allotment order and in the agreement was void and not binding upon the petitioners. It was contended that the protests in this regard was given to the authorities to revise the rate of installments, which was not done and, accordingly, the installments were not paid. The petitioners have also contended that imposition of penal interest was against the circulars issued by the respondents.

7. We have heard Sri O.P.Singh, the learned Senior Counsel assisted by Sri R.K.Gupta and Sri Hari Om for the petitioners as well as Sri Madan Mohan Chaurasiya, Sri Srikant, Sri Navneet Chandra Tripathi, Sri Anand Prakash Srivastava, Sri Sunil Kumar Misra and Sri Rana, the learned counsel appearing for the U.P.Awas Evam Vikas Parishad.

8. Having heard the learned counsel for the parties, we find that under the allotment letter and the agreement that was entered with U.P. Avas Evam Vikas Parishad for purchasing the houses under the self financing scheme or hire purchase scheme, the petitioners were required to pay the amount as per the installment fixed. It was clearly stipulated that if the installment was not paid within the stipulated period penal interest would be charged @ 18% per annum. It was also indicated that if payments are not made then eviction proceeding could also be initiated.

9. The counter affidavit filed in various petitions reveals an interesting fact. Only a few of the petitioners have paid some installments and the majority of the petitioners have not paid a single installment from the time possession of the residential house was given. Possession has been given between the period 1982 to 1998 and till date installment has not been paid barring a few who have paid the amount as per the interim order of the Court.

10. The demand letters issued by the respondents requiring the petitioners to deposit the price of the house along with interest is as per the terms and conditions of the allotment order of the agreement entered between them. We find that the relationship between the petitioners and the Parishad is governed by a non-statutory contract.

11. There is a line of decisions to the effect that where a contract is entered between the State and the person aggrieved is a non-statutory contract in which case the rights are governed only by the terms of the contract for which no writ could be issued under Article 226 of the Constitution of India nor can the Writ Court compel the authority to remedy the breach of contract, if any, as held by this Court in **Radha Krishna Agarwal vs. State of Bihar, AIR 1977 SC 1496, Premji Bhai Parmar vs. Delhi Development Authority, AIR 1980 SC 738 and DFO vs. Vishwanath Tea Company Ltd., AIR 1981 SC 1368**.

12. In Bareilly Development Authority vs. Ajai Pal Singh, 1989 SC 1076, the Supreme Court held that even if the Bareilly Development Authority had the trappings of a State or came under the category of "other authority" for the purpose of Article 12 of the Constitution while determining the price of the house/flat constructed by it and the rate of monthly installments to be paid, the authority or its agent after entering into the field of ordinary contract acts purely in its executive capacity, which determines the rights and obligations of the parties inter-se. Such relationship between the parties was governed by a non-statutory contract.

13. In the light of the aforesaid, we are of the opinion that the writ petitions are not maintainable.

14. In **Tarun Kumar Chabra vs. U.P. Avas Evam Vikash Parishad, Lucknow, 1990(2)UPLBEC 1330**, a similar controversy arose with the Avas Evam Vikas Parishad with regard to the demand of 18% additional interest for the period of delay in making payment of installment. A Division Bench of this Court held that writ petition was not maintainable since the contract entered between the parties were non-statutory. The said decision is fully applicable in the instant case.

15. In **Punjab Urban Planning and Development Authority and others vs. Raghunath Gupta, 2012 (8) SCC 1997**, the Supreme Court held that once the offer was accepted and a condition was imposed, the authorities are bound by the terms and conditions and are liable to pay interest, including penal interest.

16. In **Writ Petition No.8916 of 2011, Prem Lata vs. State of U.P. and another,** decided on 28.2.2011, relating to the same controversy involved in the present writ petition with regard to allotment of the house under the E.W.S. scheme, the Court declined to interfere in the demand notice holding:-

"The next issue is whether this Court can interfere in the award of penal interest. Penal interest is part of the letter of allotment and terms and conditions by which allotment was done. It is the realm of the original allottee on the one hand and the respondents on the other. In such matters, Court cannot intervene and impose some other conditions to create another contract. The contract, terms and condition under which it was entered, has to be recognized by this Court, unless there is a power in the respondents to waive any amount. If there be any such power, then it is open to the person to apply. At any rate that cannot be subject matter of intervention by this Court."

17. The contention of the petitioners, that penal interest was waived by the respondents by circular dated 19.11.1994 and 25.3.1995, is patently misconceived. We find that the said circulars were modified by circular dated 22.7.1996, which provided that additional interest @ 3.5% per annum would be charged in addition to the simple interest. By another circular dated 22.9.1999, the Joint Housing Commissioner further clarified that the circular dated 22.7.1996 superseded the

Government Orders dated 19.11.1994 and 25.11.1995 and that the earlier circulars of 1994 and 1995 became non-est.

18. In the light of the aforesaid, we are of the opinion that the contention of the petitioners that no penal interest was payable, is patently erroneous. The petitioners are liable to pay penal interest as per the terms and conditions of the allotment letter and agreement, which is deemed to have been modified by circular dated 27.7.1996.

19. The contention of the petitioners, that the installment and the rate of installment fixed in the allotment letter is in violation of the Regulations of 1979, is patently misconceived and cannot be considered at this belated stage. Admittedly, the petitioners accepted the allotment order and thereafter entered into an agreement and was given possession. Majority of the petitioners have not paid a single paisa since getting possession of the house. The petitioners have violated the terms and conditions of the allotment orders and the agreement with impunity and cannot turn around after 20 years, contending that the conditions so fixed in the allotment letter is violative of the Regulations of 1979.

20. We are of the opinion that once an agreement has been executed, the rights and obligations are governed only by the terms of the contract and not by the Regulations. The authorities cannot be compelled to remedy the breach of contract, if any, in terms of the Regulations. The decisions cited by the learned counsel for the petitioner in **Anupam Sari Centre vs. Collector, Padrauna, Laws (All)-1998-11-69, Iqbal Naseer Usmani vs. Central Bank of India, 2006 Law Suit (SC)45, Mange Ram and another vs. State of U.P. and others, 2010 Law Suit (All) 660, Mirza Javed Murtaza vs. U.P. Financial Corporation Kanpur, 1983 AIR (All)-0-234, Mahrajwa vs. State of U.P., UPLBEC-2013-1-56, Writ Petition No.1933 of 2003 Hraidesh Kumar vs. State of U.P. and others, decided on 14.1.2013 and Corporation Bank vs. D.S. Gowda, 1994- SCC-5-213** are not at all applicable to the facts and circumstances of the case and are clearly distinguishable.

21. In the light of the aforesaid, we do not find any error in the impugned demand notices. The demand notices do not suffer from any error of law.

22. All the writ petitions fail and are dismissed.

(2016) 9 ILRA 1224
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2016

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No.- 40903 Of 2016

Smt. Premlata Singh **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Manju Rani Chauhan

Counsel for the Respondents:
C.S.C.

Civil Law U.P.— Zamindari Abolition and Land Reforms Act—Section 229-B—declaratory suit—title suit—U.P. Land Revenue Act—Section 40-A—mutation—right in a holding—competent court—Section 331—Section 143—agricultural land—house exists over plots—municipal tax—jurisdiction of Revenue Court—declaration of rights—bhumidhar—asami—mutation proceedings—maintainability of suit—interlocutory order—revision not maintainable—writ petition devoid of merits and dismissed.

By means of this petition, the petitioner has sought a writ of certiorari for quashing the order dated 9.11.2015, passed by the Sub Divisional Magistraterespondent No. 4. in a suit under Section 229B, filed by respondent No. 5 whereby the parties have been restrained from creating any third party interest in the suit property. (Para 2)

3.A revision, filed against this order, has been dismissed vide order dated 5.7.2016 passed by the Additional Commissioner-respondent No. 3, holding the revision to be not maintainable, being directed against an interlocutory order. It is these two orders, which are impugned in the writ petition.(Para 3)

The factual background of this case briefly stated is as follows:
The dispute between the parties pertains to Plot No. 473 area 0.0021hectare and Plot No. 473M area 0.030 hectare, situated in Village-Kalyanpur Kalan, Tehsil Sadar, District Kanpur Nagar, which was recorded in the name of the petitioner's grand father-in-law, Ram Prasad Singh. The petitioner sought mutation over the land in question relying upon an unregistered Will in her favour alleged to have been executed by the recorded tenure-holder-Ram Prasad Singh. This mutation application was allowed on 20.1.1995 by the Nayab Tehsildar.(Para 4)

5.Against the order of mutation passed in favour of the petitioner, the respondent NO. 5 filed a restoration application, which was allowed on 11.3.2008. Subsequently by order dated 13.11.2009, the respondent No. 5 was ordered to be mutated over the land in place of Ram Prasad Singh.(Para 5)

6.The petitioner filed a restoration application, alongwith a delay condonation application, seeking recall of the order dated 13.11.2009. The petitioner is stated to have filed a revision also against the orders dated 13.11.2009 and 11.3.2008, which was allowed on 18.3.2015. The orders impugned in the revision dated 17.3.2008 and 13.11.2009 was set aside and the order of mutation passed in favour of the petitioner on 20.1.1995 was maintained.(Para 6)

7.Consequential revision, filed by the respondent No. 5, was dismissed by the Board of Revenue on 16.4.2015. Respondent No. 5, preferred a Writ Petition No. 39908 of 2015 before this Court. This Court vide order dated 21.7.2015, disposed of the writ petition on the ground that the petitioner in the said writ petition had an alternative remedy of a suit in view of Section 40A of the Land Revenue Act.(Para 7)

8.The respondent No. 5, thereafter has filed a suit under Section 229-B wherein an ex parte interim order dated 9.11.2015 was granted directing the parties not to create any third party interest in the land in question during the pendency of the suit.(Para 8)

9.The petitioner filed a revision before the Additional Commissioner challenging the interim order aforesaid. This revision has been dismissed vide order dated 5.7.2016. Hence, this writ petition challenging the interim order dated 9.11.2015 and the order dated 5.7.2016 whereby the revision of the petitioner has been disposed of.(Para 9)

Held:(Paras 13-24)

1.Upon a consideration of the submissions made, the first point, which arises for consideration is whether a suit under Section 229B of the UP ZA and LR Act, is a title suit. The contention of learned counsel for the petitioner is that this suit is not a title suit contemplated under Section 40-A of the UP Land Revenue Act. The said Section 40-A is extracted below:

"Section 40-A. Saving as to title suits.- No order passed under Section 33, Section 35, Section 39, Section 40, Section 41 or Section 54 shall bar any suit in a competent Court for relief on the basis of a right in a holding."

2.A bare perusal of this provision reveals that an order of mutation, passed under Section 35 of the UP Land Revenue Act, does not par a suit in a competent court for relief on the basis of a right in a holding.

3.The words 'competent court' are crucial in view of the submissions made and have to be considered in the light of the provisions contained in Section 229-B of the UP ZA and LR Act, which has been invoked by the respondent. The said Section reads as follows"

"Section 229-B. Declaratory suit by person claiming to be an asami of a holding or part thereof.-

Any person claiming to be an asami of a holding orany part thereof, whether exclusively or jointly with any other person, may sue the landholder for a declaration of his rights as asami in such holding or part, as the case may be.

In any suit under sub-section (1) any other personclaiming to hold as asami under the land-holder shall be impleaded as defendant.

The provisions of sub-sections (1) and (2) shallmutatis mutandis apply to a suit by a person claiming to be [bhumidhar] with the amendment that for the word "landholder" the word "the State Government and the [Gaon Sabha] are substituted therein."

4.The quoted provision is for a declaration of the rights of the plaintiff, be it right as an asami or as a bhumidhar in a holding. Since this provision is for declaration of the rights of an individual, it is a title suit and there is no force in the submission of learned counsel for the petitioner that a title suit is necessarily a civil suit. Besides, in view of Section 331 of the UP ZA and LR Act, no court other than a court mentioned in the Column 4 of Schedule-II is entitled to take cognizance of a suit, application or proceeding for a relief, which can be obtained by means of such suit for application. The proviso to this Section is extremely relevant and the same is extracted below:

"Section 331. Cognizance of suits, etc. under this Act.-(1) Except as provided by or under this Act no court than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.
Provided that where a declaration has been made under Section 143 in respect or any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof."

5.At this stage, it would be relevant to note that on a pointed query by the Court, learned counsel for the petitioner has not been able to demonstrate that any declaration, under Section 143 of the Act, has been granted as regards the land in question. It is, therefore, clear that in the absence of a declaration under Section 143, the Revenue Court exercising jurisdiction under Section 229B of the Act, alone is competent to adjudicate upon the title of the parties to the land in question.

6.Besides, a Full Bench of this Court in Irfan Ali vs. Rafiq, 1991 RD 374 has held that in a case, a mutation case is decided against a person, he has two remedies; (i) he can file a revision or (ii) he can file a suit under Section 229B. In the instant case, the respondent No. 5 has filed a suit under Section 229B, which is clearly maintainable. The submissions of learned counsel for the petitioner, to the contrary, are without substance and are hereby repelled.

7.The second contention that a house exists over the plots in question assessed to municipal tax, which tax is being paid, therefore, the Civil Court alone would have jurisdiction, is also without substance.

8.There is no material on record to show that the entire area of the two plots in question is covered by a house. It is quite possible that only a portion of the land is covered by a house. It has been held by this Court in Deena Nath Verma Vs. Gokaran and others, 2002 (5) AWC 4109, that even if certain constructions exist on agricultural land, it will not cease to be 'land' unless a declaration has been made under Section 143 of the Act. As noticed herein above, no declaration under Section 143 has been granted as regards the plots in question and, therefore, the land continues to be agricultural land and amenable to the jurisdiction to the Revenue Court under Section 229B of the UP ZA and LR Act. Hence, even the second contention of learned counsel for the petitioner cannot be accepted.

9.There is yet another aspect of the matter. It is not in dispute that the petitioner has herself been mutated over the plots in question in proceedings under Section 34 of the UP Land Revenue Act. It is, therefore, admittedly agricultural land over which the provisions of UP Land Revenue Act were applicable. In case, the argument of learned counsel for the petitioner is accepted even the UP Land Revenue Act would not be applicable in the land and, therefore, the mutation orders, passed in her favour, would also be without jurisdiction.

10.It is further relevant to record that learned counsel for the petitioner has placed reliance upon the following three judgements in support of her contentions:
Gandabhai Dalpatbhai Patel vs. State of
Gujarat, 2004 LawSuit (Guj) 522;
State of Gujarat vs. Patel Raghav Natha,1969 AIR SC 187;Ramji Gupta and another vs. Gopi KrishanAgrawal (D) and others 2013 (3) AWC 2782.

11.The first two case cited, pertain to Bombay Land Revenue Code, 1887, which is not applicable in the instant case and, therefore, these two judgements are wholly irrelevant. The third judgement cited, namely, Ramji Gupta and another (supra) pertains to the Provincial Small Causes Courts Act, 1887 and Section 23

thereof, which provide that a Court of Small Causes cannot determine a question of title and in case, an issue of title arises, the Court may at any stage of the proceedings return the plaint to be presented to a court having jurisdiction to determine title. Even the Provincial Small Causes Courts Act, 1887, is not attracted to the instant case. Even this judgment, therefore, is irrelevant as regards the controversy involved in the instant case.In view of the above discussion, the writ petition is devoid of merits and is, accordingly, **dismissed**.

Case Law discussed:
1.Irfan Ali v. Rafiq, 1991 RD 374 — para 18
2.Deena Nath Verma v. Gokaran and others, 2002 (5) AWC 4109 — para 20
3.Gandabhai Dalpatbhai Patel v. State of Gujarat, 2004 LawSuit (Guj) 522 — para 22
4.State of Gujarat v. Patel Raghav Natha, AIR 1969 SC 187 — para 22
5.Ramji Gupta and another v. Gopi Krishan Agrawal (D) and others, 2013 (3) AWC 2782 — para 22

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Smt. Manju Rani Chauhan, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. By means of this petition, the petitioner has sought a writ of certiorari for quashing the order dated 9.11.2015, passed by the Sub Divisional Magistrate-respondent No. 4. in a suit under Section 229B, filed by respondent No. 5 whereby the parties have been restrained from creating any third party interest in the suit property.

3. A revision, filed against this order, has been dismissed vide order dated 5.7.2016 passed by the Additional Commissioner-respondent No. 3, holding the revision to be not maintainable, being directed against an interlocutory order. It is these two orders, which are impugned in the writ petition.

4. The factual background of this case briefly stated is as follows:

5. The dispute between the parties pertains to Plot No. 473 area 0.0021hectare and Plot No. 473M area 0.030 hectare, situated in Village-Kalyanpur Kalan, Tehsil Sadar, District Kanpur Nagar, which was recorded in the name of the petitioner's grand father-in-law, Ram Prasad Singh. The petitioner sought mutation over the land in question relying upon an unregistered Will in her favour alleged to have been executed by the recorded tenure-holder-Ram Prasad Singh. This mutation application was allowed on 20.1.1995 by the Nayab Tehsildar.

6. Against the order of mutation passed in favour of the petitioner, the respondent NO. 5 filed a restoration application, which was allowed on 11.3.2008. Subsequently by order dated 13.11.2009, the respondent No. 5 was ordered to be mutated over the land in place of Ram Prasad Singh.

7. The petitioner filed a restoration application, alongwith a delay condonation application, seeking recall of the order dated 13.11.2009. The petitioner is stated to have filed a revision also against the orders dated 13.11.2009 and 11.3.2008, which was allowed on 18.3.2015. The orders impugned in the revision

dated 17.3.2008 and 13.11.2009 was set aside and the order of mutation passed in favour of the petitioner on 20.1.1995 was maintained.

8. Consequential revision, filed by the respondent No. 5, was dismissed by the Board of Revenue on 16.4.2015. Respondent No. 5, preferred a Writ Petition No. 39908 of 2015 before this Court. This Court vide order dated 21.7.2015, disposed of the writ petition on the ground that the petitioner in the said writ petition had an alternative remedy of a suit in view of Section 40A of the Land Revenue Act.

9. The respondent No. 5, thereafter has filed a suit under Section 229-B wherein an ex parte interim order dated 9.11.2015 was granted directing the parties not to create any third party interest in the land in question during the pendency of the suit.

10. The petitioner filed a revision before the Additional Commissioner challenging the interim order aforesaid. This revision has been dismissed vide order dated 5.7.2016. Hence, this writ petition challenging the interim order dated 9.11.2015 and the order dated 5.7.2016 whereby the revision of the petitioner has been disposed of.

11. The contention of learned counsel for the petitioner is that the suit under Section 229B filed by the respondent No. 5 is not maintainable in view of Section 40A of the UP Land Revenue Act. It is submitted that the word 'suit', used in the said Section 40A, necessarily refers to a civil suit. The Revenue Court exercising jurisdiction under Section 229B of the UP Zamindari Abolition and Land Reforms Act grants a declaration and the same is not a title suit. The respondent No. 5 could, therefore, have filed and maintained only a civil suit and the courts below have committed illegality and have acted beyond jurisdiction in entertaining the suit and granting an interim order therein.

12. It is further contended that a residential house exists, over the plots in question. The petitioner is paying house-tax and, therefore, the plots are not land within the meaning of the word in the UP ZA and LR Act. Therefore, also the suit filed by the respondent No. 5 is not maintainable.

13. I have considered the submissions made by learned counsel for the petitioner and have perused the record.

14. Upon a consideration of the submissions made, the first point, which arises for consideration is whether a suit under Section 229B of the UP ZA and LR Act, is a title suit. The contention of learned counsel for the petitioner is that this suit is not a title suit contemplated under Section 40-A of the UP Land Revenue Act. The said Section 40-A is extracted below:

"Section 40-A. Saving as to title suits.- No order passed under Section 33, Section 35, Section 39, Section 40, Section 41 or Section 54 shall bar any suit in a competent Court for relief on the basis of a right in a holding."

15. A bare perusal of this provision reveals that an order of mutation, passed under Section 35 of the UP Land Revenue Act, does not par a suit in a competent court for relief on the basis of a right in a holding.

16. The words 'competent court' are crucial in view of the submissions made and have to be considered in the light of the provisions contained in Section 229-B of the UP ZA and LR Act, which has been invoked by the respondent. The said Section reads as follows"

*"**Section 229-B. Declaratory suit by person claiming to be an asami of a holding or part thereof.**-*

(1) Any person claiming to be an asami of a holding or any part thereof, whether exclusively or jointly with any other person, may sue the landholder for a declaration of his rights as asami in such holding or part, as the case may be.

(2) In any suit under sub-section (1) any other person claiming to hold as asami under the land-holder shall be impleaded as defendant.

(3) The provisions of sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a person claiming to be [bhumidhar] with the amendment that for the word "landholder" the word "the State Government and the [Gaon Sabha] are substituted therein."

17. The quoted provision is for a declaration of the rights of the plaintiff, be it right as an asami or as a bhumidhar in a holding. Since this provision is for declaration of the rights of an individual, it is a title suit and there is no force in the submission of learned counsel for the petitioner that a title suit is necessarily a civil suit. Besides, in view of Section 331 of the UP ZA and LR Act, no court other than a court mentioned in the Column 4 of Schedule-II is entitled to take cognizance of a suit, application or proceeding for a relief, which can be obtained by means of such suit for application. The proviso to this Section is extremely relevant and the same is extracted below:

*"**Section 331. Cognizance of suits, etc. under this Act.**-(1) Except as provided by or under this Act no court than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.*

Provided that where a declaration has been made under Section 143 in respect or any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof."

18. At this stage, it would be relevant to note that on a pointed query by the Court, learned counsel for the petitioner has not been able to demonstrate that any declaration, under Section 143 of the Act, has been granted as regards the land in question. It is, therefore, clear that in the absence of a declaration under Section 143, the Revenue Court exercising jurisdiction under Section 229B of the Act, alone is competent to adjudicate upon the title of the parties to the land in question.

19. Besides, a Full Bench of this Court in ***Irfan Ali vs. Rafiq, 1991 RD 374*** has held that in a case, a mutation case is decided against a person, he has two remedies; (i) he can file a revision or (ii) he can file a suit under Section 229B. In the instant case, the respondent No. 5 has filed a suit under Section 229B, which

is clearly maintainable. The submissions of learned counsel for the petitioner, to the contrary, are without substance and are hereby repelled.

20. The second contention that a house exists over the plots in question assessed to municipal tax, which tax is being paid, therefore, the Civil Court alone would have jurisdiction, is also without substance.

21. There is no material on record to show that the entire area of the two plots in question is covered by a house. It is quite possible that only a portion of the land is covered by a house. It has been held by this Court in ***Deena Nath Verma Vs. Gokaran and others, 2002 (5) AWC 4109***, that even if certain constructions exist on agricultural land, it will not cease to be 'land' unless a declaration has been made under Section 143 of the Act. As noticed herein above, no declaration under Section 143 has been granted as regards the plots in question and, therefore, the land continues to be agricultural land and amenable to the jurisdiction to the Revenue Court under Section 229B of the UP ZA and LR Act. Hence, even the second contention of learned counsel for the petitioner cannot be accepted.

22. There is yet another aspect of the matter. It is not in dispute that the petitioner has herself been mutated over the plots in question in proceedings under Section 34 of the UP Land Revenue Act. It is, therefore, admittedly agricultural land over which the provisions of UP Land Revenue Act were applicable. In case, the argument of learned counsel for the petitioner is accepted even the UP Land Revenue Act would not be applicable in the land and, therefore, the mutation orders, passed in her favour, would also be without jurisdiction.

23. It is further relevant to record that learned counsel for the petitioner has placed reliance upon the following three judgements in support of her contentions:

(i) Gandabhai Dalpatbhai Patel vs. State of Gujarat, 2004 LawSuit (Guj) 522;
(ii) State of Gujarat vs. Patel Raghav Natha, 1969 AIR SC 187;
(iii) Ramji Gupta and another vs. Gopi Krishan Agrawal (D) and others 2013 (3) AWC 2782.

24. The first two case cited, pertain to Bombay Land Revenue Code, 1887, which is not applicable in the instant case and, therefore, these two judgements are wholly irrelevant. The third judgement cited, namely, Ramji Gupta and another (supra) pertains to the Provincial Small Causes Courts Act, 1887 and Section 23 thereof, which provide that a Court of Small Causes cannot determine a question of title and in case, an issue of title arises, the Court may at any stage of the proceedings return the plaint to be presented to a court having jurisdiction to determine title. Even the Provincial Small Causes Courts Act, 1887, is not attracted to the instant case. Even this judgment, therefore, is irrelevant as regards the controversy involved in the instant case.

25. In view of the above discussion, the writ petition is devoid of merits and is, accordingly, **dismissed**.

(2016) 9 ILRA 1231
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2016

BEFORE

THE HON'BLE RAN VIJAI SINGH, J.

Writ C No.- 44164 of 2016

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

Counsel for the Petitioner:
Syed Wajid Ali, Santosh Kumar Singh

Counsel for the Respondents:
C.S.C., Amresh Singh

Civil Law — Fair Price Shop Agent—gaon sabha—open meeting—resolution—Government Order dated 3.7.1990—Para 4.4—Para 4.12—special case—complaint—inquiry—Sub-Divisional Officer—Block Development Officer—supervisor—Village Pradhan—ex parte inquiry—Naib Tehsildar—opportunity of hearing—cancellation of resolution—principles of natural justice—impugned order vitiated—writ petition succeeds and is allowed—impugned order quashed.

Through this writ petition, prayer has been made to issue a writ of certiorari quashing the order dated 3.9.2016 passed by the SubDivisional Officer, Baheri, District Bareilly by which the SubDivisional has cancelled the earlier resolution of the gaon sabha dated 13.5.2016 and directed the Block Development Officer to get a fresh resolution passed in the open meeting for appointment of fair price shop agent.(Para 2)

3.While assailing the impugned order, learned counsel for the petitioner submits that the impugned order is patently illegal and without application of mind. In the submissions of learned counsel for the petitioner, earlier resolution dated 13.5.2016 was passed in favour of the petitioner in the open meeting of the gaon sabha in presence of the supervisor appointed by the Block Development Officer pursuant to the order of the Subdivisional Officer and it is in his presence, the open meeting of the gaon sabha was held and a C.D. was prepared. Thereafter the Block Development officer has forwarded the paper for appropriate order before the SubDivisional Officer/Committee headed by him, therefore there was no occasion to reinquire the matter on the basis of the frivolous complaint of a third person without having version of the Block Development Officer who has forwarded the resolution, the village pradhan, and the supervisor appointed by the Block Development officer in whose presence resolution was passed and C.D. was prepared.(Para 3)

Held:(Paras 10-13)
1.I have gone through the impugned order. I do not find that after receipt of the complaint of the respondent no. 5, the SubDivisional Officer/Committee headed by him has applied its mind with regard to genuineness of the complaint and after testing the merit of the complaint has directed for holding the inquiry.

2.For the sake of arguments even if it is assumed that this was done as the case is being decided in absence of the counter affidavit in that case too, once the Block Development officer has been entrusted by the SubDivisional Officer to get a resolution passed and the Block Development Officer has appointed a supervisor for getting the resolution passed and the resolution was passed in the presence of supervisor as well as of the Pradhan of the concerned village and the same has been forwarded/recommended by the Block Development Officer for approval, meaning thereby, the Block Development Officer too has applied his mind and tested the genuineness of the resolution as the Block Development Officer is not meant to act like a post office and transmit the resolution whichever is sent by the Gaon Sabha for appointment of fair price shop agent and once the Block Development Officer has also applied his mind and sent the proposal for approval, in that eventuality, the SubDivisional Officer/the Committee headed by him if decided to hold an inquiry then the version of the Village Pradhan, Supervisor and the Block Development Officer ought to have been called for and considered by the authority concerned before cancelling the resolution.

3.Here in this case, from the perusal of the impugned order, it transpires that nothing has been done and only exparte inquiry was conducted by the Naib Tehsildar on which basis the impugned order has been passed. This Court, dealing with such matter in Virendra Vs. State of U.P. and others, 2013 (7) ADJ 262 has held that if after receipt of the resolution, the SubDivisional Officer decided to disapprove the resolution, in that eventuality, opportunity has to be offered to the person in whose favour resolution has been passed and the village pradhan too. The view taken by me find support from the Division bench judgement of this Court in the case of Gainda Devi Vs. State of U.P. and others, 2012 (11) ADJ 717. This is the specific case of the petitioner where the petitioner was never associated either in the course of the inquiry by the Naib Tehsildar or before passing the impugned order, therefore the order impugned is vitiated and in my considered opinion it cannot be sustained in the eyes of law.

4.In the result, the writ petition succeeds and is **allowed**. The impugned order dated 3.9.2016 passed by the SubDivisional Officer, Baheri, District Bareilly is hereby quashed. The SubDivisional officer/Committee constituted under Para 5 of the government order dated 17.8.2002 is directed to pass a fresh order, considering the complaint of the respondent no. 5 and keeping in mind the observation made by this Court, herein, above, expeditiously but not later than six weeks from the date of receipt of certified copy of the order of this Court.

Case Law discussed:
1.Virendra v. State of U.P. and others, 2013 (7) ADJ 262 — para 12
2.Gainda Devi v. State of U.P. and others, 2012 (11) ADJ 717 — para 12

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri Syed Wajid Ali along with Sri Santosh Kumar Singh, learned counsel for the petitioner, learned standing counsel for the State-respondents and Sri Amresh Singh, learned counsel for the gaon sabha.

2. Through this writ petition, prayer has been made to issue a writ of certiorari quashing the order dated 3.9.2016 passed by the Sub-Divisional Officer, Baheri, District Bareilly by which the Sub-Divisional has cancelled the earlier resolution of the gaon sabha dated 13.5.2016 and directed the Block Development Officer to get a fresh resolution passed in the open meeting for appointment of fair price shop agent.

3. While assailing the impugned order, learned counsel for the petitioner submits that the impugned order is patently illegal and without application of mind. In the submissions of learned counsel for the petitioner, earlier resolution dated 13.5.2016 was passed in favour of the petitioner in the open meeting of the gaon sabha in presence of the supervisor appointed by the Block Development Officer pursuant to the order of the Sub-divisional Officer and it is in his presence, the open meeting of the gaon sabha was held and a C.D. was prepared. Thereafter the Block Development officer has forwarded the paper for appropriate order before the Sub-Divisional Officer/Committee headed by him, therefore there was no occasion to re-inquire the matter on the basis of the frivolous complaint of a third person without having version of the Block Development Officer who has forwarded the resolution, the village pradhan, and the supervisor appointed by the Block Development officer in whose presence resolution was passed and C.D. was prepared,

4. Sri Amresh Singh, who appears for the gaon sabha, has also submitted that once the resolution was passed in the open meeting of the gaon sabha, there was no occasion for holding an inquiry in view of para 4.12 of the government order dated 3.7.1990 without application of mind as to whether there was any substance in the complaint made by the respondent no. 5. More so, when the resolution was passed in the presence of the supervisor who happens to be the government servant and thereafter concurrence of the Block development Officer about the aforesaid resolution by forwarding the same to the Sub-divisional Officer without there being any adverse comment.

5. Learned Standing Counsel appearing for the State respondents contended that there is no illegality in the impugned order. In his submissions, after receipt of the complaint, inquiry was conducted by the Naib Tehsildar Baheri, who has submitted his report on 15.7.2016 and considering the report, the Sub-Divisional Officer came to the conclusion that C.D. was not prepared in accordance with law.

6. I have heard learned counsel for the parties and perused the impugned order. For deciding the controversy involved in this case, some conditions provided in the government order dated 3.7.1990, are required to be looked into, governing the field of passing of resolution by the gaon sabha for appointment of fair price shop agent and its approval, which are reproduced herein under "-

4.4 गाँव सभा की राय से वह उचित दर की दुकानें खोली जायेगी। गाँव सभा की राय उनकी खुली बैठक में पारित प्रस्ताव के माध्यम से प्राप्त की जायें।

4.12 गाँव सभा का प्रस्ताव प्राप्त होने पर सामान्यतया किसी अन्य जाँच की आवश्यकता नहीं होगी। परन्तु यदि किसी विशिष्ट मामले में जिलाधिकारी कोई जाँच करवाना चाहे तो इस पर कोई रोक नही है लेकिन यह सुनिश्चित कर लिया जाए कि जाँच के कारण नियुक्ति में बिलम्ब न हो।

5. गांव सभाओं में उचित दर की दुकानों के चयन का कार्य निर्धारित समय के अंदर पूरा हो जाये व गांव सभा की खुली बैठकें वास्तव में हो जाये, इसको सुनिश्चित करने के लिए यह सुझाव है कि जिलाधिकारी व्यवहारिक रोस्टर बना लें जिसमें ग्राम पंचायत अधिकारी के साथ एक उससे उच्च स्तर का पर्यवेक्षक अधिकारी जरूर उपस्थित रहें।

7. From the perusal of Para 4.4. of the government order dated 3.7.1990, it transpires that the fair price shop has to be opened after getting the opinion of the members of the village in its open meeting. From the perusal of the Para No. 4.12. it transpires that normally after receipt of the proposal of the goan sabha there will be no need for any inquiry but in the special case, if the District Magistrate desires the inquiry, there is no prohibition but before doing so, it must be ensured that on account of inquiry, there should not be any delay in the appointment of the fair price shop agent. If both the paras 4.4. and 4.12 are read together then it will mean that decision for appointment of fair price shop agent has to be taken in the open meeting of the gaon sabha and once the decision/proposal of the gaon sabha is sent before the Sub-Divisional Officer, normally there would be no requirement to hold an inquiry but in the special case, inquiry is permissible that too on the instance of the District Magistrate.

8. The use of word *'vishisth mamle'*, 'special case' has some weight,meaning thereby in normal case, inquiry is not required but if the District Magistrate requires an inquiry then mind has to be applied by the District Magistrate that it is a special case where prima facie it appears that irregularity has been committed in the process of the passing of the resolution. Looking into the language used in Para 4.12, mentioned herein above, in my opinion without recording any reason for holding the inquiry in routine manner no order for inquiry can be passed after resolution of the gaon sabha is passed and forwarded/recommended by the Block Development Officer for issuing the appointment letter and execution of the agreement.

9. On being confronted as to whether at present too, it is the District Magistrate who is the only officer who can pass the order for holding the inquiry in the event of complaint received by him with respect to any resolution passed, learned Standing Counsel, taking shelter of para 5 of the government order dated 17.8.2002, submits that now all these powers have been conferred upon the Committee constituted under para 5 of the aforesaid government order, in the chairmanship of the Sub-Divisional Officer. For convenience, para 5 of the government order dated 17.8.2002 is quoted herein under :-

5- ग्रमीण क्षेत्र में राशन की दुकानों के आवंटन हेतु निम्नानुसार गठित तहसील स्तरीय समिति द्वारा किया जायेगा

1. उप जिलाधिकारी - अध्यक्ष

2 सम्बन्धित खण्ड विकास अधिकारी - सदस्य

3. अनुसूचित जाति/जनजाति एव पिछडी - सदस्य
जाति का एक-एक अधिकारी जो
जिलाधिकारी द्वारा नामित किया
जाये (यदि उपर्युक्त अधिकारियों में
से कोई इस वर्ग का हो तो अलग से नामांकन करने की आवश्यकता नहीं होगी)

4. क्षेत्रीय खाद्य अधिकारी - सदस्य/ संयोजक

10. I have gone through the impugned order. I do not find that after receipt of the complaint of the respondent no. 5, the Sub-Divisional Officer/Committee headed by him has applied its mind with regard to genuineness of the complaint and after testing the merit of the complaint has directed for holding the inquiry.

11. For the sake of arguments even if it is assumed that this was done as the case is being decided in absence of the counter affidavit in that case too, once the Block Development officer has been entrusted by the Sub-Divisional Officer to get a resolution passed and the Block Development Officer has appointed a supervisor for getting the resolution passed and the resolution was passed in the presence of supervisor as well as of the Pradhan of the concerned village and the same has been forwarded/recommended by the Block Development Officer for approval, meaning thereby, the Block Development Officer too has applied his mind and tested the genuineness of the resolution as the Block Development Officer is not meant to act like a post office and transmit the resolution whichever is sent by the Gaon Sabha for appointment of fair price shop agent and once the Block Development Officer has also applied his mind and sent the proposal for approval, in that eventuality, the Sub-Divisional Officer/the Committee headed by him if decided to hold an inquiry then the version of the Village Pradhan, Supervisor and the Block Development Officer ought to have been called for and considered by the authority concerned before cancelling the resolution.

12. Here in this case, from the perusal of the impugned order, it transpires that nothing has been done and only exparte inquiry was conducted by the Naib Tehsildar on which basis the impugned order has been passed. This Court, dealing with such matter in ***Virendra Vs. State of U.P. and others, 2013 (7) ADJ 262*** has held that if after receipt of the resolution, the Sub-Divisional Officer decided to disapprove the resolution, in that eventuality, opportunity has to be offered to the person in whose favour resolution has been passed and the village pradhan too. The view taken by me find support from the Division bench judgement of this Court in the case of ***Gainda Devi Vs. State of U.P. and others, 2012 (11) ADJ 717***. This is the specific case of the petitioner where the petitioner was never associated either in the course of the inquiry by the Naib Tehsildar or before passing the impugned order, therefore the order impugned is vitiated and in my considered opinion it cannot be sustained in the eyes of law.

13. In the result, the writ petition succeeds and is allowed. The impugned order dated 3.9.2016 passed by the Sub-Divisional Officer, Baheri, District Bareilly is hereby quashed. The Sub-Divisional officer/Committee constituted under Para 5 of the government order dated 17.8.2002 is directed to pass a fresh order, considering the complaint of the respondent no. 5 and keeping in mind the observation made by this Court, herein, above, expeditiously but not later than six weeks from the date of receipt of certified copy of the order of this Court.

(2016) 9 ILRA 1236
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ C No.- 11973 Of 1999
&
Connected With Other Cases

Shyam Narain Misra & Ors. ...Petitioners

Versus

New Okhla Inustrial Development Authority & Anr. ...Respondents

Counsels for Petitioners:
Shri A. Kumar, Shri Ashish Kumar Srivastav, Shri Navin Sinha, Shri Udai Nandan

Counsels for Respondents:
Shri U.S. Awasthi, Shri G.K. Singh, Shri R.D. Tiwari, Shri Rajesh Kumar, Shri Ramendra Pratap Singh, Shri V.K. Singh

Held:

Para 1: This common judgment disposes of multiple writ petitions involving similar questions of law and facts. Neutral Citation No. - 2016:AHC:132546-DB.
Para 2: Petitioners seek a writ of Certiorari to quash NOIDA's cancellation orders (dated 16.03.1999 & 23.03.1999) regarding new plots allotted via conversion, and a direction to NOIDA to accept balance dues and hand over possession.
Para 3: Petitioner No. 1 (Shyam Narain Misra) withdrew his petition on 17.08.2016; petitions for Petitioners No. 3 and 10 were dismissed as not pressed on the same date.
Para 4: Respondents No. 3 to 22 were wrongly impleaded in the amended petition after their impleadment applications were rejected; their names are struck off from the cause title.
Para 5: Respondents No. 3–7 and 11–22 were denied intervention for lack of formal applications. The scope of C.M.W.P. No. 11973 of 1999 is confined to Petitioners No. 2, 4–9, and 11.
Para 6: Petitioners in C.M.W.P. Nos. 69517 & 69518 of 2011 were wrongly joined as Respondents No. 9 & 10 in the main petition, but their separate writ petitions seeking identical relief are considered jointly.
Para 7: Details NOIDA's plot conversion policy introduced via Office Order dated 03.07.1992, setting out 11 specific conditions governing location changes, fee structures, and area adjustments.
Para 8: The conversion scheme was amended on 29.09.1993 to allow conversion into unallotted or newly carved-out plots across different sectors, expanding beyond cancelled/surrendered plots.

Para 9: Petitioners applied for and received conversion orders, depositing substantial amounts. When NOIDA refused to countersign challans for the balance amounts, petitioners filed the original writ petition seeking acceptance of dues and possession.
Para 10: Pending the writ petition, NOIDA issued orders dated 16.03.1999 and 23.03.1999 cancelling the conversion allotments, prompting petitioners to amend their pleadings to challenge these cancellation orders.
Para 11: Highlights the earlier High Court Division Bench order dated 09.11.2007, which had disposed of the matter by directing NOIDA to calculate dues with interest and issue payment challans.
Para 12: Tracks NOIDA's appeal (Civil Appeal No. 583 of 2011), where the Supreme Court set aside the High Court's order and remitted the matter back for fresh adjudication on the legality of the cancellation orders.
Para 13: Notes the post-remand filings, including supplementary affidavits and the tagging of C.M.W.P. Nos. 69517 & 69518 of 2011 with the primary writ petition.
Para 14: Counsel for petitioners outlines NOIDA's four primary grounds for cancellation: allotment in an undeveloped sector, default in original plot payments, non-submission of conversion applications, and area expansion exceeding 50%.
Para 15: Petitioners argue that prohibition of conversion to undeveloped sectors was not in the 1992/1993 policy (introduced only in 1996) and that Sector 44 was already recognized as developed in 1994–95.
Para 16: Addresses Ground (ii), arguing that original dues were paid and pointing out that NOIDA restored 14 non-cancelling cases despite delayed payments, rendering the action discriminatory under Article 14.
Para 17: Rebuts Ground (iii), showing that official conversion orders and NOIDA's own SLP grounds confirm that Petitioners No. 4 and 6 had explicitly requested conversions.
Para 18: Refutes Ground (iv), stating the 1992 scheme explicitly permitted area variations subject to premium payments, and notes NOIDA restored other plots cancelled on this same ground, demonstrating discrimination.
Para 19: Argues that petitioners acquired vested rights after paying substantial amounts, making the unilateral cancellations without a hearing a violation of natural justice and void *ab initio*.
Para 20: NOIDA's counsel argues that under SC observations in W.P.(C) No. 150/1997, the U.P. Industrial Area Development Act, 1976 does not permit category conversion of plots.
Para 21: NOIDA defends the cancellation orders on merits, relying on SC observations in W.P.(C) No. 150/1997 and internal scrutiny showing policy violations.
Para 22: Rebuts NOIDA's statutory argument, noting petitioners were not parties to W.P.(C) No. 150/1997, and highlights that SC rejected NOIDA's identical argument in Review Petition No. 1 of 2015 (arising from C.A. No. 3159 of 2006).
Para 23: Examines paragraph 16 of the SC order dated 27.11.2013 in W.P.(C) No. 150/1997 regarding the statutory non-postulation of plot conversion.
Para 24: Notes that while the word "conversion" is absent from the 1976 Act, the Court proceeds to examine whether conversion legally constitutes a mode of property transfer.
Para 25: Analyzes legal definitions from Black's Law Dictionary and Section 118 of the Transfer of Property Act, 1882, establishing that "conversion" and "exchange" are legally synonymous.
Para 26: Concludes that NOIDA's plot conversion scheme is functionally an "exchange" of plots, which is a recognized legal mode of transferring immovable property.
Para 27: Interprets Section 7 of the U.P. Act of 1976, holding that the phrase "otherwise transfer" gives NOIDA statutory authority to transfer land via exchange/conversion.
Para 28: Observes that the Supreme Court implicitly affirmed this power by dismissing NOIDA's Review Petition No. 1 of 2015 on both delay and merits on 14.01.2015.
Para 29: Re-iterates the four primary grounds of cancellation to evaluate each sequentially on merits.
Para 30: Analyzes Ground (i), holding that the 1992/1993 scheme allowed cross-sector conversions and contained no restriction against transfers from developed to undeveloped sectors.
Para 31: Notes NOIDA's admission in SLP pleadings that the restriction was added only in 1996 and cannot apply retrospectively to 1994–95 allotments, alongside exoneration of its officer regarding Sector 44's developed status.

Para 32: Holds that since Sector 44 was a developed sector at the relevant time, cancellation of allotments for Petitioners No. 2, 4–9 and 2011 petitioners on Ground (i) is legally unsustainable.
Para 33: Evaluates Ground (ii) (payment default on original plots) and notes petitioners' willingness to pay any lawful dues.
Para 34: Holds Ground (ii) discriminatory under Article 14 because NOIDA condoned non-payment delays and retained allotments for 14 other similarly placed allottees.
Para 35: Evaluates Ground (iii) and finds written records (allotment recitals and NOIDA's SLP pleadings) directly contradict the claim that Petitioners No. 4 and 6 did not apply for conversion.
Para 36: Concludes that cancellation of new plot allotments for Petitioners No. 4 and 6 on the ground of non-application is wholly unjustified.
Para 37: Evaluates Ground (iv) (excess area over 50%) and finds no upper limit cap in the conversion policy governing size differences.
Para 38: Holds Ground (iv) arbitrary and discriminatory, noting Clause 7 required only additional premium payments, and NOIDA had already restored plots to other allottees cancelled under this ground.
Para 39: Rules that cancelling allotments without giving petitioners an opportunity to be heard violated natural justice and rendered the cancellation orders *non-est* in law, especially since NOIDA took possession of original plots and created third-party rights.
Para 40: Summarizes that impugned cancellation orders are arbitrary, illegal, discriminatory, violative of natural justice, and offensive to Article 14 of the Constitution.
Para 41: Recalls similar matters where the Supreme Court directed NOIDA to issue payment challans and deliver possession after conversion.
Para 42: Extends the ratio and benefits of the Supreme Court's decisions in *Pushpa Devi* and *Vanchit Leasing* to the present petitioners.
Para 43: Quashes the cancellation orders; directs NOIDA to calculate outstanding amounts and issue payment challans within 1 month, and hand over physical possession within 6 weeks of payment.
Para 44: Orders that parties shall bear their own costs.

List of Citations:

Chairman, NOIDA & others vs. Pushpa Devi, Special Leave Petition (Civil) No. 17606 of 2003 (Order dated March 22, 2004).

Chief Executive Officer, NOIDA vs. Vanchit Leasing and Finance Co. & another, Special Leave Petition (Civil) No. 4857 of 2004.

NOIDA vs. Shyam Narain Misra & others, Special Leave Petition (Civil) No. 10678 of 2008 / Civil Appeal No. 583 of 2011.

In Re: Writ Petition (Civil) No. 150 of 1997 (Order dated November 27, 2013).

Monopolies and Restrictive Trade Practices Commission (MRTPC) Order dated 1st September 2005.

NOIDA vs. [MRTPC Applicant], Civil Appeal No. 3159 of 2006 (Order dated January 8, 2014).

NOIDA vs. [MRTPC Applicant], Review Petition (Civil) No. 1 of 2015 in Civil Appeal No. 3159 of 2006 (Order dated January 14, 2015).

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

1. The above writ petitions involve similar question of law and facts, therefore, they are heard together and being disposed of by this common judgement.

2. In the above writ petitions, the petitioners prayed for issuance of a writ in the nature of Certiorari for quashing the orders dated 16.03.1999 & 23.03.1999, contained in Annexures-18 series of amended writ application, (relating to petitioners Nos.2,4,5,6,7,8,9) Annexure No.I of Amendment Application No.133611, (relating to petitioner no. 11) and Annexure 4 of each writ applications bearing Writ Petition No.69517 and 69518 of 2011, (relating to petitioners of both the writ applications), whereby and where-under the respondent NOIDA had cancelled the allotment of new plots made in favour of the petitioners by way of conversion. The petitioners further prayed for issuance of a direction commanding the respondents to accept the due amount, if any, and hand over the possession of newly allotted plots to the petitioners.

3. It is worth mentioning that the petitioner no. 1 namely Shyam Narain Misra has been allowed to withdraw the writ petition filed on his behalf vide order dated 17.08.2016, whereas by the same order the writ petitions filed by the petitioners no. 3 & 10 have been dismissed as not pressed, because none had turned up to press the same on their behalf.

4. It is further worth mentioning that the respondents no. 3 to 22 were not impleaded as respondents in the original writ petition bearing Civil Misc. Writ Petition No. 11973 of 1999, but they have been wrongly impleaded as respondents in the amended writ petition. From perusal of the order-sheet it appears that vide orders dated 22.05.2012 & 11.01.2016, the impleadment applications filed by them had been disposed of with observation that no case is made out to permit the applicants to be impleaded as respondents in the writ petitions. Under the aforesaid fact and circumstance, names of respondents no. 3 to 22 are hereby struck off from cause title of the amended writ petition.

5. It is not out of place to mention here that vide order dated 17.08.2016, respondents no. 3 to 7 and 11 to 22 were not allowed to intervene in the matter, because they have not filed any application for intervention. Thus, in this writ petition, bearing Civil Misc. Writ Petition No. 11973 of 1999, we are confined to consider the cases of petitioners no. 2, 4 to 9 & 11.

6. It is relevant to mention that though petitioners of Civil Misc. Writ Petitions No. 69517 & 69518 of 1999 were wrongly impleaded as respondents no. 9 & 10 in Civil Misc. Writ Petition No. 11973 of 1999, but, since they filed separate writ petitions for the same relief, therefore, their cases also considered by us.

7. The factual matrix of the case is that the petitioners were originally allotted residential plots by the NOIDA in different sectors. Details of their plots and areas mentioned in the writ petitions. It is an admitted position that the NOIDA has a Scheme for conversion of plots. The above scheme was amended by the NOIDA vide office order no. 4070/ NOIDA/ DCED/ 92 dated 03.07.1992, which runs as follows:-

In supersession of all previous orders, conversion of residential plots/houses/flats/appartments shall be governed by the conditions as given below:

"Application for conversion (i.e. change of location) shall be entertained only from such allottees who have been allotted residential plots/houses/flats/apartments, originally by the Authority.

(1) Application for conversion of plots against house/flat/apartment or vice versa shall not be entertained.

(2) In case residential plots, only cancelled & surrendered properties shall be offered for conversion. However, this shall not be applicable for conversion of apartment/flat/house.

(3) The details of availability of properties shall be available in the office of Dy. Chief Executive Officer.

(4) In case of allotments made through cooperative housing societies, conversion may be allowed within the sector only. However, this restriction shall not be applicable in cases of allotment other than through cooperative societies.

(5) Up-to-date dues of the allotted properties for which conversion required should be cleared.

(6) All expenses pertaining to conversion such as conversion charges, location benefit charges, stamp duty, registration charges etc. shall be borne by the allottee.

(7) In case the area of converted plot is more than the area of allotted plot, then the allottee shall be required to pay the premium for additional area at prevailing rate and conversion charges in lump sum within 30 days of conversion being allowed. Additional charges, if applicable shall also be charged in addition to the above.

(8) In case of built up apartment/flat/house, difference in the prevailing cost of original allotted property and the prevailing cost of property under conversion shall be charged towards conversion charges in lump sum within 30 days of conversion being allowed.

(9) In case area under conversion is less than the area of plot originally allotted, then the amount of premium including interest having been paid by the allottee for the difference area, shall be refunded adjusted. Likewise in case prevailing cost of the apartment/flat/house under conversion is less than the original cost of apartment/flat/house originally allotted, then the difference of the amount paid including interest shall be refunded/adjusted.

(10) The facility of conversion shall be available in both pre-possession and post-possession cases.

(11) Conversion charges shall be payable within 30 days from the conversion being allowed as per details given below. ....."

8. It is also admitted by the parties that aforesaid scheme of conversion again amended by the NOIDA on 29.09.1993. Originally, the conversion was allowed only with respect to cancelled or surrendered plots, but after the amendment, unallotted plots or newly carved out plots in different sectors have also been included in the plot availability list for conversion.

9. It is stated by the petitioners that they applied for conversion of their original plots with that of other residential plots situated in other sectors. It is stated that the NOIDA, after considering their requests, had approved the conversion and allotted new plots with a direction to pay the amount mentioned in respective conversion orders. The petitioners annexed the aforesaid conversion orders in the writ petitions. It is stated that the petitioners had deposited the money through challans as demanded by the NOIDA. It is further stated that some amount still remained to be paid by some of the petitioners. It is stated that the petitioners approached the NOIDA for counter signing the challans, but NOIDA refused to do so, because of that the petitioners could not deposit balance amount. It is stated that the petitioners were repeatedly making requests to the NOIDA for accepting the deposits and handing over the possession of the newly allotted plots, but the respondents are not passing any order. Aggrieved with the same, the petitioners of Civil Misc. Writ Petition No. 11973 of 1999 had filed writ petition for a direction to the respondents to accept the amount by making endorsement on the challans and hand over the possession of newly allotted plots.

10. It is stated that during the pendency of the writ petition, the NOIDA had cancelled the allotments of new plots made in favour of the petitioners vide orders dated 16.03.1999 and 23.03.1999. Accordingly the petitioners filed amendment application and challenged the cancellation orders.

11. It then appears that a Division Bench of this Court vide order dated 09.11.2007 disposed of the writ petition bearing Civil Misc. Writ Petition No. 11973 of 1999. The operative portion of the order runs as follows:-

"The petitioners are agreeable to pay along with interest on the deposited amount, therefore, we are of the view that the writ petition can be disposed of with a direction upon the authorities to consider the case and to calculate the amount to be deposited by the petitioners and issue challan in connection thereto ignoring the delay on the basis of the observation of the Supreme Court as in the aforesaid judgment within a period of one month from the date of communication of the order. At the time of due consideration, the authorities are entitled to see whether cancellation is made only on the ground of delay or not. In case the other point or points is/are also there, they are entitled to act in accordance with law without confining themselves only on the question of delayed payment. The writ petitioners will be entitled to get certify copy of the order only after depositing deficit court fees within a period of seven days from this day leaving aside the court fees already deposited treating to be deposited for only one petitioner. However, this

order will not be operative in case petitioners nos. 3, 10 and 11 who have not pressed this writ petition, therefore, no order is required in those cases.

Writ petition is, thus, disposed of. No order is passed as to costs."

12. The NOIDA challenged aforesaid order of this Court by filing a Special Leave Petition bearing no. 10678 of 2008 (Civil Appeal No. 583 of 2011). While hearing the aforesaid appeal the Hon'ble Supreme Court noticed that though the order of conversion had already been cancelled by the NOIDA and the petitioners had filed amendment application challenging the cancellation order, but no finding was given by the High Court on the legality of the cancellation orders. Accordingly, the Hon'ble Supreme Court remitted the case to this Court for fresh disposal of the writ petition after considering the pleadings and documents filed by the parties. The operative portion of the judgement of the Hon'ble Supreme Court in aforesaid civil appeal is as follows:

"It, however, appears that attention of the High Court was not invited to the amended prayer and this appears to be the reason why the High Court did not pronounce upon the legality of the orders passed for cancellation of the sanction issued by the then Chief Executive Officer for conversion of the plots and disposed of the writ petition by issuing directions to which reference has been made herein above.

In our view, without deciding the question whether orders passed by the Competent Authority for cancellation of the conversion sanctioned in favour of the respondents were contrary to any constitutional or legal provision or the rules of natural justice, the High Court was not justified in issuing a mandamus to the appellants to accept the amount of conversion and thereby facilitate allotment of plots to the respondents in Sector 44. But at the same time, we feel that the respondents should not suffer merely because the High Court did not decide the legality of the orders passed by the Competent Authority and it will be in the interest of justice to remit the matter to the High Court for fresh disposal of the writ petition.

In the result, the appeal is allowed, the impugned order is set aside and the matter is remitted to the High Court for fresh disposal of the writ petition after consideration of the pleadings and documents which have already been filed and which may be filed hereafter.

The parties shall file additional affidavits and documents within 3 months from today. Insofar as the appellants are concerned, they shall file the required affidavit alongwith all the documents which were produced before this Court and other documents which may have bearing on the decision of issues raised in the writ petition.

It will be open to either party to make a request to the High Court for early disposal of the writ petition."

13. In view of the aforesaid remand made by the Hon'ble Supreme Court, the writ petition placed before us for hearing. It is worth mentioning that after the aforesaid order of Hon'ble

Supreme Court, both the parties had filed supplementary affidavits, supplementary counter affidavits, amendment application annexing various documents in support of their cases. It is also worth mentioning that the petitioners of Civil Misc. Writ Petitions No. 69517 & 69518 of 2011, who were interveners before Hon'ble Supreme Court, have filed separate writ petitions for redressal of their grievances and the said writ petitions are also tagged with previous writ petition i.e. Civil Misc. Writ Petition No. 11973 of 1999.

14. Sri Navin Sinha, learned Senior Advocate assisted by Sri Manu Khare, advocate appearing for petitioners no. 2,4,5,6,7,8 & 9 submitted that the impugned orders of cancellation are broadly based on 4 grounds i.e. (i) Conversion of residential plots allowed in an undeveloped sector. (ii) Conversion of residential plots allowed in favour of such allottee who defaulted in making payment against the originally allotted plots. (iii) No applications were filed by some of the petitioners for conversion and (iv) Conversion was allowed much in excess of the originally allotted area i.e. more than 50% in comparison to original plot area.

15. It is submitted that so far as the grounds no. 1 & 4 are concerned, the same were not mentioned in the original Scheme/Conversion Policy. It is also submitted that from perusal of the office order dated 03.07.1992 as amended by the order dated 27.09.1993, it appears that the same does not prohibit conversion (change of location) from developed sector to undeveloped sector. It is submitted that the NOIDA admitted in an affidavit filed in SLP (Civil) No. 10678 of 2008 before the Hon'ble Supreme Court that at the time of conversion in question (i.e. in the year 1994-95), the aforesaid condition for cancellation of conversion is not part of the Scheme. It is submitted by Sri Sinha, learned senior counsel appearing for the petitioners, that in that affidavit it is stated that in the year 1996 the change of plots policy was reconsidered and then the same was included. He, thus, submits that a policy which has been adopted later on, cannot become basis for cancellation of plots, which were allotted on the basis of earlier policy. It is further submitted that in the said affidavit, the NOIDA further admitted that in the year 1994-95 sector 44 was a developed sector. Accordingly, it is submitted that cancellation of conversion order on ground no. 1, is not permissible.

16. Sri Sinha, learned senior counsel submitted that cancellation of conversion on ground no. 2 is also not sustainable, because the petitioners had paid all the dues demanded by the NOIDA towards the price of their old plots. It is submitted that the NOIDA admitted in its supplementary counter affidavit that in cases of 14 allottees their plots had not been cancelled even though payments were not made by them within the stipulated time. Sri Sinha brought to our notice the list of such cases annexed by the NOIDA in its supplementary counter affidavit. Accordingly, he submits that the order of cancellation of conversion on the ground of default for non-payment of price of original plot is discriminatory, therefore, violative of Article 14 of the Constitution of India. However, he submits that aforesaid defect is curable and petitioners are ready to pay any due if legally payable.

17. It is then submitted that so far as the third ground that the petitioner Nos. 4 and 6 had not made applications for conversion is concerned, the same is misconceived and against the

material available on the record. It is submitted that from bare perusal of conversion order it will be clear that all the petitioners had made requests for conversion of plots. This fact also admitted by the NOIDA in the grounds of SLP (Civil) No. 10678 of 2008, wherein it is specifically stated that the respondents (petitioners of this case) themselves had applied for conversion of their plots. Thus, it is submitted that this ground is also not available to the respondent-authority for cancelling the conversion order.

18. So far as the ground no. (iv) is concerned, it is submitted that the same is also not mentioned in the Conversion Policy dated 03.07.1992 as amended on 29.09.1993. It is submitted that from perusal of office order dated 03.07.1992 it is clear that one of the conditions for conversion is that in case the area of converted plot is more than the area of the allotted plot then the allottee shall be required to pay premium of additional area at the prevailing rate and the conversion charges in lump sum within 30 days of conversion being allowed. It is submitted that there is nothing in the entire conversion policy which prohibits conversion if the area of converted plot is much in excess of the originally allotted area i.e. more than 50% in comparison to the original plot area. Sri Sinha further brought to our notice list 3 & 4 annexed with the supplementary affidavit filed by the NOIDA and submits that in fact the NOIDA had restored the plots of other allottees whose conversion cancelled on this very ground. Accordingly, he submits that the action of the NOIDA in not restoring the newly allotted plots in favour of these petitioners is discriminatory and thus, violative of equality clause of the Constitution of India.

19. Sri Navin Sinha, learned senior counsel further submits that it is an admitted position that new plots were allotted to the petitioners by way of conversion as per the scheme of NOIDA and in terms of the demand made by the NOIDA all the petitioners deposited substantial amount with the NOIDA. Thus, a legal right accrued to them in connection with the newly allotted plots, hence, it is not open for the NOIDA to cancel the allotment of new plots without giving any opportunity of hearing to the petitioners. Therefore, the impugned orders are violative of principles of natural justice, hence, void-ab-initio.

Sri Udai Nandan, learned counsel appearing for the petitioner No. 11 has adopted all the submissions made by Sri Navin Sinha, learned Sr. Advocate.

20. On the other hand, Sri Ramendra Pratap Singh, learned counsel appearing for the NOIDA, submitted that the Hon'ble Supreme Court had observed in its order dated 27.11.2013 passed in Writ Petition (Civil) No. 150 of 1997 that **1976 Act and the rules framed thereunder do not postulate conversion of plots allotted in one category to other.** Sri Singh accordingly submits that in view of aforesaid observation of the Hon'ble Supreme Court all the conversions including the conversions of plots in favour of these petitioners are illegal. Thus, it is not open for this Court, which is a Court of equity, to quash the cancellation order and allow the illegality to perpetuate.

21. On merits, Sri Singh submits that the orders of cancellation have been passed in view of the order passed by Hon'ble Supreme Court in Writ Petition (Civil) No. 150 of 1997 and also

because the NOIDA on scrutiny had found that conversions were allowed in favour of the petitioners against the conversion policy. Accordingly, it is submitted that the writ petitions filed by the petitioners have no merit, therefore, same are liable to be dismissed.

22. In reply, Sri Navin Sinha, learned senior counsel appearing for the petitioners, submitted that the observation of the Hon'ble Supreme Court is not binding on these petitioners because they are not the parties in Writ Petition (Civil) No. 150 of 1997. He further submits that in fact the conversion is a mode of transfer of immovable property. He further submits that Section 7 of the U.P. Industrial Area Development Act, 1976 (for short 'the Act') gives power to all the authorities (including the NOIDA) constituted under 'the Act' to transfer land by way of sell, lease or otherwise on such terms and conditions as it may think fit to impose. Accordingly, it is submitted that the aforesaid observation of the Hon'ble Supreme Court is not applicable in the facts of this case. It is further submitted that one similarly situated person (whose plot allotted on the basis of conversion was cancelled) had filed an application and challenged the order of cancellation of conversion order before the MRTP Commission, New Delhi. The said application was allowed by the Commission vide order dated 1st of September, 2005. Against the said order, the respondent (NOIDA) had filed an appeal before the Hon'ble Supreme Court vide Civil Appeal No. 3159 of 2006. The said appeal was dismissed by the Hon'ble Supreme Court vide order dated 8th of January, 2014. Against the aforesaid order, the NOIDA filed Civil Review Petition, which was numbered as Civil Review No. 1 of 2015. In the said Civil Review, the NOIDA had taken one of the grounds that Hon'ble Supreme Court in Writ Petition (Civil) No. 150 of 1997 had observed that 1976 Act and the rules framed thereunder do not postulate conversion of plots allotted in one category to other. After considering all the grounds taken in the aforesaid Civil Review, the Hon'ble Supreme Court vide order dated 14th of January, 2015 had dismissed the Civil Review on merits.

23. Having heard the submissions, we have gone through the relevant provisions of law as well as various documents produced by the parties through different affidavits. The respondent NOIDA in one of its counter affidavits had annexed the order dated 27.11.2013 passed by the Hon'ble Supreme Court in Writ Petition (Civil) No. 150 of 1997 wherein at paragraph no. 16 the Hon'ble Supreme Court had observed:

"1976 Act and the rules framed thereunder do not postulate conversion of plots allotted in one category to other."

24. It is true that the word 'conversion' does not find place in the Act. But the learned senior counsel appearing for the petitioners has vehemently argued that the conversion is a mode of transfer and under Section 7 of 'the Act', the NOIDA had power to transfer the land by any mode of transfer. The aforesaid point raised by learned counsel for the appellant has not been decided by the Hon'ble Supreme Court, therefore, in the interest of justice, we are proceeding to examine this question i.e. whether the conversion of one plot with another is a mode of transfer of property or not.

25. The meaning of word 'conversion' as per the Black's Law Dictionary (8th Edition) is :

The act of changing from one form to another, the process of being exchanged.

The meaning of word 'exchange' as per the aforesaid dictionary is:
The act of transferring interests, each in consideration for other.

Thus, from the conjoint reading of aforesaid meanings of the words 'conversion' and 'exchange', it appears that both are synonym of each other. Thus, if one property is exchanged with that of another, the same will amount to transfer. It is not out of place to mention that Section 118 of the Transfer of Property Act, 1882 also recognizes "exchange" as one of the mode of transfer of immovable property.

26. In the instant case, as per the Conversion Scheme of NOIDA, an old allottee of residential plot could change the old plot with that of another plot, situated in the same sector or in another sector of NOIDA. Thus, though the nomenclature of the process was given in the Scheme as conversion, but in fact the same is exchange of plots. Therefore, in our considered view the conversion of plots, as per the Scheme of the NOIDA, is 'exchange', which is a recognized mode of transfer of property.

27. Section 7 of the Act of 1976 reads as under:

"The authority may sell, lease or otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the Authority in the industrial development area on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose."

A plain reading of aforesaid provision shows that the NOIDA has power to transfer any land or building belonging to it through sell, lease or otherwise. In our view, the phrase "otherwise transfer" used in the aforesaid provision manifests that the Legislature had given power to the Authorities (including NOIDA) to transfer land and building through any mode of transfer. In that circumstance, as the word conversion is synonym of the word exchange (which is one of the recognized mode of transfer), we hold that the NOIDA has power to transfer land through conversion and/or exchange. Thus, the aforesaid submissions made by Sri Singh that the conversion of old plots of the petitioners with new plots is not permissible under the 1976 Act, cannot be accepted.

28. It is not out of place to mention that subsequently even the Hon'ble Supreme Court had not accepted the aforesaid plea of NOIDA. It is worth mentioning that one of the allottees of the plot by way of conversion had challenged the cancellation of conversion order before the MRTP Commission, New Delhi. The MRTP Commission had set aside the cancellation order vide order dated 1st of September, 2005. The said order of the MRTP Commission was challenged by the NOIDA before Hon'ble Supreme Court by filing an appeal bearing Civil Appeal No. 3159 of 2006. The aforesaid Civil Appeal was dismissed by the Hon'ble Supreme Court vide order dated 8th of

January, 2014. Thereafter, the NOIDA filed a petition for review of aforesaid order vide Review Petition No. 1 of 2015. In the said Review Petition, the NOIDA had taken one of the grounds that Hon'ble Supreme Court in Writ Petition (Civil) No. 150 of 1997 has observed that **1976 Act and the rules framed thereunder do not postulate conversion of plots allotted in one category to other**. The aforesaid review application filed by the NOIDA has been dismissed by the Hon'ble Supreme Court vide order dated 14.01.2015. The said order of Hon'ble Supreme Court runs as follows:

"Upon perusal of the papers of the review petitions and the record of the Civil Appeals, we have noticed that there is an inordinate delay in filing all the review petitions, which we are not inclined to condone.

Even on merits also, we are convinced that the order of which review has been sought does not suffer from nay error apparent warranting its reconsiderations.

The Review Petitions are, accordingly, dismissed on the ground of delay as well as on merits."

Thus, from perusal of aforesaid order of Hon'ble Supreme Court, we find that the Hon'ble Supreme Court had also considered the merit of the grounds taken in the review petition and rejected all the grounds including the aforesaid ground. In that view of the matter, we are of the view that the grounds taken by Sri Ramendra Pratap Singh is worth rejecting.

29. From perusal of impugned orders, we find that cancellation of conversion orders were mainly based on four grounds, i.e. (i) the conversion of residential plots allowed in an undeveloped sector (ii) conversion of residential plots allowed in favour of such allottees who defaulted in making payment against the original allotted plots (iii) no application for conversion given by some of the petitioners and (iv) conversion was allowed much in excess of the originally allotted area i.e. more than 50% in comparison to originally allotted area.

Refer ground no. i:

30. From perusal of the scheme of conversion as contained in Office Order dated 3.7.1992, as amended by order dated 27.9.1993, we find that there is no stipulation, which prohibits conversion of plot from developed area to undeveloped area. The condition no.4 of the said Scheme stipulates that if the plot is allotted by the cooperative housing society then the conversion will be allowed within the sector only. However, it is specifically mentioned in the said condition that aforesaid restriction shall not be applicable in the cases of allotment other than through cooperative societies. Thus, it is clear that the scheme permits that the plot can be exchanged from one sector to another sector, if the same is not allotted by co-operative society. This fact is also clear from the rates of conversion charges mentioned in clause (10) of the condition for conversion. It shows that if the conversion of residential plot is allowed within the same sector then the allottee is required to pay conversion charge @ Rs. 200/- per sq. meter, whereas if the conversion is allowed in other

sector then the allottee is required to pay conversion charge @ Rs. 400/- per sq. meter. Thus, it is clear that as per the Scheme one allottee may request for exchange or conversion of plot from one sector to another sector. As noticed above, there is no restriction in office order dated 03.07.1992 as amended by order dated 27.09.1993, that no conversion will be allowed from developed area to undeveloped area.

31. The NOIDA had filed a rejoinder to the counter affidavit filed by these petitioners in SLP(C) No. 10678 of 2008. In the said rejoinder at paragraph no. 24, the NOIDA had admitted that on the specified date on which the orders were issued to the applicants regarding change of plots, the policy of change of plots does not include the condition that the change of plot should not be made in an undeveloped sector. But in 1996, the change of plots policy was reconsidered and then the same was included. In the same paragraph, the NOIDA further admitted that one of its officers namely Mr. G.C.Tiwari had been exonerated from the charge in a departmental proceeding because the change of plots in Sector 44 is correct as the sector is developed. Thus, in the aforesaid rejoinder, the NOIDA admits that in the year 1994-95, when the petitioners were allowed to change their plots, there was no condition in the scheme which prohibits change of plots from developed sector to undeveloped sector. According to NOIDA, the aforesaid condition has been incorporated in the policy in the year 1996. Under the said circumstance, in our considered view, the said condition/prohibition cannot be made effective from retrospective date. Moreover, in the same rejoinder the NOIDA admitted that sector 44 was a developed sector at the relevant time. Thus, the action of the NOIDA in cancelling the conversion on this ground, is not sustainable.

32. In this connection it is worth mentioning that the petitioners nos. 2, 4, 5, 6, 7, 8, 9 and the petitioners of Civil Misc. Writ Petitions No. 69517 & 69518 of 2011, were allotted new plots in sector 44. As noticed above, since sector 44 is a developed sector, therefore, in our considered view it is not open for the NOIDA to cancel the allotments of new plots of the petitioners on this very ground.

It is not out of place to mention that so far petitioner no. 11 is concerned, his newly allotted plot has not been cancelled on this ground.

Refer ground no. ii:

33. Except the petitioners of Civil Misc. Writ Petitions No. 69517 & 69518 of 2011, this ground is one of the common grounds for cancellation of allotment made in favour of other petitioners. It is worth mentioning that the petitioners in their writ applications had stated that they are the confirmed allottees of their original plots. They have also stated that they have paid all instalments fixed by the NOIDA till the issuance of conversion order. The details of same annexed with the brief note supplied to this Court by the petitioners, copy of which has already been served on the learned counsel for the NOIDA. It is submitted that the petitioners are not the defaulters therefore, it is not open for the NOIDA to cancel the allotments made in favour of these petitioners by conversion. However, it is submitted that the petitioners are ready to pay any amount which is legally due & payable.

34. It appears that the NOIDA in its supplementary affidavit had annexed a list i.e. List no. (1), which shows that the allotment of plots of 14 persons have not been cancelled even though payments were not made by the allottees within the stipulated time. Thus, we find that the action of NOIDA in cancelling the newly allotted plots on this ground, is discriminatory, hence, violative of Article 14 of the Constitution of India.

Refer ground no. iii:

35. On this ground we find that the allotment of new plots of petitioners no. 4 Prabhakar Singh and 6 Rajeev Kohli, have been cancelled. The allotment order of the aforesaid 2 petitioners, by which the new plots allotted after conversion, have been annexed in the writ petition as annexures 4 & 6. The opening line of aforesaid order reads as under:

"With reference to your request for conversion of plot ...."

This shows that aforesaid 2 petitioners also made request for conversion of their plots. In this connection it is worth mentioning that the respondent NOIDA in its SLP at ground no. 7 has admitted that the respondents (these petitioners) themselves applied for conversion of their plots.

36. In view of the aforesaid discussions, we find that the cancellation of new plots of petitioner no. 4 and 6 on the ground that the petitioners had not made application for conversion, is wholly unjustified.

Refer ground no. IV:

37. This is one of the common grounds for cancellation of newly allotted plots of the petitioners (except petitioners of Civil Misc. Writ Petition Nos.69517 and 69518 of 2011). From perusal of the conversion policy we do not find any condition which prohibits conversion if the area of the converted plot is much in excess i.e. more than 50% in comparison to original plot area.

38. Condition no. 7 of the scheme stipulates that in case the area of converted plot is more than the area of allotted plot, then the allottee shall be required to pay the premium for additional area at prevailing rate and conversion charges in lump sum within 30 days of conversion. Thus, from the aforesaid condition, it is manifestly clear that the NOIDA had a scheme to exchange/convert smaller plots with that of bigger plots with condition that the allottee shall pay the premium for additional area at the prevailing rate. In that view of the matter, the cancellation of newly allotted plots of the petitioners on this ground is not permissible. Thus, the above action of the NOIDA appears to be arbitrary and based on the whims of its officers.

It reveals from lists no. 3 & 4 annexed with the supplementary affidavit filed by the NOIDA that the NOIDA had restored plots of other allottees whose conversions were cancelled on this very ground. Accordingly, we find that the action of NOIDA in not restoring the newly allotted

plots in favour of these petitioners, is discriminatory and thus, violative of equality clause of the Constitution of India.

39. At last but not the least, it appears that after allotment of new plots by way of conversion, the petitioners had deposited huge amount with the NOIDA, towards the price of newly allotted plots. It further appears that the NOIDA had already taken possession of the old plots from these petitioners. It also appears from the record that in some cases, the NOIDA already transferred the interest of old plots in favour of third party. In that view of the matter, we find that a valuable right accrued in favour of the petitioners in connection with the newly allotted plots. Under the said circumstance, it is not open for the NOIDA to take away the aforesaid valuable right from the petitioners without affording them any opportunity of hearing. In the instant case, the petitioners categorically stated that the respondents had cancelled the allotment of new plots, without affording any opportunity, whatsoever, to the petitioners in contravention of the principles of natural justice. These statements made in the writ applications have not been denied by the NOIDA in its counter affidavit. Thus, we conclude that the NOIDA had cancelled the allotment of new plots of the petitioners without giving them any opportunity of hearing. Hence, in our view, the impugned order of cancellation is violative of principles of natural justice, therefore, non-est in the eye of law.

40. In view of the discussions made above, we conclude that the impugned orders, as contained in Annexure 18 series of the amended writ petition (relating to the petitioners no. 2, 4, 5, 6, 7, 8 & 9), Annexure (I) of Civil Misc. Amendment Application No. 133611 (relating to petitioner no. 11) and Annexure no. 4 of each writ applications bearing Civil Misc. Writ Petitions No. 69517 & 69518 of 2011 are arbitrary, illegal, discriminatory, violative of principles of natural justice, thus, violative of Article 14 of the Constitution of India, therefore, cannot be sustained.

41. As noticed above, admittedly the petitioners have been allotted new plots on conversion and they have been asked to pay conversion charges as mentioned in the conversion order. It has also been stated by the petitioners that they have paid certain amount towards conversion charges and they are also ready to pay rest of the amount provided the NOIDA issues challan for the same because the banks are not accepting the money unless the challans are issued by the NOIDA. It is pertinent to mention that initially Civil Misc. Writ Petition No. 11973 of 1999 was filed only for issuance of a writ of mandamus commanding the NOIDA to issue challans as well as for acceptance of rest of the conversion charges and thereafter for delivery of possession of newly allotted plots. It is also stated that for similar relief one Pushpa Devi had filed a writ application in this Court which was allowed and against that the NOIDA had filed a SLP vide Special Leave Petition (Civil) No. 17606 of 2003 (Chairman NOIDA & others vs. Pushpa Devi), which was disposed of by the Hon'ble Supreme Court with a direction to NOIDA for accepting the amount and delivering possession of the new plot allotted to her after conversion. A similar order was also passed in SLP No.4857 of 2004 (Chief Executive Officer NOIDA Vs. Vanchit Leasing and Finance Co. & another).

42. Since we have already concluded herein above that the cancellation of conversion orders i.e. the orders impugned herein are illegal, arbitrary and violative of principles of natural

justice, therefore, now the cases of the petitioners are similar to those of Pushpa Devi and Vanchit Leasing and Finance Co. (supra), as such, the aforesaid directions of Hon'ble Supreme Court can be made applicable in the case of these petitioners. Hence, we hold that the petitioners are also entitled to get the same relief.

43. In the result, the above writ petitions succeed and are accordingly allowed. The impugned orders as mentioned above are hereby quashed. We further direct the NOIDA to calculate the amount if the petitioners are further required to deposit any amount and issue challans in connection thereto within a period of one month from the date of communication of this Order, ignoring the delay, as observed by the Hon'ble Supreme Court in the order dated 22nd of March, 2004 in Special Leave Petition (Civil) No. 17606 of 2003, Chairman NOIDA & others vs. Pushpa Devi) and 4857 of 2004 (Chief Executive Officer NOIDA Vs. Vanchit Leasing and Finance Co. & another). The petitioners are directed to make payment as per the demand and challan issued by the NOIDA. We further direct that the NOIDA shall give possession of the newly allotted plots to the petitioners within 6 weeks from the date of deposit of the amount by the petitioners.

44. In the facts and circumstances of the case, we order that the parties shall bear their own costs.

(2016) 9 ILRA 1252
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Reference Against Misc. Acts No.- 1 Of 2008

In the Matter of Council of Institute of Charted Accountants ...Applicant
Versus
Shri Anil Kumar Sanghi F C A ...Opposite Party

Counsel for Applicant:
Vinod Swarup

Counsel for Opposite Party:
ASGI, Gyan Prakash, RB Singhal

Subject Matter
Chartered Accountants Act, 1949 - Sections 21, 22 - Professional and other misconduct - Reference under Section 21(5) for confirmation of CICA's recommendation to remove a Chartered Accountant's name from the Register of Members - Charges of non-disclosure of material facts in financial statements, gross professional negligence in facilitating tax evasion, and unauthorized engagement in non-professional business without Institute's permission - Held, findings of Disciplinary Committee on Charges 1, 2 and 8 confirmed as based on cogent material and recorded without procedural infirmity; recommendation of removal from membership for five years confirmed.

Facts
A complaint dated 19.03.1998 under Section 21(1) of the Act was forwarded by Smt. Seema Raj, Assistant Commissioner Income Tax, Central Circle IV, New Delhi, against the respondent, Chartered Accountant of one Sri Prakash Chandra Yadav (son of a former Union Minister), in the context of allegations of kick-backs of Rs. 133 crores in the Urea Scam and consequent CBI/CEIB inquiries. Income Tax searches conducted between June 1996 and January 1997 revealed huge cash deposits aggregating approximately Rs. 27.86 crores in three bank accounts of the respondent's concerns, M/s Anil Sanghi & Associates and M/s Ganpati Investment Consultants, which amounts were thereafter transferred, directly or through intermediate accounts, into eight companies in which Sri Prakash Chandra Yadav and his family members held controlling positions as directors/authorized signatories. Statements recorded on oath indicated that the cash had in fact been furnished by Sri Prakash Chandra Yadav to the respondent for being given the appearance of genuineness and returned to him through cheques/demand drafts to the companies, which initially filed no returns and, after search and notices under Section 158BC of the Income Tax Act, 1961, declared the amounts received as loans from the respondent's two concerns, with a further sum of Rs. 10,44,78,000/- falsely shown as share capital/share application money from the public in one such company. The respondent did not respond to the complaint forwarded to him on 25.10.1999. CICA, in its 233rd meeting (7th-8th and 24th-25th April, 2003), referred the matter to a Disciplinary Committee under Section 21(1), which framed eight charges covering non-disclosure of material facts, use of professional knowledge to facilitate tax evasion, giving false

statements on oath, collusion in misleading government agencies as to the true nature of the deposits, violation of SEBI guidelines in introducing undisclosed income as share capital, banking irregularities including forgery, and unauthorized proprietorship of a non-professional concern. After hearings between December 2003 and April 2004 - during which the respondent appeared, pleaded not guilty, deposed and was cross-examined on 28th-29th April 2004 but thereafter failed to appear on 30.04.2004 without information - the Disciplinary Committee held Charges 1, 2 and 8 proved as professional/other misconduct under Clause (11) Part I of the First Schedule and Clause (7) Part I of the Second Schedule read with Sections 21 and 22 of the Act, and held Charges 3 to 7 not proved. CICA thereafter afforded a further opportunity of hearing under Section 21(4), which the respondent neither responded to nor availed of, and in March 2008 resolved to remove his name from membership for five years, making the present Reference under Section 21(5) for confirmation of that recommendation. Before the High Court too, though represented by counsel, the respondent chose not to appear or make submissions.

Issues

1. Whether the findings of the Disciplinary Committee holding Charges 1, 2 and 8 proved against the respondent were based on cogent material, recorded after due compliance with the procedure and principles of natural justice under Section 21 of the Act, and were not perverse or such as no person of ordinary prudence could arrive at.
2. Whether the recommendation of CICA to remove the respondent's name from the Register of Members for a period of five years warranted confirmation under Section 21(5) of the Act.

Held

The respondent's own deposition before the Disciplinary Committee admitted that the amounts deposited in his two concerns were shown as his own money without satisfactorily explaining the source of such huge cash deposits, and admitted to having engaged in non-professional business as proprietor of M/s Ganpati Investment Consultants without seeking the Institute's permission. The Committee's findings that the respondent had filed block-period returns knowingly declaring money belonging to Sri Prakash Chandra Yadav as his own (Charge 1), had used his professional knowledge as a Chartered Accountant to facilitate large-scale tax evasion by Sri Prakash Chandra Yadav and was grossly negligent in his professional duties (Charge 2), and had engaged in unauthorized non-professional work as proprietor of a firm without institutional permission (Charge 8), were founded on the material on record, including the respondent's own admissions, and could not be said to be erroneous or perverse. The procedure prescribed under Section 21, consistent with principles of natural justice, was found to have been duly observed, with adequate opportunity of hearing afforded to the respondent at every stage, including a further opportunity under Section 21(4) which he chose not to avail. The charges found proved were regarded as serious professional misconduct warranting confirmation of the Disciplinary Committee's findings and CICA's recommendation.

Result

Reference answered accordingly. Recommendation of CICA confirmed. Name of Respondent-Anil Kumar Sanghi (FCA) directed to be removed from the Members of the Council of the Institute of Chartered Accountants of India for a period of five years, during which he shall stand disqualified from practising as a Chartered Accountant. Copy of judgment directed to be sent to CICA for compliance and necessary action.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This is a Reference under Section 21(5) of Chartered Accountants Act, 1949 (*hereinafter referred to as the "Act, 1949*) as it was before its substitution and amendment by Act No. 9 of 2006

which came into force on 17.11.2006, in the matter of Sri Anil Kumar Sangi, Chartered Accountant at NOIDA.

2. Brief facts necessary for exercising powers under Section 21(6) of Act, 1949 may be stated as under.

3. Smt. Seema Raj, Assistant Commissioner Income Tax, Central Circle IV, New Delhi (*hereinafter referred to as the "ACIT, New Delhi"*) forwarded a complaint dated 19.03.1998 under Section 21(1) of Act, 1949 against Respondent-Anil Kumar Sanghi, alleging that he was Chartered Accountant of one Sri Prakash Chandra Yadav son of Sri Ram Lakhan Singh Yadav, Former Union Minister. In the wake of allegations on Sri Prakash Chandra Yadav regarding receipt of kick-backs of Rs. 133 crores Urea Scam, certain inquiries were conducted by Central Bureau of Investigation (*hereinafter referred to as the "CBI"*) and Central Economic Intelligence Bureau (*hereinafter referred to as the "CEIB*"). On the basis of information received from CEIB, Income Tax Authorities conducted searches at residential premises of Sri Prakash Chandra Yadav and Respondent-Anil Kumar Sanghi, registered offices of companies of Sri Prakash Chandra Yadav and on the bank accounts of such companies and on persons/ related persons. These searches were conducted between June, 1996 to January, 1997 and therein following facts were revealed:

"(a) Huge cash deposits running into crores of rupees had been made by the Respondent in three bank accounts of his concerns viz.M/s Anil Sanghi and Associates and M/s Ganpati Invtt. Consultants.

Details of these bank accounts and the cash deposits in them are as follows:

Bank Accounts	Name of Account holder	Total deposit from financial year 1993-94 to 1.11.1996 (the date of search) (in Rs)
1.No.612 in Jammu & Kashmir Bank,NOIDA	M/s Anil Sanghi & Associates	25,47,95,300.00
2.No.613 in Jammu & Kashmir Bank,NOIDA	M/s Ganpati Investment Consultants	71,66,400.00
3.No.2387 in Andhra Bank,Asaf Ali Road,New Delhi.	M/s Ganpati Investment Consultants	1,66,91,616.00
	Grand Total	27,86,53,316.00

(b) The money so deposited in these three accounts had then been transferred either directly or after being routed through one or more bank accounts into the following Companies in

which Shri Prakash Chandra Yadav and his family members were in the controlling position as Directors/ Authorized Signatories for the bank accounts of the Companies:

Name of the Companies	Amount transferred to the company from one of the three accounts(Rs.)	Whether Shri Prakash Chandra Yadav/his family members were directors /Authorized Signatories
1. M/s Vaidahi Lease & Finance Pvt.Ltd	1,20,00,000.00	Shri Harshvardhan,S/o Shri Prakash Chandra Yadav was the director as well as authorized signatory.
2.M/s Shilpi Securities Pvt.Ltd.	1,20,00,000.00	Shri Harshvardhan,S/o Shri Prakash Chandra Yadav was the director.
3.M/s Independent Courier Pvt.Ltd	1,31,00,000.00	Smt. Manju Yadav, W/o Shri. Prakash Chandra Yadav was the authorized signatory.
4.M/s Harmony Psychiatry Center Pvt.Ltd.	1,31,00,000.00	Smt. Manju Yadav ,W/o Shri Prakash Chandra Yadav was the director and authorised signatory.
5.M/s Patliputra International Trading Ltd.	2,79,38,500.00	Shri.Prakash Chandra Yadav and his wife were the promoters /subscribers and Shri Prakash Chandra Yadav was the authorized signatory.
6.M/s Kandla Petrochemicals Corpn.Ltd	2,24,16,000.00	Shri Prakash Chandra Yadav, his son & his wife were directors and Shri Prakash Chandra Yadav was the authorized signatory.
7.M/s Uikam Invtt. & Finance Pvt.Ltd	4,55,12,000.00	Shri Harshvardhan ,S/o Shri Prakash Chandra Yadav was the authorized signatory.
8. M/s Patliputra Credit & Securities Ltd.	11,24,96,439.00	Shri Prakash Chandra Yadav, his wife and father were the directors.
Total amount transferred	25,85,63,939.00	

4. Statement of respondent on oath was recorded on different dates by ADIT (Investigation), New Delhi/ ACIT, New Delhi about source of cash deposits in three accounts

mentioned above. From these statements and facts which were available to Income Tax Department, it became evident that cash approximating to Rs. 27.86 crores was given by Sri Prakash Chandra Yadav to respondent for returning it to former after giving it appearance of genuineness. In the process of achievement of this end respondent deposited above amounts in bank accounts of his own concern and then issued cheques and demand drafts to companies in which Sri Prakash Chandra Yadav was Secretary. No returns were filed by these companies until the time of search. But, after search and on receipt of notices under Section 158 BC of Income Tax Act, 1961 (*hereinafter referred to as the "Act, 1961"*), companies filed their returns for block period wherein amounts received by them from three accounts were shown as loan from M/s Anil Sanghi and Associates and M/s Ganpati Investment Consultants. An amount of Rs. 10,44,78,000/- shown in accounts of M/s Patliputra Credit and Securities Ltd. was shown as share capital/ share application money received from public though it was nothing but money received from one or more of said three accounts.

5. Copy of complaint dated 19.03.1998 was forwarded to respondent alongwith letter dated 25.10.1999 for his response on said complaint. Respondent, however, failed to give any reply. Thereafter aforesaid complaint was considered by Council of Institute of Chartered Accountants of India *(hereinafter referred to as the "CICA"*) in its 233rd meeting held on 7th, 8th and continued on 24th and 25th April, 2003. It decided to refer matter to Disciplinary Committee for inquiry as contemplated under Section 21(1) of Act, 1949. Disciplinary Committee made its inquiry on following eight charges:

"(1) Since the Respondent has filed his return for the block period declaring the cash deposited in the three accounts to be his income and the block period returns of eight companies (in which Shri Prakash Chandra Yadav and /or his family members were in controlling position) showing the money introduced into them as loan from his two concerns M/s. Anil Sanghi & Associates and M/s. Ganpati Investment Consultants, knowing fully well that it is not his but Shri Prakash Chandra's money. Thus, he has failed to disclose a material fact known to him (which is not disclosed) in a financial statement but disclosure of which is necessary to make the financial statement not misleading".

(2) The Respondent has used his knowledge as a Chartered Accountant to help Shri Prakash Chandra Yadav in evasion of tax running into crores of rupees. Thus the Respondent has been grossly negligent in the conduct of his professional duties.

(3) The Respondent has given false statements under oath before Government agencies in order to bail out Shri Prakash Chandra Yadav.

(4) The Respondent has obtained the resignations of Shri Prakash Chandra /his family members from all the companies and taken over as their Director to make it appear that it was he who in the first place purchased /promoted these Companies. Returns for all these Companies have been filed after search & signed by him as director. Thus the Respondent was

working in collusion with Shri Prakash Chandra Yadav and trying to mislead Government agencies about the true nature of cash deposit in his accounts .

(5) The Respondent gave the idea to introduce part of the undisclosed income of Shri Prakash Chandra Yadav into M/s. Patliputra Credit & Securities Ltd., in the form of share capital subscribed by the public and for this purpose, he, even went to the extent of violating the guidelines issued by the SEBI.

(6) The Respondent has committed irregularities in banks by misusing people's photographs /names and even forging their signatures.

(7) The Respondent flouted guidance /guidelines issued by Securities & Exchange Board of India (SEBI) from time to time.

(8) The Respondent was the Proprietor of M/s. Ganpati Investment Consultants."

6. Disciplinary Committee initially scheduled its inquiry fixing 24.12.2003 which was re-scheduled as 26.12.2003 but it was adjourned on the request of respondent to 30.01.2004. Again on 30.01.2004 and 03.03.2004 matter was adjourned. On 28.04.2004 respondent was present in proceedings and after administering oath, charges were read out to him and he pleaded not guilty. Then on 29.04.2004 when matter was taken up respondent was present for hearing. His statement was recorded and he was also cross-examined by Disciplinary Committee Members. On next day, i.e., 30.04.2004 respondent failed to appear and also gave no information, notice or request to Disciplinary Committee. In view thereof Committee concluded oral hearing and submitted report holding Charges 1, 2 and 8 of "professional misconduct" falling within Clause (11) Part I of First Schedule and Clause (7) Part I of Second Schedule and other misconduct under Sections 22 read with 21 of Act, 1949, proved.

7. With regard to Charges 3, 4, 5, 6 and 7 Disciplinary Committee held respondent not guilty of "professional misconduct".

8. Thereafter CICA decided to give an opportunity of hearing to respondent under Section 21(4) of Act, 1949 before passing any order against him. Respondent, however, neither submitted any reply before CICA nor appeared on date fixed, in the meeting of CICA in March, 2008. Hence CICA decided to remove name of respondent from registered Member for a period of five years and has made present Reference under Section 21(5) of Act, 1949.

9. Before us also though respondent is represented through Sri P.K. Tripathi, Advocate but he has chosen not to appear and advance his submissions. Hence we had no option but to proceed to decide matter after hearing Sri Vinod Swarup, Advocate appearing for CICA and perusal of record.

10. With respect to Charges 1, 2 and 8 found proved against respondent, we find that Disciplinary Committee has recorded its findings as under:

"5.1 The Respondent in his deposition before the Committee submitted that the money deposited in the two concerns, M/s. Anil Sanghi & Associates and M/s. Ganpati Investment Consultants belongs to him. The Income Tax Department had assessed the income in his hands and the same income had been assessed in the hands of Mr. Prakash Chandra also. The issue is pending before the ITAT and the matter will be finally decided by the Tribunal.

5.2 In view of the above, according to the Respondent, the Committee could not take a view unless the decision is delivered by the ITAT. On being reminded, that the Committee is examining his professional conducted vis-a-vis the complaint filed by the Income Tax Department, the Respondent submitted that the total amount deposited in the Bank account was his undisclosed income. As regards the source of the money deposited in these accounts, the Respondent submitted that it was his personal money and he had given advances and loans to the listed companies which are his companies.

5.3 The respondent further submitted that M/s. Anil Kumar Sanghi & Associates is a professional firm and M/s. Ganpati Investment Consultants is not a professional firm and he was Proprietor of both the firms. The Respondent admitted that he had not sought any permission from the Institution for engaging himself in any work other than the profession and pleaded guilty on this account. As regards the Directorship of the Companies, the Respondent submitted that at that time he was the Director of those Companies. Shri Prakash Chandra Yadav and family members were appointed Directors in the year 1996 and they were Directors upto 1997. He further submitted that Mr. Prakash Chandra Yadav and his family members were also signatories to these bank accounts. As regards the allegation that the Respondent had used his knowledge as a Chartered Accountant and helped Mr. Prakash Chandra Yadav to evade tax, he submitted that the money belongs to him only and Mr. Prakash Chandra Yadav and his family members were simply the signatories.

5.4 The Committee perused the various documents filed by the Complainant and the Respondent and the deposition of the Respondent. The Committee noted that the first charge leveled against the Respondent was that he had filed his return for the block period declaring the cash deposited in the three accounts to be his income and the block period return of eight companies in which Mr. Prakash Chandra Yadav and/or his family members were in controlling position showing the money introduced to them as loan from these companies knowing fully well that it was not his but Mr. Prakash Chandra's money. The Respondent in this regard submitted that it was his money which he deposited in his bank account and as such there is nothing wrong.

5.5 According to the Committee, in view of the above statements made by the Respondent at various points of time before the IT Department and the failure on his part to explain the source of income before the Committee that from where he had deposited such huge cash in the bank account, the contention of the Respondent that money deposited in bank a/c was his own money could be accepted. The ***Committee was of the opinion that the Respondent was guilty of the charge whereby he had filed return for the block declaring the cash deposited in the bank account showing the money introduced into them as his own money***.

5.6 As regards the ***second charge*** *that the Respondent had used his knowledge as a CA to help Shri Prakash Chandra in the evasion of tax running into crores of rupees and thus the Respondent had been grossly negligent in the conduct of his professional duties, the above* ***facts as coming out from the statements clearly substantiate the allegation that the Respondent had helped Shri Prakash Chandra in the evasion of tax. There is a clear cut admission by the Respondent in his statement that he had committed a mistake to deposit such huge cash and the purpose of giving this cash was to give it white colour and channelise such cash for further utilization****. Therefore, in the opinion of the Committee the Respondent was* ***guilty of this charge also****.*

5.13 The last charge levelled against the Respondent was that he was the Proprietor of M/s Ganpati Investment Consultants which is carrying out work other than professional work. The ***Respondent during the course of hearing before the Committee admitted that M/s Ganpati Investment Consultants is a Proprietorship Firm and it is not carrying on any professional work. He also admitted that he had not sought any permission from the Institute to engage in any work other than the profession****. Therefore, the Respondent had pleaded guilty before the Committee of this charge. Accordingly in the opinion of the Committee, the* ***Respondent was guilty of this charge****." (emphasis added)*

11. Aforesaid charges are quite serious and found proved on the basis of material before Disciplinary Committee.

12. We also find that procedure prescribed under Section 21 which is consistent with requirement of principle of natural justice has been observed; adequate opportunity was afforded to respondent and there is neither any procedural flaw nor it can be said that findings in respect to Charges 1, 2 and 8, which have been found proved, erroneous or such as no person or ordinary prudence will come to such conclusion as has been arrived at by Disciplinary Committee.

13. In view of above, we confirm recommendation of CICA and direct that name of Respondent-Anil Kumar Sanghi (FCA) shall be removed from Members of Council of Institute of Chartered Accountants for a period of five years. Respondent shall stand disqualified to practice as Chartered Accountant for the aforesaid period.

14. The Reference is answered accordingly.

15. Let a copy of this judgment be sent to Council of Institute of Chartered Accountants forthwith for compliance and necessary action.

(2016) 9 ILRA 1260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Reference Against Misc. Acts. No.- 1 Of 2011

In The Matter Of Council Of Institute Of Chartered Accountant of India ...Applicant
Versus
Sri Om Prakash Tulsyan, FCA Chartered Accountant ...Opposite Party

Counsel for Applicant:
Vinod Swaroop

Counsels for Opposite Party:
Amit Mahajan, Additional Solicitor General of India, Gaurav Mahajan, R.B. Singhal

FACTS

This Reference under Section 21(5) of the Chartered Accountants Act, 1949 was received from the Institute of Chartered Accountants of India (ICAI) on the recommendation of its Council, made in its 268th meeting held from 30.4.2007 to 2.5.2007, accepting the report of the Disciplinary Committee and holding the respondent, Om Prakash Tulsyan, FCA, of Varanasi, guilty of 'other misconduct' under Section 22 read with Section 21 of the Act, 1949, with a recommended punishment of removal of his name from the Register of Members for one year.

The respondent, then Statutory Auditor and Tax Consultant of M/s Rungta Irrigation Limited (RIL), had in March 1995 persuaded the complainants, NRIs based in the USA, to invest over Rs. 4.52 crore in shares of RIL through their Overseas Corporate Body, M/s Durga Finance Limited. RIL did not deliver the shares to the complainants. The respondent took delivery of 7,54,900 shares from RIL on the strength of an authority letter purportedly signed by one of the complainants, Smt. Parwati Agarwal, which was subsequently found to be forged as per an FSL report. The respondent could produce no evidence that the shares, or the dividend amounts and TDS certificates also collected by him, were ever returned to the complainants; the shares were instead found transferred to and sold among various individuals, some of whom were shown to be associated with RIL.

Despite repeated opportunities and adjournments granted over several dates, the respondent did not meaningfully participate before the Disciplinary Committee, which ultimately proceeded and concluded the enquiry ex parte. In its report dated 2.2.2005, the Disciplinary Committee, after detailed analysis of the documentary record, held the respondent guilty of 'other misconduct', noting his failure to explain the disposal of shares and sale proceeds, his admitted receipt of shares and dividend cheques, and the forged authority letter used to obtain delivery. The Council of ICAI, after affording the respondent a further opportunity of written representation and oral hearing (which he availed on 30.4.2007), accepted the Disciplinary Committee's report and made the present Reference to this Court for final orders on punishment.

ISSUES FOR CONSIDERATION

(i) Whether the findings of the Disciplinary Committee, as accepted by the Council of ICAI, holding the respondent guilty of 'other misconduct' in connection with the fraudulent handling of the complainants' shares and sale proceeds, were sustainable on the material on record.

(ii) Whether the respondent had discharged the burden of explaining his admitted receipt of the shares, dividend cheques, and TDS certificates, and their subsequent disposal, particularly in light of the forged authority letter used to obtain delivery.

(iii) Whether the punishment of removal from the Register of Members for one year, as recommended by the Council of ICAI, was commensurate with the gravity of the misconduct.

HELD

The Court held that the findings of the Disciplinary Committee, as accepted by the Council of ICAI, were well supported by the record. The respondent, a Statutory Auditor of RIL, had admittedly taken delivery of the complainants' shares and dividend cheques but failed to bring any evidence that these were returned to the complainants or disposed of on their instructions; the authority letter on the strength of which delivery was taken stood established as forged, a fact not rebutted either by the respondent or by RIL. Counsel for the respondent, despite being repeatedly called upon, was unable to point to any perversity or misreading of evidence in the findings of the Disciplinary Committee or the Council. The Court also noted independent corroboration in the form of correspondence between RIL and the respondent suggesting collusion, and a police verification report confirming the genuineness of that correspondence.

On the question of punishment, the Court held that a Chartered Accountant occupies a position of fiduciary trust, and the respondent, a senior Fellow Member, had defrauded the complainants of a very large sum and benefited illegally. The Court expressed strong disapproval of the Council's recommendation of removal for only one year, describing it as an eye-wash reflecting undue leniency inconsistent with ICAI's statutory responsibility to the public, and observed that persons guilty of such serious misconduct ought not to be given the opportunity to re-enter the profession after a short period. While observing that the case merited permanent removal, the Court moderated the punishment in view of the long pendency of the matter and the respondent's advanced age (over 70 years), and enhanced the punishment to removal of the respondent's name from the Register of Membership for five years.

RESULT

Reference answered in the affirmative, confirming the finding of guilt against the respondent for 'other misconduct' under Section 22 read with Section 21 of the Chartered Accountants Act, 1949. The punishment recommended by the Council of ICAI is modified: the respondent's name shall be removed from the Register of Membership of ICAI for a period of five years, to commence from the date notified by ICAI. A copy of the judgment was directed to be sent forthwith to ICAI for consequential action.

(Delivered by Hon'ble Sudhir Agarwal, J.)
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Vinod Swarup, counsel for petitioners, Sri Gaurav Mahajan, counsel for respondent and perused the records.

2. This is a reference received under section 21 (5) of Chartered Accountants Act, 1949 (hereinafter referred to as Act 1949") from the Institute of Chartered Accountants of India (hereinafter referred to as "ICAI") on the recommendations made by council of ICAI in its 268th meeting held from 30.4.2007 to 2.5.2007 at New Delhi, resolving to accept report of Disciplinary

Committee and hold Sri Om Prakash Tulsyan, Fellow Chartered Accountant (hereinafter referred to as "the Respondent") (FCA (M. No.11165), of M/s O.P. Tulsyan and Company-C-21/88-N, Kamla Kutir, Lahaurabir, Varanasi, guilty of professional misconduct falling within the meaning of "other misconduct" under Section 22 read with section 21 of Act, 1949 and recommending punishment of removal of his name from the Register of Members of ICAI for a period of one year.

3. Facts in brief are, that, respondent was working as an Auditor and Tax Consultant for M/s Rungta Irrigation Limited (hereinafter referrred to as "RIL"). In March, 1995, Respondent approached Sri Mangi Lal Agarwal and Smt. Parwati Agarwal (hereinafter referred to as "complainants) who were NRIs in USA, with a proposal to invest in Initial Public Offerings (in short IPOs) of RIL. Complainants invested a sum of Rs. 4,52,94,000/- in the shares of RIL through their Overseas Corporate Body (OCB), i.e M/s Durga Finance Limited (hereinafter referred as "DFL"). RIL did not deliver shares to the complainants. Respondent forged papers and indulged in other un -professional activities, possibly in collusion with RIL and some other persons.

4. As per the stand taken by RIL, Respondent had taken delivery of shares on behalf of Complainants, by submitting an authority letter, allegedly signed by Smt. Parwati Agarwal. Complainants said that letters were totally bogus and false. No such signed letters were handed over to Respondent. Complainants believed that Respondent had sold shares of RIL in respect whereto investment was made by Complainants to some persons/entities who in turns had submitted shares to RIL for transfer. Complainants had never sold or mortgaged shares to any one.

5. Letter dated 24.3.1998 making aforesaid complaint was received by ICAI from Complainants. Notice was issued to Respondent who submitted reply/written statement, verified on 27.8.1999. Complainants submitted their rejoinder, duly verified, on 14.10.1999. Thereafter, Respondent again submitted comments, duly verified on 29.11.1999.

6. These documents were examined by Council of ICAI in accordance with Regulation 12(11) of Chartered Accountants Regulations 1988 (hereinafter referred to as "Regulation, 1988"). In a meeting held in May, 2002 at New Delhi, Council formed its opinion that prima facie Respondent was guilty of professional and/or other misconduct, hence decided to cause an enquiry to be made in the matter by Disciplinary Committee.

7. Consequently Disciplinary Committee held its enquiry and commenced the same by fixing 17.10.2002 as the first date of inquiry. First three dates, namely, 17.10.2002, 12.3.2003 and 21.4.2003, proceedings before Disciplinary Committee were adjourned on the request made by Respondent. Thereafter on 5.8.2003, Complainants were present still Respondent was absent. Disciplinary Committee, however, commenced its proceedings and partly heard the matter and then adjourned to 4.11.2003 and 5.11.2003. On 4.11.2003, Respondent submitted an application that he has filed writ petition in High Court and requested for stay of proceedings by Disciplinary Committee. Respondent himself was not present. An application along with medical certificate was submitted by an Advocate appearing on behalf of Respondent. It also stated that Respondent was ill, hence could not appear.

8. Disciplinary Committee sent a fax message to Respondent asking him to send a copy of writ petition and stay order, if any, and matter was adjourned to 5.11.2003. Again it was adjourned for 26.12.2003 for enquiry on the specific issue, whether proceedings should be stayed or not. On this date also, Complainants were present. Respondent was represented through Counsel. Both advanced their submissions. Matter was then adjourned to 30.1.2004, when both Complainants were present but on behalf of Respondent a letter was received by Disciplinary Committee stating that Respondent has approached High Court hence Disciplinary Committee must stay proceedings. In the interest of justice, Disciplinary Committee adjourned the matter with the last opportunity to Respondent to remain present on the next date else it shall proceed ex-parte and fixed the matter for 3.3.2004. On the next date fixed, only Complainants were present and Respondent did not appear. A fax message was received by ICAI from the office of Respondent requesting adjournment. Disciplinary Committee noted that request for adjournment was frequently accepted in the past giving sufficient opportunity to Respondent but he has not availed the same, hence there was no occasion to defer the matter further. Consquently, proceedings continued and concluded ex-parte against Respondent. Disciplinary Committee thereafter submitted its report on 2.2.2005 recording its finding in paras 21 to 28 of report which read as under:-

21. The Committee has considered the rival contentions, the statement of the witness and the various documents submitted before the Committee. This is a case where the allegation is that the Respondent has defrauded the Complainants. It is important to analyse the following facts which emerge out of the documents submitted by the parties and the submissions made at the time of hearings which took place before the Committee.

(i) The Respondent was a Statutory Auditor of RIL.

(ii) The Respondent has admitted that he had met the Complainants in the month of February/ March, 1995 and the investment was made by the Complainants.

(iii) The Respondent has also admitted that he helped Mrs. Parwati Agrawal in the procedural part for the purpose of making share application in RIL. This fact has also been confirmed by RIL in their letter dated 16th June, 1999 whereby it has been informed to Delhi Police that the Respondent has completed the entire formalities for investment in shares by DFL and he was business associate of the complainants.

(iv) The Respondent has taken the delivery of the Share Certificates from RIL.

(v) The Respondent confirmed that he has taken the shares from Mrs. Parwati Agrawal.

(vi) Shares were disposed of on the basis of the delivery taken by the Respondent from Mrs. Parwati Agrawal and he was the person through him the further delivery to the prospective buyers have taken place.

(vii) That the authority letter on the basis of which delivery was taken by the Respondent was forged. The Respondent as well as the Company M/s. Rungta Irrigation Ltd. has not rebutted this fact though it is being contended that this forged letter was delivered by employee of the Complainants. The Institute's office also received a letter from office of the Assistant Commissioner of Police: CBT: EOW: Crime Branch, New Delhi mentioning that the authority letter dated 23.11.1993 purportedly signed by Mrs. Parwati Agrawal was opined to be forged according to the FSL Report dated 31.5.1999.

(viii) The Respondent does not have any evidence or document that he has delivered the shares certificates to Mrs. Parwati Agrawal after taking delivery from RIL.

(ix) That the Respondent does not have any evidence that he had any authority to sell these shares, which admittedly got sold and transferred in the record of the Company, besides in the name of the various shareholders, in the name of Apex Finance Ltd. from which as per his own reply he has arranged loan for Mrs. Parwati Agarwal and as such he was associated with Apex Finance Ltd. This fact gets further support from the fact that a sum of Rs. 4,10,000/- is outstanding as an advance in the Balance sheet of M/s. Apex Finance Ltd. as on 31.3.1996 in the name of the Respondent.

(x) Apex Finance Ltd. was an associated company of RIL, as is evident from the fact that M/s. Rungta Irrigation Ltd. has given a substantial amount towards share application.

(xi) The Respondent was a Director in Palm Global Finance Ltd. (previous name of Apex Finance Ltd.) along with Mr. S.K. Rungta as is evident from Form No. 32 filed with Registrar of Companies and in the annual return of the Company.

(xii) The Complainants had made investments in share of RIL, through DFL and as per letter dated 13th March, 1995 written by Mr. Sanjay Rungta, Managing Director of RIL, there was a confirmation to pay 4 per cent brokerage on the investment to be made in the shares of RIL and a further guaranteed return of 2.5 per cent per month and buy back of the shares after six months. The signature on this letter has been confirmed by the Company Secretary of RIL, Mr. Bhagwan Kumar who appeared as a witness before the Committee.

(xiii) That there is no explanation from the Respondent who was involved in this process of investments as well as from Company, that how this brokerage and assured return was paid to the complainants.

(xiv) The Respondents in his written statement has stated that the Complainants has asked the Respondent to arrange funds for purchase of a big farm house and accordingly the funds were arranged from M/s. Apex Finance Ltd. The Respondent also enclosed a statement of account on the basis of it was contended that the outstanding amount of Rs. 70 lacs has been adjusted against the sale proceeds of the shares. The Complainants has rebutted this and has stated

that only a sum of Rs. 35 lacs was received and that too accounted for as income and not on account of loan as alleged by the Respondent.

(xv) The above sum of Rs. 35 lacs can be co related with the payment which the Managing Director has confirmed in his letter dated 13th March, 1995 to the Complainants for investment in the shares of Rungta Irrigation Ltd.

(xvi) The Respondent in his written statement has referred to another Company M/s Vatsal Investments Ltd. of which it has been alleged, Mrs. Parwati Agarwal was also debtor, but surprisingly no amount, no details, no copy of account has been submitted. Further the sale proceeds of 5,00,000 shares @ Rs. 20 per share has been adjusted in this copy of account despite the admitted fact that there was no permission from RBI to sell these shares.

(xvii) The Respondent has not produced any document or evidence to support his statement that loan was given by Apex Finance Ltd. The Respondent except filing a copy of statement of Mrs. Parwati Agarwal with M/s Apex Finance Ltd. on plain paper, that too without any confirmation has not submitted any other evidence. There is no material to support the explanation of the Respondent that it was a loan only. Nor there is any authorization from the Complainants to sell the shares registered in the name of M/s Durga Finance Ltd. an Overseas Corporate Body of the Complainants and to adjust the sale proceeds against the alleged loan in the name of Mrs. Parwati Agarwal.

(xviii) There is no explanation from the Respondent how the other shares reached in the hands of 75 odd individual buyers and what was the mode of sale of these shares.

22. In view of above facts and analysis, the Committee noted that as per the Complainants this delivery was unauthorized as no authority letter was issued by Mrs. Parwati Agarwal. The fact that the authority letter was not signed by Mrs. Parwati Agarwal is also on record and has not been rebutted either by the Respondent or by RIL. The Respondent's and the Company's contention is that this letter was delivered by one Mr. Sunil Kumar but the fact remains that this letter was a forged letter and not signed by Mrs. Parwati Agarwal. In the circumstances, the delivery taken by the Respondent was unauthorized. Further as per SEBI guidelines, the share certificates have to be sent by registered post and normally should not have been delivered in the manner in which it is being contended by the Respondent as well as RIL.

23. The contention of the Respondent that he has delivered the share certificates to Mrs. Parwati Agrawal after having received the same from RIL and the same was again delivered back by Mrs. Parvati Agarwal for further sale by the Respondent can not be accepted. The Respondent has not been able to bring any material or evidence in support of his contention. The Respondent has received the share certificates as per his own contention from RIL after giving a receipt to the Company. If that be so, it is difficult to accept that the Respondent delivered back the certificates to Mrs. Parwati Agarwal without obtaining any receipt for the same.

24. The Respondent, as per his own contention, has submitted that the share certificates were delivered back by Mrs. Parwati Agarwal alongwith the transfer deed for selling the same. If that be so, how those shares have been sold and how the money has been accounted for in respect of the shares sold to 75 individual persons, the Respondent has failed to give any explanation and justification. Moreover, the Respondent in his letter dated 5th March, 1999 addressed to the Additional DCP, New Delhi has stated that he was willing to arrange for re-transfer of 5,75,000 shares transferred in the name of M/s provided they returned back the amount of money taken away from these Companies along with interest as per business practice.

25. The allegation of the Complainants is that these shares have been transferred to various persons who happen to be close associate/employees/relatives of RIL and its Directors. In this connection, the Complainants pointed out to the Committee that the witness Mr. Bhagwan Kumar, Company Secretary, RIL, who appeared before the Committee initially denied that any of these persons to whom the shares have been transferred are the employees of RIL but when he had been put a specific question in respect of one transferee, namely, Shri Baby Kaypee, the witness confirmed that he is working in the office of RIL.

26. The Committee further noted that the Respondent having admitted that the share certificates with the transfer deeds were handed over by Mrs. Parwati Agarwal to him, has not been able to produce any evidence about how the consideration received from these shareholders have been paid back to Mrs. Parwati Agarwal. These shares were allotted in the name of DFL, an overseas Corporate Body registered in Mauritius. The Respondent was well aware of this fact and still in his reply has taken a stand that part of the consideration has been paid in cash though without bringing any evidence on record.

27. The Committee also noted that the Respondent alongwith the written statement enclosed a letter dated 16th June, 1999, written by RIL to the Joint Commissioner, of Police (Crime), Delhi as part of his defence whereby it has been claimed by the Company that the dividend cheques were handed over personally to the Respondent. The Respondent has nowhere been able to explain why he took personal delivery of the dividend cheques. It is interesting to note that in this letter RIL has stated that the Respondent was having business association with the Complainants and he was enjoying authority of the complainants.

28. The Committee noted that the entire explanation of the Respondent has been that he is being falsely implicated. The facts as brought on record and as analysed above do not support the explanation given by the Respondent. The Respondent being the Statutory Auditor of RIL, has taken delivery of the shares registered in the name of DFL. He has failed to bring any evidence on record that these shares were delivered back to DFL. The Respondent has admitted that he has received back the shares from the shareholders. These shares have been disposed of by the Respondent and the Respondent has failed to bring any material or evidence on record that these shares were disposed of as per the instructions of the concerned shareholders and the sale proceeds of the same have been accounted for as per the directions or instructions of the Complainants. The Committee further noted that the Respondent has taken delivery of the shares on

an authority letter which was forged and the fact which has not been rebutted by the Respondent as well as the Company. Moreover, the Committee also noted from the letter received from office of the Assistant Commissioner of Police: CBD:EOW:Crime Branch, New Delhi that the authority letter dated 23rd November, 1995 purportedly signed by Mrs. Parwati Agarwal was opined to be forged according to the FSL Report dated 31st May, 1999."

9. In view of the aforesaid findings, Disciplinary Committee drawn its conclusion holding Respondent guilty of charges levelled by Complainants falling within meaning of "other misconduct" under Section 22 read with Section 21 of Act, 1949. It also noted the conduct of non-cooperation on the part of Respondent.

10. After receiving report dated 2.2.2005 from Disciplinary Committee, the same was forwarded to both the parties i.e Complainants and Respondent, vide ICAI's letter dated 18.1.2007. Both parties were directed to submit their written statement, if any, to ICAI and also to intimate whether they propose to appear before Council, either in person or through a Member of ICAI, duly authorisized by them, to make oral submissions. Vide ICAI letters dated 1.3.2007 and 29.3.2007, parties were informed that Disciplinary Committee's report would be considered by Council of ICAI in the meeting held between 12.3.2007 to 14.3.2007 and 10.3.2007 to 11.3.2007. Complainants submitted their written statement on 7.5.2007 on the report of Disciplinary Committee but Respondent sought adjournment. ICAI accepted request for adjournement and communicated it vide letters dated 9.3.2007 and 5.4.2007, respectively. The matter was again proposed to be considered in the meeting held from 30.4.2007 to 2.5.2007. One of complainants, Mr. Mangi Lal Agarwal, appeared before Council for making oral submissions. Respondent also submitted written representation on 30.4.2007 and appeared alongwith his counsel before Council of ICAI and made oral submissions.

11. Having considered the same, Council decided to accept report of Disciplinary Committee and held Respondent guilty of "professional misconduct" and accordingly has made this Reference under section 21(5) of Act, 1949 to this Court.

12. The facts regarding receipt of shares issued by RIL to Complainants, having been delivered to Respondent are evident from record. For taking such delivery, Respondent submitted an authority letter dated 23.11.1995 alleged to have been signed by Mrs. Parwati Agarwal and said letter was presented to RIL through a person representing himself as Sri Sunil Kumar. Shares were collected by Respondent on 16.12.1995 against a receipt issued to RIL. RIL also paid divident amounting Rs. 6,27,020/- (crores). The dividend cheques and TDS certificates were also handed over to Respondent. These cheques were negotiated by DFL on 21.6.1996 and 12.12.1996 towards net divident of Rs. 5,36,100/- and Rs. 5,01,606/-, respectively. Thereafter, RIL received shares for transfer and thereafter Complainants made grievance of non-delivery of shares to them. The admission of delivery of shares has been admitted by Respondent at various places and one of such letter dated 9.3.1999, sent by Respondent to Additional Deputy Commissioner of Police, Crime Branch, New Delhi, in para 9, reads as under:-

"Consequently, when I came to Delhi from Varanasi for some official work of my other clients, I collected 7,54,900 shares on 18th December, 1995 from Rungta and informed her about it."

13. In para 10 of the said letter, Respondent said that aforesaid shares were handed over to Mrs. Parwati Agarwal personally by him at her residence at Lajpat Nagar, Delhi but no evidence to this effect has been placed on record.

14. We required repeatedly from learned counsel for Respondent to show any perversity , misreading or incorrect findings recorded by Disciplinary Authority or the view taken by Council of ICAI in accepting report of Disciplinary Committee, and making recommendation to this Court under section 21(5) of Act, 1949 but he could not show anything.

15. Our attention was drawn by Sri Vinod Swaroop, learned counsel appearing for ICAI to the letter dated 31.7.2003 written by Respondent which is on page 585 of Paper Book, stating that since a criminal case against Respondent has been registered by Economic Wing, Delhi Police and charge-sheet has also been submitted under Sections 409, 420, 468, 471 and 120-B I.P.C., therefore, inquiry proceeding should be defered. Sri Swaroop submitted that no serious attempt was made by Respondent to clear charge levelled against him. He also drew our attention to the two letters, dated 30.3.1995 addressed by Managing Director, RIL to M/s Durga Finance Limited, and 9.2.1996 addressed by Managing Director, RIL to Respondent showing collusion between RIL and Respondent, and playing fraud with Complainants. He also placed before us report sent by Inspector, Crime Branch, Delhi Police endorcement, dated 22.6.2000, verifying that both the letters contained genuine signature of Mr. Sanjay Rungta, Managing Director, RIL as verified by G.E.G.D. Hyderabad, on a query made by one of the complainant Mr. Mangi Lal Agarwal. He, therefore, submited that it was a clear case of "unprofessional conduct" amounting to misconduct on the part of Respondent which has been found proved on the material on record and in absence of anything otherwise shown by learned counsel appearing for Respondent, we find no reason to take a different view in the matter.

16. We, therefore, express, our agreement with the findings recorded by Disciplinary Committee and accepted by Council of ICAI that Respondent is guilty of "other misconduct" falling under Section 22 read with section 21 of Act, 1949.

17. Now we come to the question of punishment. A Chartered Accountant has a pious duty, having fiduciary relation with his client. He indulged in financial transactions in respect whereto people have great faith in him. In the present case, Respondent had not only cheated Complainants but has also played an active role in defrauding with the huge money of more than four crores of Complainants and benefited himself in a wholly illegal manner. It is a very serious thing. In our view, such persons should not be allowed to remain on the Roll of ICAI by serving punishment for a limited period. They may again have opportunity to cheat the people after serving the sentence. Here is a Chartered Accountant, that too, a senior Chartered Accountant who was a Fellow Member and hence it deserved to be treated more sincerely and very strictly.

18. In fact, ICAI in such matters should have shown a policy of "zero tolerance". Any person who has such a blot should not be allowed to remain a Member of ICAI for all times to come.

19. We, unfortunately, find it beyond comprehension as to why a just an eye-wash attitude has been addopted by ICAI by recommending removal of name of Respondent from register of Membership of ICAI only for a period of one year so that he may again join and indulge in similar activities. ICAI is a statutory body, owe responsibility to the people at large. It is answerable and accountable to the people in general for any act of misconduct, which also amounts to a criminal offence, committed by its members. If a message is given by ICAI that it takes such illegal acts of its Members leniently, with due sympathy towards them, instead of taking care of victims, it will be cast stigma on the credibility of statutory body like ICAI. It will convey a wrong message to the entire people in general of this country. It will also erode confidence and impiety of the statutory obligations and duties imposed upon ICAI by Parliamentary enactment.

20. Looking to the entire facts and circumstances of the case, though initially we were of the view that here is a fit case where respondent's name should be recommended to be removed from register of Membership, permanently, but since this matter has already remained pending for quite long time and Respondent is more than 70 years of age, having virtually served his professional career to a large extent, we hold that he should be awarded punishment of removal of his name from Register of Membership of ICAI for a period of five years which shall commence from the date it is so notified by ICAI.

21. We order accordingly.

22. The Reference is answered in affirmance subject to modification of punishment and stands disposed of accordingly.

23. Let a copy of this judgment be sent forthwith to ICAI for consequential action without any further delay.

(2016) 9 ILRA 1270
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Reference Against Misc. Acts. No.- 2 Of 1999

In The Matter Of Council Of The I.C.A. Of India ...Applicant
Versus
D.K. Agrawal. ...Opposite Party

Counsel for Applicant:
Vinod Swaroop

Counsels for Opposite Party:
Rahul Sahai, RB Singhal

FACTS

This Reference under Section 21(5) of the Chartered Accountants Act, 1949 was made by the Council of the Institute of Chartered Accountants of India (ICAI) concerning D.K. Agrawal, FCA, a practising Chartered Accountant at Agra. The proceedings arose from a complaint dated 7.2.1986 by the then Inspecting Assistant Commissioner of Income-tax (Assessment), Agra, alleging, inter alia, that the respondent had offered and paid bribes to Income Tax officers and staff to expedite his clients' assessments, fabricated documents, books of accounts and trust deeds (including recovery of rubber seals of various officers from his residence), charged fees as a percentage of capital raised for trusts, engaged in activities beyond the profession of Chartered Accountancy, misused his professional qualification before actually acquiring it, and committed forgery of challans defrauding the revenue.

Despite repeated opportunities, the respondent failed to file a written statement, and the matter was referred to the Disciplinary Committee (DC) for enquiry. The respondent submitted voluminous documentary material but did not meaningfully participate in the concluding hearing, absenting himself without valid reason after submitting a letter seeking adjournment. The DC examined six witnesses and, in its report dated 12.9.1989, held the respondent guilty of charges 1 and 2 (bribery of tax officials and fabrication of documents/trust deeds/rubber seals) and of professional misconduct under Clause (10) of Part I of the First Schedule (charging fees as a percentage of capital) in respect of charge 3, while exonerating him of charges 4 to 7 for want of evidence.

The Council of ICAI, after considering the DC's report and the respondent's representations, accepted the findings on 6.9.1995, holding the respondent guilty of 'other misconduct' under Section 21 read with Section 22 for charges 1 and 2, and of 'professional misconduct' under Clause (10) of Part I of the First Schedule read with Sections 21 and 22 for charge 3. For the professional misconduct under charge 3, the Council itself ordered removal of the respondent's name from the Register of Members for one year under Section 21(4). For the 'other misconduct' under charges 1 and 2, the Council recommended removal of the respondent's name for five years and made the present Reference to this Court under Section 21(5) for final orders.

ISSUES FOR CONSIDERATION

(i) Whether the findings of the Disciplinary Committee, as accepted by the Council of ICAI, holding the respondent guilty of 'other misconduct' under charges 1 and 2 (offering bribes to Income Tax officials and fabrication of documents/trust deeds) were sustainable on the material on record.

(ii) Whether the respondent's non-participation before the Disciplinary Committee and failure to offer any specific explanation to the documentary and admissive material relied upon (including his own statement recorded by the tax authorities and entries in seized diaries in his own handwriting) undermined his defence.

(iii) Whether the punishment of removal from the Register of Members for five years, as recommended by the Council of ICAI, was adequate having regard to the gravity and repetitive nature of the misconduct, including a related, separately considered matter against the same respondent.

HELD

The Court held that the findings of the Disciplinary Committee, as accepted by the Council of ICAI, holding the respondent guilty of charges 1 and 2 were well founded, being based on the respondent's own admission recorded by the tax authorities and on entries in diaries seized from his premises in his own handwriting, which the respondent had never denied. The respondent's counsel was unable to explain the search and seizure conducted under Section 132(1) of the Income Tax Act, 1961, or to rebut the documentary material, and could offer no more than a general denial and a plea for leniency. The Court found the respondent's conduct to be that of an initiator of corruption, offering bribes to public officials, and observed at length that such conduct by a professional entrusted with aiding public administration strikes at the root of public trust and cannot be viewed leniently.

The Court further held that the punishment of removal from membership for only five years, as recommended by the Council, was inadequate and virtually an eyewash, particularly since a related Reference concerning the same respondent was being considered by the Court on the same day, indicating a pattern of deliberate and repeated misconduct rather than an isolated lapse. The Court emphasised that punishment must be commensurate with the gravity of the misconduct and that a policy of leniency towards a professional who initiates corruption would itself perpetuate the very evil sought to be curbed.

RESULT

Reference answered in the affirmative. The findings of ICAI holding the respondent guilty of charges 1 and 2 ("other misconduct" under Section 21 read with Section 22 of the Chartered Accountants Act, 1949) are confirmed. However, in modification of the Council's recommendation of removal for five years, the Court directed that the respondent's name be removed from the Register of Membership of ICAI permanently. A copy of the order was directed to be sent to ICAI for consequential action.

CASE REFERRED

Secretary, Jaipur Development Authority Vs. Daulat Mal Jain, 1997 (1) SCC 34:
High Court of Judicature at Bombay Vs. Shirishkumar Rangrao Patil, 1997(6) SCC 339
B. R. Kapur Vs. State of T.N., 2001(7) SCC 231
State of A.P. Vs. V. Vasudeva Rao, 2004 (9) SCC 319

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This Reference under Section 21 (5) of the Chartered Accountants Act, 1949 (hereinafter referred to as "Act, 1949") has been made by Council of Institute of Chartered Accountants of India

(hereinafter referred to as "ICAI") in the matter of D.K.Agrawal, FCA of M/s Dinesh K. Agrawal & Co., Chartered Accountants, 46-A, Madhav Kunj, Pratap Nagar, Agra.

2. Facts in brief are that Shri A.K. Sawhney, the then Inspecting Assistant Commissioner of Income-tax, (Assessment), Agra (hereinafter referred to as "**IACIT**") made a complaint dated 07.02.1986 against Sri D.K. Agrawal making following allegations:

"1. Misconduct and misdemeanour - indulging in practice of offering and paying bribes to the officers and staff of the Government as a means of expediting his work by resorting to such unfair means.

2. Fabrication of documents, books of accounts, trust deeds etc. (including recovery of rubber seals of various officers from his residence).

3. Charging fixed percentage of commission on bogus and fictitious capital lent to others.

4. Engaging in activities other than occupation of Chartered Accountant.

5. Misuse of Degree and qualifications during the period when he did not possess such degree of qualifications.

6. Fabrication of books of accounts, documents and balance sheets.

7. Committing acts of cheating, forgery and defrauding the revenue by forging challans."

3. Copy of complaint was forwarded to respondent vide ICAI's letter dated 30.05.1986 asking him to file his written statement. Vide letter dated 20.06.1986, respondent said that some papers of complaint were not clear and requested ICAI to send clear copies. Desired documents were forwarded to respondent vide ICAI's letter dated 04.09.1986 and he was requested to submit his written statement. Vide letter dated 20.09.1986 respondent asked that complainant be directed to sent statement on oath about appearance of respondent before Income Tax Authorities and signing balance sheet etc. He was informed by ICAI' vide letter dated 13.10.1986 that under Act, 1949 and Rules framed thereunder, an affidavit is not required to support any complaint and he was advised to submit written statement on the basis of record made available. He was also informed that in case ICAI refers the matter to Disciplinary Committee (hereinafter referred to as "DC"), complainant would be required to appear before DC and make his submission on oath in the presence of respondent and he can cross-examine complainant also before DC. Respondent again sent a letter dated 28.01.1987, informing that he has earlier sent two letters, requiring certain information but has not received any response, though these letters had been received by ICAI.

4. Ultimately, final opportunity for filing written statement was given vide ICAI's letter dated 13.10.1986. Respondent again requested ICAI to direct Income Tax Officer, CC-I to supply copies of seized material and also permit inspection of record to enable him to prepare his written statement. ICAI vide letter dated 30.03.1987 informed respondent that Institute is not in a position to direct complainant to provide any particular document and it is open to the respondent to approach complainant's Department directly. Time to file written statement was extended by 15.04.1987. Later on, Income Tax Department vide letters dated 20.03.1987, 31.03.1987 and 01.04.1987 communicated its willingness to permit inspection of its documents to respondent and he was informed accordingly vide ICAI's letters dated 21.04.1987, 15.05.1987 and 24.06.1987.

5. Respondent, however, did not respond. He also failed to submit his written statement. ICAI in these circumstances and in the absence of any written statement, which respondent failed to submit despite repeated opportunity, considered the matter in its 128th meeting held from 14th to 17th September, 1987 and formed an opinion that prima facie respondent was guilty of professional and/or "other misconduct".

6. Consequently, ICAI referred the case to DC for enquiry. DC fixed 07.03.1988 as the first date for enquiry. Respondent submitted voluminous record as evidence running in about 3000 pages to DC. Copies of these records were forwarded to complainant for his reference and making submissions at the time of hearing. Vide letter dated 25.02.1988 complainant requested for adjournment on the ground that voluminous records sent by respondent needed some more time for scrutiny and complainant was also busy in revenue matters since limitation in a large number of cases was going to expire in the month of March. DC consequently, adjourned hearing and fixed 29.12.1988 at Agra. On the date fixed, complainant's representatives Shri Mohan Singh, Deputy Commissioner of Income Tax, (Central), Lucknow and Shri K.K.Saxena, Assistant Commissioner of Income Tax (Central Circle-I), Agra, respondent and six witnesses were present. Matter was heard by DC but hearing could not conclude and it was next fixed on 21st and 22nd February, 1989 at Agra. On 21.02.1989 respondent came to venue of meeting and handed over a closed envelope to DC, which was addressed to Secretary, ICAI and left venue stating that he would appear in the meeting before DC only after a decision is taken on the letter contained in envelope. Envelope contained a confirmation copy of a telegram dated 19.02.1989 stated to have been sent by respondent to ICAI, requesting for adjournment of hearing and taking a decision on his letters dated 1st and 11th February, 1989. DC found that in the letter dated 01.02.1989 respondent has said that Shri A.K.Sawhney, IACIT, who made complaint, should be directed to remain present before DC. He also pointed out that Shri Sawhney is now posted as Deputy Director of Income Tax (Investigation), Kanpur. DC also noted that on earlier date of hearing held on 29.12.1988, Shri K.K. Saxena, successor of Shri Sawhney had appeared before Committee and respondent did not raise any objection in the proceedings. It also noted by that ICAI had already sent notice to Shri Sawhney at Kanpur for appearing before committee and, thereafter, Sri Sawhney, Deputy Director of Income Tax (Investigation), Kanpur and Shri K.K.Saxena, Assistant Commissioner of Income Tax (Central) both appeared before DC. In reply to respondent's letter dated 01.02.1989, he was informed by ICAI through telegram that hearing would be held as scheduled and he may make his

submissions before DC at the time of hearing. Letter dated 11.02.1989 of respondent was repetition of his earlier letter dated 01.02.1989.

7. In the circumstances, non-participation of respondent in DC's meeting dated 21.02.1989, was found wholly without any valid reason. Hence DC proceeded with hearing in continuation of his earlier part-heard proceedings held on 29.12.1988, in the absence of respondent, and concluded the same.

8. DC in all examined six witnesses, namely :

1. Sri Lal Singh, Stamp Vendor, Agra.
2. Shri Vinod Kumar Gupta, Stamp Vendor, Agra.
3. Shri S.P.Sharma, Dy. Manager (Govt.), State Bank of India, Agra.
4. Shri A.L. Taneja, Officer (Govt.), State Bank of India, Agra.
5. Shri N.K. Bhargava, Cash Officer, State Bank of India, Agra.
6. Shri Rakesh Agarwal, Partner, M/s Rakesh Dinesh & Co., Chartered Accountants, Agra.

9. DC submitted its report dated 12.09.1989 dealing with charges and recorded its findings as under :

*"**29.1**. The first charge relates to the mis-conduct and mis-demeanour. The Committee has carefully perused the details contained in Annexure-B to the complaint. The Complainant had mainly relied on the statement of the Respondent recorded by the IAC (Assessment), Agra on 9th, 10th and 11th July, 1985, wherein the Respondent had admitted that he had offered bribes to officers for getting assessment of his clients completed. The Committee has also perused the diary marked as B/2 wherein the entries relating to Vishnu Bhagwan Agarwal, Pathwari, Agra have been indicated. The Committee has also seen a number of such entiries in the diary marked as B/8 and B/12. At number of places, the Respondent in his own hand-writing has indicated in respect of various charges in their individual account. The amount paid to I.T.O. on account of Trust is one such entry for instance, at page 39 in the diary B-11 in the name of Dilip Kumar Kali Charan, Agra, wherein Rs.4,000/- have been shown as "Paid cash to I.T.O. A/c Trust on 10.12.1982." **This is a diary which has been seized by the department from the premises of the Respondent and the entries in the diary are in the hand-writing of the Respondent.** The entries in this diary, in various parties accounts, clearly **disclosed the amount paid to the I.T.O. On various accounts, on different dates, and against which, the Respondent has received the reimbursement from the concerned clients, from time to time.** In the wake of Respondent's admission before the Income tax Department and the entries made by him in the diaries and registers seized from him, **which the Respondent had not denied, at any time, the Committee is inclined to hold the Respondent guilty of a conduct and indulging in practice of paying bribes to officers and staff of the Income-tax Department**.*

29.2 As regards the charge of fabrication of documents, Books of Accounts, Trust Deed and charging fee concession/fees on the basis of percentage of the capital created, the Committee noted ***that in the seizure from the Respondent's premises a large number of rubber stamps were recovered including in the names of the Government officials****. The seals include the rubber stamp in the name of Sardar Lal Singh, Stamp Vendor as well as a large number of other assesses, Chartered Accountants, etc. The entries made by the Respondent in his own handwriting in the diaries B/2 and X/7* ***clearly establish that the Respondent was himself involved in forming trust and charging fees @ 8% which have been clearly marked in the various pages of the ledger in the Annexure-X/7****. Similarly, entries in his own hand-writing in the diary 3/E clearly establish the involvement of the Respondent in forming a large number of trusts by charging commission as percentage of the capital created.* ***The Respondent had not denied or repudiated his statements and the seizure-memo which had been duly signed by him. He is thus guilty of this charge.***

29.3 As discussed above, the Complainant has shown an original Trust Deed, wherein Shri Agarwal has noted the instructions on 7.6.1982, but the existence of the Trust has been shown w.e.f. 15.1.1977. Similarly, it has been found on the ***Trust deed of Manju Agarwal that the Respondent has signed on 19.4.1972 as Chartered Accountant whereas the Respondent was enrolled as an Associate Member only in the year 1975****. From the ledger and diaries seized by the Department from the premises of the Respondent and which are in the handwriting of the Respondent, it is evident that the Respondent has charged commission/fees at 8% or at other percentage. It is evidently against the clause (10) of Part I of the First Schedule which prohibits a member to charge or offer to charges, accept or offer to accept in respect of any professional employment fees which are based on percentage.*

29.4 As regards the Charge number 4 regarding the engagement in activities other than occupation of C.A., the Complainant has mainly relied on the statement of Shri Nagendra Mohan Mittal S/o Shri Om Dayal Agarwal, the brother-in-law of the Respondent where-in he has admitted of having invested money received from Shri Agarwal. However, the ***Committee finds no other evidence of the Respondent having engaged himself in other activities and in the absence of any evidence, this charge fails and is not proved.***

29.5 As regards the Charge number 5 i.e., Mis-use of degree and qualifications during the period when the Respondent did not possess such degree or qualifications, the Committee has dealt with this charge alongwith charge Nos.2 and 3. The date 19.4.1972, given by Shri D.K.Agarwal below his signature on the Deed is taken to be correct on the original Trust Deed seen by the Committee. ***It is evident that the Respondent was not a member as on that date but he has acted as a Chartered Accountant on 19.4.1972. However, the Committee finds that a person, not being a member to represent himself as a Chartered Accountant is governed by Section 24 of the Chartered accountant and could be dealt with accordingly. However, such a case would not fall, within any of the clauses under the First Schedule/Second Schedule read with Section 21 of the Chartered Accountants Act, 1949****.*

29.6 As regards the charge number 6, i.e. the fabrication of books of accounts, documents and Balance Sheets, the complainant has relied on the draft Balance Sheet at page 52 in the Complaint, (original of which was shown at the time of hearing to the Committee). During the course of proceedings, the Complainant has drawn the attention of the Committee to a large number of blank papers seized by the department duly signed by the various parties running into thousands. The Committee also noted that a large number of books relating to various assessees and the papers relating to them were seized by the department from the premise of the Respondent. The number of Rubber stamps were found at the premises of the Respondent. However, as far as the specific instances which have been referred about the balance-sheet of Smt. Shanti Devi, in the absence of a clear evidence that the said Balance sheet was filed in the same manner, ***the Committee is inclined to give benefits of doubt to the Respondent****. The corrections made in the Balance sheet are at the stage of preparation itself and even assuming that this has been sent and corrections have been made afterwards, it would not tantamount to a fabrication unless it is established that the said balance sheet in the said manner has been filed anywhere. Evidently,* ***this balance sheet has been seized during the course of raid and mere corrections in the balance sheet without making the correction in the total, would not establish a charge of fabrication against the Respondent****.*

29.7 As regards charge no.7, the Complainant has pointed out that the Respondent was instrumental in forging three challans of Rs.500 each in respect of the parties indicated in the complaint, namely, Shital Prasad Jain Pvt. Family Trust, Padam Chand Jain Pvt. Family Trust and Surendra Kumar Jain Pvt. Family Trust. These challans of Rs.500/- each were purported to have been deposited in the state bank of India, Agra towards fees payable to the settlement commissions. ***The State Bank of India has confirmed that no such payments were made with Bank, and these challans have been forged****. The Copies of the challans filed by the Complainant at pages 54 and 56 in his complaint (Annexure X-13) indicate the payment of Rs.500/- each and the Complainant has relied that the handwriting in the challans is of the Respondent. These challans have been received by the Income tax Department from the Settlement Commission alongwith the application and were not seized by the Department from the Respondent in the raid. The handwriting in the challans may appear to be in the hand of Respondent. However, the Complainant has not got the handwriting expert's opinion on this matter, nor has he recorded the Respondent's statement and therefore, in the absence of positive and clear cut evidence, the Committee is unable to hold the Respondent guilty of his involvement for the forgery in these challans. Similarly, the department has not been able to prove beyond reasonable doubt, that the Respondent was instrumental in forging the notices of demand, purported to have been issued in the name of Prem Chand S/O Kapoor Chand and in the absence of adequate evidence, the Committee holds that the* ***charge contained in clause (7) of the complaint is not proved."***

(emphasis added)

10. The aforesaid findings show that DC held respondent guilty of charges 1 and 2, constituting "other misconduct" under Section 21 read with Section 22 of Act, 1949 and

"professional misconduct", under Section 21 read with Section 22 and Clause (10) of Part I of First Schedule to Act, 1949 for charge 3.

11. Above report was submitted to ICAI and then forwarded to complainant as well as respondent vide ICAI's letter dated 08.08.1991 with the information that report would be considered by ICAI in one of its forthcoming meeting. Parties were permitted to file their representation, if any. For consideration of report of DC, ICAI fixed the matter to be considered in its meeting scheduled on 5th to 7th August, 1993 but on the request of respondent, it was adjourned. Next date i.e. 24th to 26th November, 1993 was also adjourned to 14th to 16th July, 1994 on the request of respondent. Then the matter was scheduled for 1st to 3rd September, 1994 but due to paucity of time, could not be taken up and Council fixed 5th to 7th December, 1994 but on this date again, it was adjourned on the request of complainant. Next dates fixed were 16th to 18th January, 1995 and 20th to 22nd July, 1995, when it was adjourned on the request of complainant.

12. Respondent then submitted representations dated 27th July, 1993 and 4th July, 1994 but neither he nor his authorized representative appeared before Council. Complainant, however, failed to submit any representation whatsoever.

13. Ultimately, Council took up matter in its meeting on 06.09.1995 and after considering report and representation of respondent accepted report. Council found respondent guilty of "other misconduct" within the meaning of Section 21 read with Section 22 of Act, 1949 in respect of charges 1 and 2. It also found him guilty of "professional misconduct" under Clause (10) of Part I, First Schedule read with Sections 21 and 22 of Act, 1949 in respect of charge 3. For other charges 4 to 7, respondent was exonerated.

14. Thereafter, in respect of misconduct Clause (10) Part I, First Schedule, a show cause notice was issued to respondent for passing order under Section 21(4) of Act, 1949. Matter was separately processed and after giving opportunity to respondent, ICAI in its meeting held from 8th to 10th December, 1997 decided to remove name of respondent from Register of Members for a period of one year. In respect to "other misconduct", Council decided to recommend removal of name of respondent from Register of Members for a period of five years and made Reference to this Court under Section 21(5) of Act, 1949 that is how, matter has now come up before us.

15. Respondent at the time of hearing, filed supplementary affidavit bringing on record assessment orders for Assessment Years 1983-84, 1984-85 and 1985-86 to show that after remand by Tribunal, Assessing Officer accepted income disclosed by Assessee, i.e. respondent.

16. We confine ourselves in this matter to consider this Reference so far as respondent has been found guilty of "other misconduct" under charges 1 and 2. Finding of DC in respect of charge 1 is founded, besides others, on the admission of respondent recorded by IACIT (Assessment), Agra on 9th 10th and 11th July, 1985 that respondent had offered bribe to officers for getting assessments of his clients completed. This was verified from entries made in diary marked as B/1

and B/12 in the handwriting of respondent. This diary was seized by Income Tax Department from the premises and possession of respondent. Search and seizure operation was conducted at residential and business premises of respondent in September, 1984 pursuant to warrant of authorization, issued against respondent under Section 132(1) of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961"). Documents seized during said proceedings, were sought to be explained/interrogated with respondent by Income Tax Authorities and a questionaire recorded by the Authorities was relied in support of aforesaid charges. In the written representation, submitted by respondent, we also find nothing about aforesaid search and seizure operation and the material seized in the said proceedings. General allegation is made that complainant has submitted false and bogus complaint and documents. Basic objection was that the photostat copies were not admissible in evidence and that witnesses were not produced before DC and papers prepared by complainant are fabricated In support of charges 1 and 2, brief reply given by respondent in his written statement reads as under :

"As regards the charges No.1 to 3 no original Documents, person man, Accounts and other evidence, witness have been either produced before the Committee or examined by the Committee, the fabricated papers prepared by the complaints have been in photo state copies shown to committee. No person and witness have been produced for proving the first charge, second charge and third charge at all, in respect of the Report prepared after thought and after gap of time back dated. So, it is only supplied to me on 14/10/1991 only."

17. Learned counsel for respondent contended that entire complaint has been manufactured against him but when questioned, he could not reply as to why respondent could not participate in the enquiry before DC. He also could not place anything before us to show that his premises was not searched pursuant to warrant of authorization under Section 132(1) of Act, 1961 and material documents, etc. seized therein were examined by Income Tax Authorities or that he was also questioned and that the Questionnaire supplied by complainant was not a statement given by him. In fact, we find virtually no explanation whatsoever, except simple denial on the part of respondent, which lacks specific explanation with regard to allegations founded on the basis of record.

18. Learned counsel for respondent in fact attempted to defend his client but in the absence of any material, after a shortwhile, could not make any further submission and stated that whatever is available on record, Court may examine and take a lenient view in the matter.

19. In the circumstances, findings recorded by DC and accepted by ICAI in regard to charges 1 and 2 holding respondent guilty, are hereby confirmed.

20. Counsel has recommended punishment of removal from Membership Register for a period of five years. There is another matter, which has been heard by this Court today, which is also related to this very respondent, wherein ICAI has separately proposed removal of name of respondent from Register of Membership for a period of two years. Two References received in respect of same person shows that misconduct found proved against him is not an act committed

indeliberately at some point of time, may be under some misconception, but the things are otherwise. The modus operandi of respondent shows planned and well considered regular practice.

21. In fact charges found proved by DC and accepted by ICAI, which have been subject matter of consideration before this Court, in our view are very serious. Respondent has been found indulged in practice of offering bribe to Officers and staff of Income Tax Department. Respondent is initiator of corruption and equal participants are some Officers of Income Tax Department. In the present proceedings, subject matter of consideration of corruption is only the respondent, who is offerer and giver of bribe to public servants and not the public servant(s), acceptor of illegal gratification.

22. This is a conduct wholly unbecoming of a person engaged in profession of Chartered Accountant and is also an offence under criminal law. Not only this, charges show substantial cause of a serious disease, Nation is presently suffering and is the root cause of lots of problems of citizens in general and entire Nation in particular. It is the people like respondent, who initiate corruption, taking advantage of greed of human being and that is how, cause huge loss to the nation's development.

23. The term "corruption" has various shades. In general, the well accepted meaning of corruption is the act of corrupting or of impairing integrity, virtue, or moral principle; the state of being corrupted or debased; lost of purity or integrity; depravity; wickedness; impurity; bribery. It further says, "the act of changing or of being changed, for the worse; departure from what is pure, simple, or correct; use of a position of trust for dishonest gain."

24. Though in a civilized society, corruption has always been viewed with particular distaste to be condemned and criticised by everybody but still one loves to engage himself in it if finds opportunity, ordinarily, since it is difficult to resist temptation. It is often, a kind, parallel to the word 'bribery', meaning whereof in the context of the politicians or bureaucrats, induced to become corrupt.

25. The Greek Philosopher Plato, in 4th Century BC said, "in the Republic that only politicians who gain no personal advantage from the policies they pursued would be fit to govern. This is recognised also in the aphorism that those who want to hold power are most likely those least fit to do so." While giving speech before the House of Lords William Pitt in the later half of 18th Century said, "Unlimited power is apt to corrupt the minds of those who possess it." Lord Acton in his letter addressed to Bishop Creighton is now one of the famous quotation, "Power tends to corrupt and absolute power corrupts absolutely."

26. Corruption is a term known to all of us. Precise meaning is illegal, immoral or unauthorized act done in due course of employment but literally it means "inducement (as of a public official) by improper means (as bribery) to violate duty (as by committing a felony)." It is a specially pernicious form of discrimination. Apparently its purpose is to seek favourable, privileged treatment from those who are in authority. No one would indulge in corruption at all if those who are in authority, discharge their service by treating all equally.

27. We can look into it from another angle. Corruption also violates human rights. It discriminates against the poor by denying them access to public services and preventing from exercising their political rights on account of their incapability of indulging in corruption, of course on account of poverty and other similar related factors. Corruption is, therefore, divisive and makes a significant contribution to social inequality and conflict. It undermines respect for authority and increases cynicism. It discourages participation of individuals in civilised society and elevates self interest as a guide to conduct. In social terms we can say that corruption develops a range bound field of behaviour, attitude and beliefs.

28. Corruption is antithesis of good governance and democratic politics. It is said, that when corruption is pervasive, it permeates every aspect of people's lives. It can affect the air they breathe, the water they drink and the food they eat. If we go further, we can give some terminology also to different shades of corruption like, financial corruption, cultural corruption, moral corruption, idealogical corruption etc. The fact remains that from whatever angle we look into it, the ultimate result borne out is that, and the real impact of corruption is, the poor suffers most, the poverty grows darker, and rich become richer.

29. It is not that the Apex Court is oblivious of the situation at ground level. It had also occasion to comment thereon time and again. In **Secretary, Jaipur Development Authority Vs. Daulat Mal Jain, 1997 (1) SCC 34:**

". . . . When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as 'corruption'."

30. In **High Court of Judicature at Bombay Vs. Shirishkumar Rangrao Patil, 1997(6) SCC 339,** the Court held:

"Corruption, appears to have spread everywhere. No facet of public function has been left unaffected by the putrefied stink of 'corruption'. 'Corruption' thy name is depraved and degraded conduct..... In the widest connotation, 'corruption' includes improper or selfish exercise of power and influence attached to a public office."

31. Again the Court in **B. R. Kapur Vs. State of T.N., 2001(7) SCC 231** said:

". . . . scope of 'corruption' in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate."

32. In **State of A.P. Vs. V. Vasudeva Rao, 2004 (9) SCC 319** the Court took judicial notice of this epidemic and said:

". . . The word 'corruption' has wide connotation and embraces almost all the spheres of our day-to-day life the world over. In a limited sense it connotes allowing decisions and actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations."

33. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments, gets frustrated but the people like respondent succeed by polluting the system. It erodes credibility in the system.

34. Corruption is a double edged knife, one who initiates corruption, causes same injury and the one who accepts the same. An official indulged in corruption should not be tolerated to remain in system even for a while and there should be a zero tolerance. Similarly those who initiate corruption, offer it or invite the greed of human being, should be dealt with strictly, since they are the persons who abet corruption. If such persons are not available, question of bringing in corruption may not arise. Any action which is coloured with corruption is illegal since inception. The authorities whose responsibility is to check it must deal with, both, strictly. Public administration no doubt involves a vast amount of administrative discretion but if it shields action of persons indulging in corruption, it is the duty of Court to take effective steps and rise to the occasion, otherwise, confidence of common man would shake. Barring the two sides who are participants in corruption, real loser is 'common man'. He is the person who is a silent victim and ultimately suffers on account of his economical disadvantages. That is how, corruption is against basic human rights, since it creates discrimination between haves and have nots. Whenever matter of corruption comes to Court, it is our responsibility to take such matters in a manner so that confidence of common man remains intact. He gets a message that he is not helpless and those indulged in corruption cannot succeed by their superiority in status or prosperity etc. They will have to pay for their misdeeds. Courts must show to a common man that there is a someone to take care and restrain arbitrary and illegal activities, not only on the part part of public functionaries indulged in corruption but also those who attempt to sow the seed of corruption.

35. In our system, Constitution being supreme, yet real power vests in the people of India since Constitution has been enacted "for the people, by the people and of the people". In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. For purity of public functions Legislature in respect of service and professions has regulated their functioning so that such professionals/service providers aid and assist public functionaries in discharge of their duties towards public free of any irregularity, illegality, dishonesty and anything which causes ultimate loss to the public in general and public exchequer in particular. After all, public exchequer is nothing but a fund held by the State in trust for and on behalf of the people of India so as to be condoned for its benefit and welfare. Whenever if the professionals and service providers who are supposed to show a good, honest

and law abiding conduct, themselves indulge in corruption by initiating corruption to impure the public functionaries, taking advantage of normal human greed, entire edifice of the system made for larger public benefit is bound to collapse. Therefore, whenever such professional or service provider is found indulged in corruption, i.e. initiation of corruption by offering bribe, illegal gratification, etc. to public functionaries, like Revenue Authorities, Regulatory Bodies should take the matter not only seriously but when the charge is proved, punishment must be stringent so that it only excludes such person(s) from finding any opportunity in future to again re-indulge in such kind of activities but may also be a nation for those not to think of those activities. In the present case, the respondent having been found guilty of offering bribe to Income Tax Officers, still has been proposed a punishment of removal of his name from register of Membership only for five years, which is nothing but an opportunity offered to him to re-enter the profession and enjoy another opportunity of indulging in similar activities. This conduct, in our view requires stringent and severe punishment. Punishment should always be commensurate to misconduct or error or guilty committed by person concerned. An attempt of sympathy or compassion with such erring person will be nothing but a misplaced sympathy with the guilty persons, ignoring the fact that those who have suffered on account of such illegality, stand to continue to suffer for all times to come.

36. When we consider the charges 1 and 2 having been proved against respondent and seriousness thereof, we are pained to see that ICAI has taken a lenient view of the matter and its proposal is a mere eyewash. We fail to understand why in such a case, ICAI should now follow a policy of zero tolerance and remove root cause of corruption by slapping/forbidding such persons from holding licence to practise as Chartered Accountant for all times to come.

37. We have no hesitation in observing that findings of ICAI holding respondent guilty of charges 1 and 2 and making this Reference before us under Section 21(5) of Act, 1949, is absolutely correct but their recommendation for removal of name of respondent only for five years from Register of Membership, is not only inadequate but an inbuilt peril therein would be that initiator/ participant of corruption, after a shortwhile, will continue to have an opportunity to indulge in such activities again. The disease does not require a mere medication for the time being but an amputation is only solution which may also be a message to others and will be an example to any person, who might be thinking in terms like that of respondent.

38. We therefore, answer Reference in affirmance, confirming guilt of respondent in respect of charges 1 and 2, which are subject matter of Reference under Section 21(5) of Act, 1949. We further direct that respondent's name shall be removed from the Register of Membership of ICAI permanently.

39. Copy of this order be remitted to ICAI for consequential action.

40. Reference is answered accordingly.

(2016) 9 ILRA 1283
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Central Excise Reference No.- 9 Of 2010

Commissioner Of Central Excise, Kanpur ...Applicant

Versus

M/S Kanpur Plastic Pack Ltd. ...Opposite Party

Counsel for Applicant:
C.S.C., B.K. Singh Raghuvanshi

Counsel for Opposite Party:
Anubhav Chandra.

Subject Matter
Central Excise Act, 1944 - Section 11B(2), Proviso (c) - Section 12B - Doctrine of unjust enrichment - Refund of duty paid on intermediate/captively consumed goods - Whether Tribunal correctly applied the exemption from the bar of unjust enrichment under proviso (c) to Section 11B(2) to a refund of duty on captively consumed goods not corresponding to Modvat credit on inputs, and not arising under Rules/Notification issued under the Act - Held, reliance on proviso (c) was not justified as it was not attracted on facts, but refund could not in any event be denied on the ground of unjust enrichment as that issue stood concluded in Assessee's favour by an unchallenged, final order of the appellate authority.

Facts
The respondent-Assessee, a manufacturer of HDPE/Polypropylene tapes, fabrics and sacks, initially classified its furnished products under Chapters 54, 59 and 63, under protest. Following a Tribunal decision in other matters, the Assessee sought reclassification under Chapter 39 vide classification list effective 11.7.1989. The Assistant Collector, by order dated 19.1.1990, declined the revised classification. This was upheld in appeal by the Commissioner of Central Excise (Appeals), Allahabad, on 19.11.1990, but the Tribunal, by order dated 21.9.1992, allowed the Assessee's further appeal, set aside the CCE(A) order, and granted consequential relief. Relying on this, the Assessee sought refund of Rs. 1,85,84,873/- paid on tapes during 1.3.1986 to 11.2.1990, on the footing that the tapes (Chapter 39) were captively consumed in manufacturing fabric (also Chapter 39) and hence exempt. After a writ petition compelled a decision, the Assistant Collector rejected the refund on 13.10.1995 on grounds of limitation and unjust enrichment. In appeal, the CCE(A), by order dated 31.1.1996, held the plea of unjust enrichment not sustainable - since duty was paid on intermediate products and the question of passing on its incidence to customers did not arise - and remanded the matter on that footing; this order was not challenged by Revenue and attained finality. On remand, the Assistant Commissioner, by order dated 30.6.1998, dropped the limitation objection but again invoked unjust enrichment, holding the burden lay on the Assessee to show non-passing of duty incidence. The CCE(A), by order dated 16.11.1998, set aside this order and directed refund of Rs. 1,16,28,268/- (after adjustment of duty on fabrics against Modvat credit and duty paid on tapes). Revenue's appeal against this order was

rejected by the Tribunal on 25.10.2000, holding that refund did not amount to unjust enrichment and was admissible under proviso (c) to Section 11B in respect of credit of duty paid on inputs. Revenue's reference application (No. 23/2001) under Section 35H(1) led to this Court directing, by order dated 24.11.2009, that the Tribunal refer the two questions of law set out above for adjudication.

Issues

1. Whether the Tribunal correctly applied proviso (c) to Section 11B(2) of the Central Excise Act, 1944 - which exempts refunds from the bar of unjust enrichment - to a refund of duty paid on captively consumed goods, where the refund did not correspond to Modvat credit of duty paid on excisable goods used as inputs.
2. Whether the Tribunal correctly applied the said proviso (c) to such a refund where it had not arisen in accordance with the Rules made, or any Notification issued, under the Central Excise Act, 1944.

Held

Proviso (c) to Section 11B(2) is concerned with payment of refund to the Assessee rather than credit to the Consumer Welfare Fund, in respect of amounts relatable to clauses (a), (b) and (c) of the proviso. The Tribunal's reliance on proviso (c) to exclude the bar of unjust enrichment was, on facts, not correct, since the refund in question did not correspond to Modvat credit on inputs as contemplated by that provision. However, this did not entitle Revenue to succeed, because the plea of unjust enrichment itself stood concluded against Revenue by the order of the Commissioner of Central Excise (Appeals) dated 31.1.1996, which held the plea unsustainable as duty was paid on intermediate products and no question of passing on its incidence to customers arose. That order was never challenged by Revenue and attained finality. Consequently, the Assistant Commissioner had no jurisdiction to reopen and reapply the overruled plea of unjust enrichment on remand, and his order to that effect was unauthorized, without jurisdiction, and illegal. The concurrent findings of the CCE(A) and the Tribunal granting refund in favour of the Assessee were therefore rightly recorded, notwithstanding the incorrect invocation of proviso (c) by the Tribunal, and the ultimate order of the Tribunal warranted no interference.

Result

Reference answered in favour of the Assessee and against the Revenue on both questions: reliance on proviso (c) to Section 11B(2) was not justified as inapplicable on facts, but refund could not be denied on the ground of unjust enrichment, that issue having attained finality in Assessee's favour. Tribunal's order upheld. Reference disposed of accordingly.

(Delivered by Hon'ble Sudhir Agarwal, J.)
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Shri Praveen Kumar, learned counsel for applicant Revenue and Shri Aasutosh Agrawal, learned counsel for respondent, Assessee.

2. The following questions have been referred for adjudication under section 35H(4) of Central Excise Act, 1944 (hereinafter referred to as "Act, 1944").

"1. Whether Tribunal has correctly applied provisions contained in proviso (c) to sub section (2) of Section 11B of Central Excise Act, 1944, which afford protection to refunds from the bar of unjust enrichment, to a case of refund of duty paid on goods which have been captively

consumed, when the said refund does not correspond to credit of duty paid on excisable goods used as inputs?

2. Whether the Tribunal has correctly applied provisions contained in proviso (c) to sub section (2) of Section 11B of Central Excise Act, 1944, which afford protection to refunds from the bar of unjust enrichment, to a case of refund of duty paid on goods which have been captively consumed, when the said refund has not arisen in accordance with the Rules made or any Notification issued under the Central Excise Act, 1994?"

3. The bare minimum facts, necessary to deal with these questions, as evident from record, are stated as under:

4. M/s Kanpur Plastipack Ltd, Panki Industria Area, Kanpur (hereinafter referred to as the respondent) are manufacturer of HDPE/Polypropylene Tapes, fabrics and sacks - both laminated and unlaminated. Their starting raw-material is HDPE/LDPE/PP Granules which are extruded in the extrusion machine to make films. The films so made are slated to form tapes of the required width. The tapes are, thereafter, woven into fabrics and the fabrics thereafter, are stitched to make sacks and bags. The basic raw-material for the manufacture of HDPE/Sacks and bags is plastic granules and falls under Chapter 39 of Central Excise Tariff.

5. Assessee filed a classification list on 31.8.1996, classifying furnished product under Chapter 54, 59 and 63, though under protest. Later, on a judgment of Tribunal in some other matters, Assessee sought revision of classification of furnished product to Chapter 39. It filed a classification list No.2/89 effective from 11.7.1989 classifying furnished products under various headings of Chapter 39. Revised classification list was not approved by Assistant Collector who ordered on 19.1.1990 to continue classification of furnished goods under various headings of Chapters 54, 59 and 63.

6. Aggrieved by order dated 19.1.1990, Assessee preferred appeal before Commissioner of Central Excise (Appeals), Allahabad (hereinafter referred to as "CCE(A)") who rejected the same vide order dated 19.11.1990. Assessee then preferred further appeal before Customs, Central Excise & Service Tax Appellate Tribunal (hereinafter referred to as "Tribunal") who by order dated 21.9.1992 allowed appeal and set aside CCE(A)'s order dated 19.11.1990 and granted consequential relief to Assessee.

7. Based on the order of Tribunal, dated 21.9.1992, Assessee submitted an application dated 15.3.1993 before Assistant Commissioner claiming refund of Central Excise Duty of Rs.1,85,84,873/- paid by him on Tapes during 1.3.1986 to 11.2.1990 on the ground that Tribunal has held these tapes classifiable under Chapter 39 and since these tapes were consumed by Assessee for manufacture of fabric, again a Chapter 39 product, the same was exempt from duty. The application remained unattended whereupon Assessee came to this Court and filed a writ petition which was disposed of directing concerned authority to take a final decision within two months. Pursuant thereto, Assistant Collector vide order dated 13.10.1995, rejected claim of refund

on the ground of being barred by "time" as also "unjust enrichment". Assessee preferred appeal to CCE(A) which was decided vide order dated 31.1.1996 and the matter was remanded to Assistant Commissioner with the following observations:

(a) the ***ground of rejection*** *of refund claim i.e* ***undue enrichment is not sustainable,*** *as the duty was paid on intermediate products and the question of passing on of incidence of duty to the customers does not arise; and*

(b) in the instance case, ***duty has been under protest and hence limitation of six months does not apply*** *as per the provisions of Section 11-B of Excise Act.*

8. Assistant Commissioner again passed order dated 30.6.1998 after remand, wherein he dropped objection regarding limitation but with respect to "unjust enrichment", it held that Section 12B of Act 1944 talks of "excise duty" which includes "duty paid on intermediate product" also hence burden to prove that incidence of duty whereof refund is asked, was not passed on to the customer, is upon Assessee.

9. Aggrieved by this order dated 30.6.1998 passed by Assistant Commissioner, Assessee preferred appeal before CCE(A) who allowed the same vide order dated 16.11.1998, set aside order 30.6.1998 and directed for refund of Rs.1,16,28,268/-. CCE(A) determined amount of refund after adjusting duty, to Rs.3,71,57,046/- on fabrics which became payable by virtue of settlement of classification dispute and allowing Modvat credit of duty on inputs, to Rs.3,02,00,441/- and adjustment of duty of Rs.1,85,84,873/- paid from PLA at the tape stage. According to CCE(A), admissible refund was calculated as [Rs.3,02,00,441+Rs.1,85,84,873 - Rs.3,71,57,046 = 1,16,28,268/-].

10. Revenue felt aggrieved by this order dated 16.11.1998, hence preferred appeal before Tribunal but failed since appeal was rejected by Tribunal vide order dated 25.10.2000. Tribunal while rejecting appeal, observed as under:

(a) They do not agree with the contention of the department that the grant of refund in this case results in unjust enrichment to the Respondents.

(b) The refund of credit of duty is admissible to the Respondent in terms of proviso (c) to Section 11B of the Central Excise Act, according to which the bar of unjust enrichment does not apply to the refund of credit of duty paid on excisable goods used as inputs, in accordance with the Rules made, or any notification issued under the Excise Act.

(c) The finding of the lower appellate authority that requirement of cost data on HDPE tape is irrelevant, since duty on tape was paid at specific rate and that verification of modvatable document showed the total credit available, the amount of duty paid, amount of duty to be debited against sale of fabrics and the total amount refundable and that, therefore, the

Respondents were entitled to refund of Rs.1,16,28,268/- and the Commissioner(Appeals)'s order dt.16.11.1998 does not suffer from any legal infirmity.

11. Revenue thereafter filed a reference application no.23/2001 before this Court under section 35H(1) of Act, 1944 and vide order dated 24.11.2009, this Court directed Tribunal to send statement of case referring above mentioned questions of law, arising from Tribunal's order dated 25.10.2000.

12. In the present case record shows that order of CCE(A) dated 31.1.1996 itself decided the issue and held that there was no question of rejection of refund on the ground of " undue enrichment" since it was not sustainable, as duty was paid on intermediate products and question of passing on incidence of duty to customers does not arise. This order of CCE(A) attained finality since Revenue did not challenge this order in appeal. Once CCE(A) held that there was no question of "unjust enrichment", Assistant Commissioner had no jurisdiction to reiterate and follow his overruled view of "unjust enrichment" which was already negatived by CCE(A). The approach of Assistant Commissioner in reiterating the issue of "unjust enrichment" despite having been answered by CCE(A) otherwise, vide order dated 31.1.1996 which order had attained finality, was wholly unauthorized, beyond jurisdiction and illegal. Therefore, Assistant Commissioner was wholly unjustified in denying refund on the ground of "unjust enrichment" since that was beyond his powers.

14. So far as Section 11B(2) proviso (c) is concerned, we find that it stressed on the question of refund to be paid to Assessee instead of credit to the fund if amount is relatable to (a), (b) and (c). For the purpose of unjust enrichment, reliance placed by Tribunal to Section 11B(2) proviso (c), in our view is not correct but Assessee in the case in hand could not have been denied refund on the ground of "unjust enrichment" since that was already decided in favour of Assessee by CCE(A) vide order dated 31.1.1996 and that order having attained finality, it was not open to Assistant Commissioner to deny refund on the ground of unjust enrichment.

15. We therefore, answer both the aforesaid questions by holding that in order to attract plea of "unjust enrichment" under section 11B(1), Reference made by Tribunal to Section 11B(2) proviso (c) is not justified as the said provision is not attracted. However, refund was wrongly denied to Assessee and to that extent concurrent findings in favour of Assessee has rightly been recorded by CCE(A) and Tribunal. Hence, the ultimate order of Tribunal is justified and warrants no interference. Both the questions are thus answered in favour of Assessee and against Revenue.

16. Reference is answered accordingly and stands disposed of.

(2016) 9 ILRA 1288
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2016

BEFORE

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

Special Appeal Defective No.- 15 Of 2016

Manish Kumar 101(Revp)2015 Inre 2770(S/S)2002 ...Appellant
Versus
The Deputy G.M. Oriental Bank Of Commerce Lko. & Anr. ...Respondents

Counsel for Appellant:
Arvind Kumar Vishwakarma

Counsel for Respondents:
Vinay Shankar

Subject Matter

Compassionate appointment - 'Dying-in-Harness Scheme' of Oriental Bank of Commerce (Circulars dated 25.11.1993 and 16.09.1996) - Rejection of claim of a dependant, minor at the time of parent's death, on the ground of delay beyond the four-year discretionary window and beyond one year from death for making the request - Whether such time-limits, framed as a rule of thumb to alleviate distress of a bereaved family, can be applied mechanically to defeat an otherwise deserving and diligent claim - Whether the 1993 or the subsequent 1996 Scheme governs a claim where the cause of action arose during the subsistence of the 1993 Scheme - Held, delay was justified on facts; claim ought to have been considered on merits under the 1993 Scheme; appeal allowed.

Facts

The appellant's mother, a Class-IV employee of the Oriental Bank of Commerce, Branch Hazratganj, Lucknow, died in harness on 08.12.1995, survived by the appellant (then aged about 12 years) and his minor sister; the appellant's father had died earlier, on 13.10.1990. The siblings were brought up by their maternal grandfather. On attaining majority, the appellant applied for compassionate appointment on 30.08.2001. The bank rejected the claim by order dated 05.10.2001 on the ground that the application was made about six years after the death of the employee, beyond the four-year outer limit permissible under the bank's schemes dated 25.11.1993 and 16.09.1996, which required an initial request within one year of death (extendable, in the bank's discretion, up to four years for a minor dependant or one awaiting qualification, provided the initial request was made within one year). The appellant's writ petition (Writ Petition No. 2770 (S/S) of 2002) challenging this rejection was dismissed by a learned Single Judge by order dated 24.04.2014/25.04.2014, and his subsequent review (Review Petition Defective No. 101 of 2015) was also dismissed by order dated 27.10.2015. The present special appeal was filed against both orders.

Issues

1. Whether an application for compassionate appointment can be entertained even where it is not made within the scheme's stipulated four-year outer period, or where the initial request within one year of death has not been made, in circumstances where the applicant was a minor throughout the relevant period and became the family's sole prospective breadwinner only on attaining majority.
2. Whether the appellant's claim, arising from a death in 1995 during the subsistence of the bank's 1993 Scheme, was liable to be governed by the subsequent, more restrictive 1996 Scheme.

Held

Relying on a consistent line of authority from the Madras High Court (T. Meer Ismail Ali Vs. The Tamil Nadu Electricity Board, 2004 (3) CTC 120, and the subsequent line of cases including Selvi R. Anbarasi Vs. Chief Engineer (Personnel), TNEB, 2006 (2) MLJ 200, and J. Jeba Mary Vs. The Chairman, Tamil Nadu Electricity Board, 2011 (3) LLN 405, several of which were affirmed up to the Supreme Court) and the Supreme Court's decision in Balbir Kaur Vs. Steel Authority of India Ltd., (2000) 6 SCC 493, it was held that failure to apply within the stipulated period, or failure to attain majority within four years of the parent's death, are not, by themselves, valid grounds to deny compassionate appointment where the family continues to suffer indigence and no other member is employed; the four-year period is a rule of thumb, not to be applied mechanically in all cases. On facts, the appellant, having lost both parents by age 12, could not have applied during minority, and moved promptly - within the same year of attaining majority and completing his qualification - in August 2001; he could not be faulted for want of diligence, and the bank's rejection on a hyper-technical ground, without any finding that the family had other means of support, was contrary to the compassionate object of the scheme, which exists to alleviate distress and ensure that the bereaved family's need for bare subsistence is not defeated on technicality. On the question of which scheme governed, since the cause of action for compassionate appointment arose on the death of the employee in 1995, while the 1993 Scheme was in force, the claim fell to be considered under that scheme; the subsequent 1996 Scheme, being an administrative/executive instrument, could not be applied retrospectively so as to take away an accrued right, following Bank of India & Ors. Vs. Jaspal Kaur, (2007) 9 SCC 571. The application dated 30.08.2001 was accordingly held to be well within time.

Result

Appeal allowed. Judgment and order dated 25.04.2014 in Writ Petition No. 2770 (S/S) of 2002 and judgment and order dated 27.10.2015 in Review Petition Defective No. 101 of 2015 set aside. Respondent-bank directed to consider the appellant's application for compassionate appointment on merits, in accordance with the rules relating to compassionate appointment, and grant necessary relief within four weeks.

Case Law Referred

T. Meer Ismail Ali Vs. The Tamil Nadu Electricity Board, 2004 (3) CTC 120
Selvi R. Anbarasi Vs. Chief Engineer (Personnel), TNEB, Chennai, 2006 (2) MLJ 200
Balbir Kaur Vs. Steel Authority of India Ltd., (2000) 6 SCC 493
J. Jeba Mary Vs. The Chairman, Tamil Nadu Electricity Board, 2011 (3) LLN 405
Bank of India & Ors. Vs. Jaspal Kaur, (2007) 9 SCC 571
State Bank of India and another Vs. Raj Kumar, 2010 (11) SCC 661
Union of India Vs. R. Padmanabhan, (2003) 7 SCC 270

(Delivered by Hon'ble Dr. Vijay Laxmi, J.)

1. This special appeal has been filed against the judgment and order dated 25.04.2014 passed in Writ Petition No.2770 (S/S) of 2002 and judgment and order dated 27.10.2015 passed in

Review Petition Defective No.101 of 2015 whereby the claim of the appellant for compassionate appointment in place of his mother was dismissed.

2. The appellant has claimed compassionate appointment in place of his mother, who was working as Class-IV employee in the Oriental Bank of Commerce, Branch Hazratganj, Nawal Kisore Road, Lucknow (hereinafter referred to as 'Bank') who died in-harness on 08.12.1995 leaving behind her two minor children, namely, Manish Kumar, appellant aged about 12 years and Km. Jyoti, her younger sister at the time of her death. The father of the appellant had already expired on 13.10.1990 much earlier to the death of late Smt. Jayanti, mother of the appellant. The appellant along with his sister had been brought up under the guardianship of their maternal grandfather. The appellant, after attaining the age of majority, moved an application on 30.08.2001 seeking for compassionate appointment.

3. Learned counsel for the appellant argued that action of the bank in turning down the claim of the appellant was totally against Article 14 and 21 of the Constitution of India. Though the compassionate appointment was not a right but for minimum requirement of human life, the appointment of the appellant was very much required in the facts and circumstances of the case. The fundamental rights guaranteed under Article 21 of the Constitution of India guaranteeing the right to life and live with dignity neither can be diluted nor circumvented by the scheme or statutory provision. The appellant was hardly 12 years of age and his mother who was sole bread earner of the family died and admittedly when he became major after 5 years, just after attaining the age of 18 years, he applied for appointment on the compassionate ground. Learned counsel for the appellant contends that the order was passed by the respondent-bank without considering the relevant facts about the size of the appellant's family/employment status of his family members and sources of their income, liabilities and expenses and the decision of the bank rejecting the case of the appellant for compassionate appointment is arbitrary. It was submitted that the case of the appellant ought to have been considered in the light of the Scheme `Dying in Harness Scheme' which was then in vogue and the action of the bank is just contrary to the justice, equity and good conscience and is liable to be set aside .

4. Per contra, learned counsel for the respondent-bank has vehemently opposed the claim of the appellant alleging that the claim of the appellant had been turned down on the basis of bank Circular No. Per/50/92/93/295, dated 25.11.1993 followed by the the subsequent Circular No. Per/53/75/96/104, dated 16.09.1996, which provided norms and guidelines for providing compassionate appointment to the dependents of deceased employee. According to these norms the dependent is required to apply for compassionate appointment with the bank within the period of one year from the date of death of employee, and in case the dependent is minor, his/her case can be considered at the discretion of the bank within the period of four years from the death of employee which is lacking in this case. Beyond that period, the request for compassionate appointment cannot be considered in any case. Learned counsel for the respondent-Bank argued that the bank circulars dated 25.11.1993 and 16.09.1996 are binding in nature and no discretion is given to the bank authorities to deviate, modify or to create any distinction in the said schemes.

5. Learned counsel for the respondent-bank further contended that consideration for appointment on compassionate ground is contrary to Articles 14 and 16 of the Constitution of India and is only in the nature of concession and, therefore, it does not create a vested right in favour of the claimant/respondent. It was submitted that `Dying in Harness Scheme' is a non-statutory scheme and is in the form of a concession which does not create a vested right in favour of the claimant/appellant. The compassionate appointment is justified when it is granted to provide immediate succor to the deceased-employee and cannot be granted in view of passage of time. In support of his contention, learned counsel for the respondent placed reliance on the ruling of **State Bank of India and another versus Raj Kumar** reported in 2010 (11) 661 and **Union of India versus R. Padmanabhan** reported in (2003) 7 SCC 270 and argued that the appointment on compassionate ground cannot be made a source of recruitment. It is an exception to the general rule that the recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. It was to enable the family of the deceased to get over for the sudden financial crisis.

6 . We have heard rival submissions of learned counsel for both the parties and perused the record. It would be appropriate here to mention the relevant provisions of the scheme of the bank dated 25.11.1993 which are reproduced below:

▪

"Para IV: Appointment under this scheme shall be made with the prior sanction of the General Manger. Requests for appointment under this scheme should be received by the bank within one year from the date of death of the employee concerned. This condition may be waived by the General Manger on the merits of each case.

▪ However, with the approval of the Board of Directors:

(a)In case the member of the family to be offered appointment is a minor, the offer of appointment may be kept open till the minor attains the age of majority provided a request to that effect is made to the bank within the stipulated time limit."

▪ (b) In case a member of the family sponsored for appointment desires to wait till he/she attains certain educational qualifications, his/her case may be considered provided the date so stipulated is within four years from the date of death of the employee."

7. The relevant provisions of the scheme of the bank dated 16.09.199 are reproduced as under:

3. Request for appointment under the scheme should be made at the earliest and in any case not later than one year from the date of death of the employee.

4. In case, the dependent is a minor or does not possess minimum qualification his/her case can be considered at the discretion of the bank within four years of the death of the

employee to enable him/her or to qualify in terms of age and/or qualification provided that the dependent has made a request to the bank within one year of death of the employee.

5. Compassionate appointment shall be considered bythe bank only subject to the availability of vacancy.

8. Thus the schemes categorically provide that there werethree per-requisite conditions under the scheme for compassionate appointment:- (i) an application by a dependent family member of the deceased employee within one year of death of the employee; (ii) fulfillment of the eligibility criteria prescribed under the scheme, for compassionate appointment; and (iii) availability of posts, for making such appointment. According to the respondent bank the said three conditions were not fulfilled by the appellant hence his claim was rightly rejected.

9. Admittedly, the mother of the appellant was employed in the Oriental Bank of Commerce, Branch Hazratganj as class-IV employee who died on 08.12.1995 leaving behind her two minor children, namely, Manish Kumar, appellant aged about 12 years and Km. Jyoti aged about 10 years. The father of the appellant had expired earlier on 13.10.1990. It is contended by learned counsel for the appellant that it is because of death of both father and mother the appellant could move application for the first time on 30.8.2001 after attaining age of majority by which time he had passed the Junior High School examination. The bank has scrutinized the claim of the appellant and wrongly rejected the same vide order dated 05.10.2001 observing that the appellant had moved the application for compassionate appointment on 30.08.2001 i.e after lapse of about 6 years from the date of death of the employee i.e. 08.12.1995 thus the case of the appellant did not fall within the four corners of the schemes of the bank.

10. The learned single Judge who heard the writ petitiondismissed the same by an order dated 24.04.2014 holding that the concept of compassionate appointment has been recognized as an exception to the General Rule carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. In this regard, the learned single Judge placed reliance on several decisions of the Hon'ble Supreme court and dismissed the Writ Petition. Aggrieved by such order, the appellant has filed the instant Appeal. It is seen that two reasons have been assigned for rejecting the appellant's request. Thus the two points that emerge for consideration, are as follows:

(a) Whether the application for appointment on compassionate grounds can be entertained even if not made within the stipulated period of four years?

(b)Whether the application for appointment on compassionate grounds was not in time?

11. The issue as to whether an application made after 4 years can be considered or not, has come up for consideration in number of cases before High Court and the Honourable Supreme Court where the findings have been given by the Courts that in case the appellant has not filed

application seeking compassionate appointment within four years from the date of death of his father and that he has not completed 18 years of age within four years, these are not valid grounds to deny appointment on compassionate ground. Similar issue was considered by Madras High Court in the decision reported in T.Meer Ismail Ali v. The Tamil Nadu Electricity Board, 2004 (3) CTC 120 [F.M.Ibrahim Kalifullah,J (as he then was)]. In the said case the deceased Board employee died on 13.04.1993 and the application submitted by one of his daughter on 05.08.1997 was rejected on the ground that she had not completed 18 years of age and after completing 18 years of age when an application was made on 04.07.2000 which was rejected on the ground that the application was not made within three years from the date when the Board Proceedings dated 13.10.1995 was issued. The Court considering the technical plea raised by the respondent Board set aside the said order and remitted the matter to pass fresh orders without reference to the objections already raised by the Board. The said order of the learned single Judge was challenged by the TNEB in W.A.No.4008 of 2004 before the First Bench of Madras Court (consisting of the Hon'ble Mr.Justice Markandey Katju,C.J. (as he then was) and N.V.Balasubramanian,J.) which dismissed the writ appeal on 01.12.2004. The respondents therein filed SLP No.6387 of 2005 against the said order which was also dismissed on 01.04.2005 by the Honourable Supreme Court and consequently the said writ appellant was given compassionate appointment.

12. Another Writ Petition in W.P.No.41459 of 2005 was considered by Madras High Court on the same set of facts. The said writ petition was allowed following the earlier order of the Division Bench of Madras High Court made in W.A.No.4008 of 2004 dated 01.12.2004 and the said decision is reported in Selvi R. Anbarasi v. Chief Engineer (Personnel), TNEB, Chennai, 2006 (2) MLJ 200. The said order was challenged by the TNEB before the First Bench in W.A.No.988 of 2006. However, the said appellant was given appointment on compassionate ground by implementing the order and therefore the writ appeal was dismissed as infructuous on 15.09.2006 by recording the statement made by the Standing Counsel for the TNEB.

13. In W.P.No.21512 of 2003 one Indiraniammal challenged the rejection of compassionate appointment before Madras High Court on similar ground. The learned single Judge dismissed the writ petition by order dated 04.08.2003 against which W.A. No.3050 of 2003 was filed and the said writ appeal was allowed by the Division Bench (consisting of the Hon'ble Mr. Justice P. Sathasivam (as he then was) & S.K.Krishnan,J) by order dated 08.03.2005 following the earlier judgments as well as the Supreme Court Judgment reported in Balbir Kaur v. Steel Authority of India Ltd., (2000) 6 SCC 493. Against the said decision Civil Appeal No.2039 of 2006 was filed by the respondent Board which was dismissed by the Honourable Supreme Court on 30.03.2010.

14. Dismissal of another W.P.No.775 of 2004 by order dated 29.01.2005 of Madras High Court on the ground of delay was considered by the Division Bench (F.M.Ibrahim Kalifullah,J. (as he then was) & P.Murugesan,J) in W.A(MD).No.29 of 2006 and by order dated 27.06.2006 the Division Bench allowed the writ appeal and directed to give compassionate appointment to the younger son of the deceased Board employee, who died on 15.11.1996. The said order of the Division Bench was also challenged by the Board in SLP(C)No.15534 of 2007 which was also dismissed by the Apex Court on 08.04.2009.

15. In W.P.No.18575 of 2006 filed by P.Venkatesan, Madras High Court again considered similar issue and allowed the writ petition on 20.06.2006 by following earlier orders. The said order was also challenged by the respondent in W.A.No.42 of 2007 and the Division Bench (D.Murugesan,J & K.Venkataraman,J) dismissed the writ appeal on 02.07.2009. The Board filed SLP(C)No.8305 of 2010 which was also dismissed by the Hon'ble Supreme Court on 06.07.2010. The said candidate viz., P.Venkatesan was given compassionate appointment by order dated 18.08.2010.

16. Similar issue came up for adjudication before High Court of Madras in J. Jeba Mary vs. The Chairman, Tamil Nadu Electricity Board reported in 2011 (3) LLN 405 (Mad.) which was considered by Mr. Justice N. Paul Vasanthakumar. The writ was allowed and the direction was given to give compassionate appointment to the dependent of the deceased employee. The judgment was confirmed by the the Apex Court.

17. From the above referred decisions passed in series of cases on the same ground, it is evident that on the similar grounds raised by the respondents that the appellant has not filed application seeking compassionate appointment within stipulated period from the date of death of his father and that he has not completed 18 years of age within stipulated period are not valid grounds to deny appointment on compassionate ground as according to appellant no one in his family was employed and the family of the appellant was in indigent circumstance even on that date. Therefore, when the family of the employee who died in harness is still suffering where no other member is employed, this Court as well as the Apex Court have always come to rescue of the applicant seeking appointment on compassionate grounds. Such applications can also be entertained in deserving cases and the said rule of 4 years can only be treated as a rule of thumb and cannot be strictly implemented in all cases.

18. In the instant case, it is not in dispute that the appellant was about 12 years of age when he lost his mother, he had lost his father earlier thus after completing 18 years of age he earned more an application for compassionate appointment only in the year 2001.The appellant is prosecuting the matter before the respondents right from August, 2001. Thus It cannot be held that the appellant was not diligent in seeking for compassionate appointment at the earliest point of time. In fact, immediately after attaining 18 years of age and also after qualifying himself, when the appellant came forward with the present application in 2001, in all fairness, the respondent should have considered the appellant's claim on merits who claimed that his sister was minor and, therefore, he was the only breadwinner of the family. In such circumstances, it was a deserving case where the respondent should have shown some compassion while considering the appellant application for compassionate appointment. Unfortunately, the respondent did not seem to have shown any compassion at all and mercilessly rejected the appellant's application on a hyper technical ground. It is not the case of the bank that the appellant family is having any other income to negate their claim for appointment on compassionate ground.

19. Now coming to the next question about request for appointment within one year of the death of the employee, it is not disputed that the application for appointment on compassionate

grounds was made by the appellant on 30.08.2001. As per the then prevailing scheme of 1993, though the request for appointment was to be made within one year of the the death of the employee, but it was due to peculiar circumstances of this case that the appellant could submit his application for the first time on 30.08.2001 i.e. after about more than 5 years after the death of the employee, since the appellant had lost both his father in 1990 and his mother in 08.12.1995. Thus under such circumstances no adverse order could be passed against the appellant on this ground. Moreover, when a person cannot be employed in government service before completion of 18 years of age, he could not also make an application during his period of minority,

20. It appears that the appellant has immediately submitted an application on 30.08.2001 on attaining majority. The respondent bank has taken a hyper technical stand that the application must have been submitted only within one year of the the death of the employee and the application submitted after more than 5 years is invalid. This court is rejecting the contention of the respondent bank. The intention of the said bank scheme is to alleviate the distress of the bereaved family. The purpose of the scheme is to see that the cry of the family for bare subsistence would not go unheeded on certain technicality. Ours is a welfare state. The judgment, therefore, are meant to highlight the constitutional philosophy of socialistic one and to make an attempt to give the philosophy a reality of flesh and blood**.**

21. Now regarding the applicability of the bank scheme of 1993 or 1996, the appellant's mother died in 1995 while she was serving as a class IV employee in the respondent-bank and the appellant applied for compassionate appointment. The respondent-bank rejected the appellant's claim. However, the cause of action to be considered for compassionate appointment arose when the bank scheme of 1993 was in force. A**s per the judgment of Supreme Court in Bank of India & Ors. vs. Jaspal Kaur, (2007) 9 SCC 571 ,** the claim cannot be decided as per 1996 Scheme. The scheme of 1996 being an administrative or executive order cannot have retrospective effect so as to take away the right accrued to the appellant as per scheme of 1993.

22. We are, therefore, of the view that the appellant's case deserves consideration inasmuch as he had diligently made a claim after attaining the age of 18, in the year 2001 and in such circumstances, rejection of his application on the ground that it was not made within four years was not justified.

23. In view of the above, this Court is of the view that the application made on 30.08.2001 is well within time and the orders impugned are, therefore, set aside and the respondent bank is directed to consider the appellant's application on merits and provide necessary relief to the appellant in accordance with the rules relating to compassionate appointment within four weeks from today.

24. With the above direction, the appeal is allowed.

(2016) 9 ILRA 1296
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE MUKHTAR AHMAD, J.

Criminal Appeal No.- 153 Of 1984

Nan Bachcha **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
G.P. Dixit

Counsel for Respondent:
A.G.A.

FACTS

The instant criminal appeal was preferred against the judgment and order of conviction and sentence dated 12.1.1984 passed by the 4th Additional Sessions Judge, Fatehpur in Sessions Trial No. 263 of 1982 (State v. Jamrehi and Nan Bachcha), arising out of Case Crime No. 175 of 1981, under Section 302 I.P.C., P.S. Khaga, District Fatehpur, whereby the sole appellant Nan Bachcha was convicted and sentenced to life imprisonment under Section 302 I.P.C., while co-accused Jamrehi Nath Singh was acquitted giving him the benefit of doubt. A third accused, Chhedu Singh alias Ramsiroman Singh, had died before the case was committed to the Court of Session.

As per the prosecution case, in the intervening night of 8/9 June, 1981, the deceased Vijay Pal Singh was sleeping on a cot in the verandah of a flour mill (Ata chakki) while the informant (PW-1, his brother) and PW-2 were grinding flour inside. On the exhortation of Jamrehi Nath Singh to kill the deceased, the informant and PW-2 came out and allegedly witnessed co-accused Chhedu Singh and the appellant, both armed with country-made pistols, firing at the deceased, who succumbed to the injuries. The First Information Report was lodged shortly thereafter.

The postmortem examination revealed firearm entry and exit wounds on the abdomen and head, with the cause of death opined to be shock and haemorrhage due to ante-mortem injuries. The prosecution examined three witnesses of fact — PW-1, PW-2 and PW-4 — as eyewitnesses, apart from the medical officer (PW-3) and the police witnesses (PW-5 and PW-6). The trial court convicted the appellant under Section 302 I.P.C. while extending the benefit of doubt to co-accused Jamrehi Nath Singh, to whom the role of exhortation had been assigned.

ISSUES FOR CONSIDERATION

(i) Whether the presence and testimony of the eyewitnesses, particularly regarding the alleged exhortation and identification of the assailants during the night, were natural, credible and free from doubt.
(ii) Whether the prosecution proved the availability of electric light/supply at the place of occurrence to establish visibility for identification of the accused.
(iii) Whether PW-4, being a relative of the informant's family and a chance witness, could be relied upon in the absence of corroboration regarding the cinema he claimed to have watched.
(iv) Whether, once the co-accused Jamrehi Nath Singh (to whom the role of exhortation was assigned) was acquitted by extending the benefit of doubt, the appellant — his son, similarly implicated on the same set of evidence — was also entitled to the benefit of doubt.

HELD
The Court found the prosecution story doubtful on several counts: the alleged exhortation was said to have been heard by witnesses despite the noise of the flour-grinding machine; no reliable evidence was produced to establish the availability of electric supply at the spot on the relevant night, the report of the Junior Engineer, Electricity Department, Khaga having remained unproved; the conduct of the assailants in allegedly announcing their presence and awaiting the witnesses before firing, instead of fleeing after the assault, was found unnatural; PW-4 was found to be a chance witness related to the informant's family, and the prosecution failed to verify his claim of having watched a film at the cinema hall on the relevant night; and the Investigating Officer was found to have been negligent in several material respects, including failure to verify the electricity supply and the cinema exhibition, and failure to record the statement of the treating doctor at Khaga Hospital.
The Court held that since the co-accused Jamrehi Nath Singh, father of the appellant, to whom the role of exhortation was assigned, had already been extended the benefit of doubt on the very same evidence, the appellant — implicated on an identical footing along with his father and deceased brother-in-crime — was also entitled to the benefit of doubt, and the prosecution could not be said to have proved its case against him beyond reasonable doubt.

RESULT
Appeal allowed. The impugned judgment and order of conviction and sentence dated 12.1.1984 passed by the 4th Additional Sessions Judge, Fatehpur, in Sessions Trial No. 263 of 1982, is set aside. The appellant's bail bonds and sureties stand discharged, subject to his furnishing sureties in compliance with Section 437-A Cr.P.C. before the trial court.

(Delivered by Hon'ble Arvind Kumar Tripathi, J.)

1. Shri G.S.Chaturvedi, learned Senior Counsel assisted by Shri Samit Gopal, learned counsel for the appellant and Shri Chandrajit Yadav, learned A.G.A. on behalf of the State appeared.

2. We have heard learned counsel for the parties and judgement was reserved on 22.8.2016.

3. The instant criminal appeal has been preferred challenging the impugned judgment and order of conviction and sentence dated 12.1.1984 passed by 4th Additional Sessions Judge, Fatehpur passed in Sessions Trial No.263 of 1982 (State vs. Jamrehi and Nan Bachcha) arising out of Case Crime No.175/1981, under section 302 I.P.C. PS.Khaga, Sub District Khaga, District Fatehpur convicting and sentencing the sole appellant Nan bachcha under section 302 I.P.C. to undergo life imprisonment. Jamrehi Nath was acquitted giving the benefit of doubt.

4. The First Information Report was lodged by one Amar Pal Singh s/o Ramdhani Singh, village & Police Station Khaga, District Fatehpur against three persons namely Jamrehi Nath Singh s/o Agan Singh, Chhedu Singh alias Ramsiroman Singh and Nan Bachcha s/o Jamrehi Nath Singh, village Hardo, PS. Khaga. The charge sheet was submitted against all the three accused. Before the case was committed to the court of Sessions, accused Chhedu Singh alias Ramsiroman died, hence the trial court proceeded against the appellant and co-accused Jamrehi Nath Singh, father of the appellant, hence the present appeal is only on behalf of sole appellant Nan Bachcha, against the conviction and sentence of life imprisonment.

5. The brief facts of this case is that the First Information Report was lodged by PW-1 Amar Pal Singh (brother of the deceased) with the allegation that in the night of 9th August, 1981 his brother Vijay Pal Singh (deceased), son of Ramdhani Singh, village Hardo, District Fatehpur Fatehpur was present alongwith the informant (Amarpal Singh) and one Ram Naresh, s/o Nandu Singh, village Hardo at the Ata chakki(flour mill). His brother Vijay Pal Singh was sleeping in the verandah and the informant with Ram Naresh Singh were grinding flour at about 1.30 A.M.(in the night). Jamrehi Nath Singh, Agan Singh, Chhedu Singh alias Ramsiroman and Nan Bachcha, both sons of Jamrehi Nath Singh of village Hardo, PS.Khaga, District Fatehpur came near cot of his brother Vijay Pal Singh, Chhedu Singh alias Ram Siroman Singh was having country made pistol in his right hand, Nan Bachcha was also having country made pistol in his right hand and cartridges in left hand. The accused Jamrehi Nath Singh abusing Vijay Pal Singh exhorted his two sons including appellant that this is the person to kill him. After hearing the same the informant and Ram Naresh who were grinding flour came out and saw that Ram Siroman Singh shot fire with his country made pistol on his brother Vijay Pal Singh causing injuries on his abdomen and Nan Bachcha also shot fire on Vijay Pal Singh. The informant and Vijay Pal raised alarm calling the villagers to rush as they killed his brother. In the meantime Narendra Singh, s/o Mahabir Singh and Surya Bhan alias Radhai s/o Surajpal Singh,Village Hardo reached there and in the meantime the said accused ran away. There was electric light and they saw and identified the accused persons. After sometime the number of villagers reached there. Since his brother was breathing and not speaking, hence he took his brother to Government Hospital, Khaga. After examination Medical Officer, Khaga declared him dead. Thereafter he took the dead body to the Police Station and after scribing the report, the First Information Report was lodged and registered at the police station Khaga. The report was proved as Ext.Ka-3. The chick report was proved as Ext.Ka.2 registered on the same day at about 3.45 A.M. The distance from the place of occurrence was about 1 km. S.I.Jadunath Dwivedi who was posted as S.H.O. Khaga District Fatehpur was present at the police station and in his presence the First Information Report was lodged. Thereafter he recorded the statement of the informant Amar Pal Singh at the police station, Panchayatnama of the dead body of Vijay Pal Singh was prepared. Necessary papers were proved as Ext.Ka.6 to Ext. Ka.11. The dead body of the deceased Vijay Pal Singh was sealed and sent for postmortem examination. Thereafter the investigating officer went to the place of occurrence at about 9.00 A.M. recorded the statement of Ram Naresh Singh, Narendra Singh etc. inspected the place of occurrence and prepared the site plan Ext.Ka.12. He took the plan and furnished the rope of cot (badh), sample of plain blood, mud from the place of the occurrence which were kept and sealed separately. On the spot he also found three ticklies which he sealed and covered as Ext.Ka.15. Postmortem

examination was conducted on 9.8.1981 at 5.00 P.M. by Medical Officer, Dr.G.S.Gaur who was examined as PW-3. As per medical report, three firearm injuries were noted, two entry and one exit wound.

1. One firearm wound of entry, 1.5 x 1.5 x Abdomen cavity deep on left side of Abdomen 1" lateral to umbilicus at 3 O'clock position. Margin inverted, blacking and tattooing present. Direction from front to backward and downward.

2. One firearm wound of entry 1" x 1" x brain deep on left side of head 2.5" above left ear. Blackening and tattooing present. Margin inverted. Direction from back to front and slightly towards right side.

3.Firearm wounds of exit each 1/4" x 1/4" x brain deep on left side of forehead. Margins everted. It is inter-related to injury no.2. 26 (twenty six) small size bullets and two big size pellets and one wadding piece recovered from the body.

6. On an internal examination, skull was found lacerated, fracture under the injury no.2 & 3. Membrance lacerated. Brain lacerated, two shots (big size- pea size). Peritoneum lacerated. Stomach contained half ounce food digested present. Small intestine found lacerated empty. Six small size pellets recovered. Big intestine was found full. Bladder lacerated. 20 small size pellets recovered. According to opinion of doctor cause of death was shock and haemorrhage as a result of anti-mortem injuries. Dr.G.S.Chaturvedi was examined as PW-3.

7. After receipt of the postmortem examination report and completing the necessary formalities, the charge sheet was submitted. The charges were framed on 20.8.1983 under section 302 I.P.C. against accused Nan Bachcha and a separate charge under section 302 read with section 34 I.P.C. was also framed against the accused Jamrehi Nath Singh. which was read over and explained to the accused appellant in Hindi. He pleaded not guilty and claimed to be tried.

8. The prosecution to prove its case examined as many as six witnesses and three witnesses of fact claimed to be eyewitnesses. PW-1 Amar Pal Singh, brother of the deceased, PW-2 Ram Naresh, witness of the informant, PW-3 Dr.G.S.Gaur, Medical Officer, District Hospital, Fatehpur who conducted the postmortem examination on the body of the deceased Vijay Pal Singh, PW-4 Narendra Singh who is claiming that he was returning after watching film Abdulla from Khaga and after hearing alarm he reached at the place of the incident. PW-5 Surendra Prasad Shukla, Head Constable who proved the chick report and First Information Report and G.D. entry, PW-5 Jadunath Dwivedi, the then SHO Khaga who conducted the investigation and submitted the charge sheet.

9. After the evidence was closed, the statement of the accused was recorded under section 313 Cr.P.C. The accused appellant denied the charges and submitted that he was falsely implicated. Witnesses grudged against him but neither any evidence was adduced in defence nor any reason of any enmity was mentioned. Subsequently when question was put regarding report submitted by J.E. Electrical Department, Khaga regarding supply of electricity in the intervening night of 8/9 June,

1981, he submitted that the report was forged one. At the time of incident there was no supply of electricity and said Junior Engineer whose report was submitted was not at Khaga.

10. On the basis of prosecution evidence, the trial court held the appellants guilty for committing the offence under section 302 I.P.C. He was convicted and sentenced to undergo life imprisonment under section 302 I.P.C. However, the benefit of doubt was given to the co-accused. Against the impugned judgement the present Criminal Appeal was preferred which was admitted and prayer for bail was allowed on 16.1.1984.

11. Learned counsel for the appellant challenged the impugned judgement and order of conviction and sentence on the ground that none of the witnesses were present so that it was a blind murder. The assailants chosen the time of mid night or after mid night so no person could saw them committing murder of the deceased Vijay Pal Singh. The role of firing was assigned to two persons namely the appellant Nan Bachcha and the co-accused Chheddu Singh alias Ram Siroman Singh and the role of exhortation was assigned to their father Jamrehi Nath Singh. Father and two sons were implicated in the present case. Jamrehi Nath Singh was aged about more than 80 years. According to prosecution case, the informant and his servant PW-2 were grinding flour and due to noise of grinding machine, it is unnatural that they heard exhortation. If the accused appellant and co-accused chosen the dark night for committing the offence and the deceased was found sleeping in the veranada, then they would shot fire and ran away from the spot instead of raising voice to invite the witnesses to watch the incident and identify them that it was a dark night and supply of electricity was also not proved. The investigating officer did not take any pain to verify whether there was electricity in the night of 8/9.6.1981 in village Hardo or not. He also did not verify whether on the date of incident film Abdulla was shown in the picture hall at Khaga or not because PW-4 is a chance witness. According to him he was returning after seeing film into picture hall at Khaga and reached near the place of the incident at the same time. When the incident took place and the informant raised alarm it was also unnatural that during night he went to see film and was returning at 1.30 A.M. in the night. He also contended that only due to village rivalry the appellant, his brother and father were falsely implicated in the present case, hence benefit of doubt was given to the co-accused his father Jamrehi Nath Singh and he was acquitted to whom the role of exhortation was assigned. According to the prosecution case after hearing the exhortation the accused and Jamrehi Nath Singh came out. PW-4 Narendra Singh is not only a chance witness but he is relative of the family of the deceased.

12. He submitted that in view of the fact the prosecution story is doubtful and the appellant is also entitled for the benefit of doubt, hence the impugned judgment and order of conviction and sentence is liable to be set aside.

13. Learned A.G.A. opposed the aforesaid prayer. There are three witnesses of the incident and according to their statement, the appellant Nan Bachcha and co-accused Chheddu Singh alias Ramsiroman shot fire. Only role of exhortation was assigned to their father Jamrehi Nath Singh, hence the benefit of doubt was given to him considering his old age. There was no reason of false implication of the appellant. The presence of the witnesses are not doubtful. There are no

contradiction and discrepancy in their statement which are corroborated by the medical report though there are negligence on the part of the investigating officer, merely on that ground the prosecution story will not be disbelieved which has been proved by the witnesses adducing the oral evidence merely because the benefit of doubt was given to one of the co-accused to whom the role of exhortation was assigned, on the ground of old age, hence the appellant is not entitled to any benefit of doubt on that ground.

14. Considered the submissions of counsel for the parties and perused the record.

15. In the present case co-accused Jamrehi Nath Singh and his sons namely Chheddu Singh who died before the case was committed to the court of Session and Nan Bachcha the appellant are accused. The role of exhortation was assigned to co-accused Jamrehi Nath Singh, father of the appellant and he was acquitted of the charges under section 302 I.P.C. read with section 34 I.P.C. Three witnesses of fact have been examined by the prosecution, PW-1 Amar Pal Singh, brother of the deceased, PW-2 Ram Naresh, servant of Amar Pal Singh and PW-4 who was relative of the informant. The first information report was lodged by PW-1 Amar Pal Singh. According to his statement, in the night of 9.6.1981 at about 1.30 A.M. his brother Vijay Pal Singh was sleeping on cot in verandah. There was electric light. He was having a flour mill which was being run by electric motor. He alongwith servant was grinding flour. The accused person reached where the deceased was sleeping. Co-accused Jamrehi Nath Singh, father of the appellant exhorted his son to kill Vijay Pal Singh who was sleeping there. He said "Yah Sala Pada Hai, Ise Mar Dalo" and after hearing exhortation he alongwith Ram Naresh came out, in verandah and saw that the co-accused Chheddu Singh and appellant Nan Bachcha who were having country made pistol, both shot fire on his brother Vijay Pal Singh causing firearm injuries. Thereafter they ran away towards west. Co-accused Jamrehi Nath only threatened. He did not pay attention whether he was having country made pistol in hand or not. After causing firearm injuries they raised alarm on which Narendra Singh and one Suraj Bhan reached there. When they reached in veranada before that assailants ran away towards west. He saw that his brother was breathing, hence he was taken to the hospital by bullock-cart to Khaga and after examining, doctor declared him dead, thereafter he went to the police station and lodged the first information report regarding motive. He further submitted that two days before the incident Nan Bachcha was sitting with Radio at the door of one Ramjas who was neighbour of the informant. When daughter of the Ramjas came there he started misbehaving with her. Vijay Pal Singh also reached there who saw their conduct. He asked to Nan Bachcha to stop that on which Nan Bachcha threatened him to see him and to kill him. Next day he informed regarding the same. In cross examination he informed that Suraj Pal, his real brother of Ramsiroman. Chatrapal alias Chhedu, son of Suraj Pal is married to Smt.Ramsri. Ramsri is real sister of PW-4 Narendra Singh. In cross examination on suggestion from the side of defence he stated that he was not aware regarding any case for land in between the co-accused Jamrehi Nath Singh and his father and grand father but he further stated there was no other person in the village of the same name like name of his father. He also denied that he was falsely implicated. He also stated that at the time of incident flour mill was being run with electric motor and they were grinding flour while his brother was sleeping and he had not covered his face. There was a bed sheet of markin on cot which was blood stained. Tahmat was also blood stained. The cloths were shown to the sub inspector. However, according to the investigating officer PW-6 no

cloth was found on the cot of the deceased. Further in cross examination PW-1 stated that immediately on exhortation by co-accused Jamrehi Nath Singh both shots were fired causing firearm injuries and accused run away. Houses were situated both sides of passage(Gali). Women were used to sleep inside the house.

16. According to PW-2 Ram Naresh, the servant of the informant, he was grinding flour at the flour mill of the deceased Vijay Pal Singh, PW1 Amar Pal was also alongwith him. When at about 1.30 A.M. in the night. Vijay Pal was sleeping in verandah, there was electric light. Jamrehi Nath Singh came there in verandah and said "Mar Do Sale Ko Yahni So Rai Hai". After hearing the said exhortation he and Amar Pal came out in verandah and saw that the co-accused Ramsiroman and the appellant Nan Bachcha shot fire with their country made pistol causing firearm injuries to the deceased Vijay Pal Singh. They raised alarm and thereafter the accused ran towards west. After hearing alarm, other witnesses reached there.

17. Considered the submissions of counsel for the parties.

18. PW-1 Amar Pal Singh, brother of the deceased Vijay Pal Singh is the informant. According to him, he was present at the flour mill alongwith Ram Naresh who was examined as PW-2 and they were working there for grinding flour (Ata). According to witnesses the work of the grinding flour was being done during night on the availability of the electricity as the same was supplied to the District during night in the village. The deceased's brother was sleeping in veranada, outside the room where Ata Chakki was being run. According to witnesses there was light of bulb. After hearing the exhortation and abusive language used by Jamrehi, the informant and his servant Ram Naresh came out of room and saw that Ram Siroman, Chheddu and Nan Bachcha were having country made pistol and both shot fire at his brother Vijay Pal Singh who was sleeping on the cot at about 1.30 A.M. in the intervening night of 8/9.8.1981. After firing they ran away towards west. The presence of PW-1 and PW-2 might not be doubtful inside the room in which they were grinding flour but no evidence was adduced to show that there was electric supply during night. The report of J.E. Electricity Department, Khaga was filed but the same was not proved. Against that report defence version was that there was no such Junior Engineer posted there at that time and the report was forged one. The investigating officer- PW-6 Yadunath Dwivedi, neither visited the electricity department nor he tried to collect the evidence whether there was electric supply in the village on the date of incident or not. He also did not peruse the register maintained at the flour mill. At the grinding mill he did not try to know regarding quantity of flour (Ata) kept there for grinding. Regarding electric supply no evidence was adduced to prove by the prosecution to show that there was electric supply on the date of incident or that flour mill was running for grinding flour during night. According to counsel for the appellant, even if the person would be present inside the room, where flour machine was operational and if there was exhortation or instigation outside the room it would not be practically possible to hear the same. It also appears to be unnatural that if the assailants chosen mid night for committing murder then it would not be expected to raise voice to invite the attention of witnesses present either inside the room or near by places. If the intention was to kill Vijay Pal Singh, who was sleeping in verandah outside the room,then they will shot and ran away from the place even they have not covered their faces to conceal their identify.

19. According to PW-1 Jamrehi Nath Singh exhorted and uttered (Yah Sala Pada Hai, Ise Mar Dalo, Yah Sun Kar Varamade Me Aya, PW-2 stated that Jamrehi Nath Singh Varamade Me Aa Kar Kaha, Mar Do Sale Ko Yaha So Raha Hai, Itna Sunkar Ham Evam Amar Pal Varamade Me Aa Gai. So after uttering above noted words, the accused were invited attention of the witnesses. They were waiting the witnesses to come in the verandah to see the incident and they fired with country made pistol. PW-1 and PW-2 raised alarm, Narendra Singh and Suraj Bhan reached there. According to Narendra Singh he was returning after watching Abdulla film but he did not tell the story of that film and name of actress and actor except the name of Abdula. Cross examination on behalf of defence was that on the date of incident Abdula film was not shown rather film Ram and Shyam was shown and there was only one picture hall in Khaga. No evidence was placed to prove that film Abdulla was shown. He was a chance witness and relative of the informant and deceased. His sister was married with Chhatrapal cousin of Amar Pal Singh. According to witnesses since Vijay Pal Singh was breathing, hence he was taken to the hospital but it was unnatural that neither Ram Naresh-servant of the informant and deceased nor any other relative of the informant accompanied him either to the hospital or to the police station. According to prosecution the incident took place at 1.30 A.M. in the night and the First Information Report was lodged at 3.45 A.M. The distance of the police station was one kilometer towards south. The Investigating officer did not verify whether picture Abdula was shown on the relevant date. Witness Narendra Singh is not only chance but relative also. The investigating officer did not record the statement of doctor of Khaga Hospital. The question was also put to PW-2 that his father Nandu was convicted under section 325 I.P.C. in which accused Jamrehi Nath Singh was doing pairvi in State case under section 325 I.P.C. The trial court given the benefit of doubt to the accused Jamrehi Nath Singh and he was acquitted. The murder of Ram Siroman was committed before the case was committed to the court of Sessions, hence the appeal is only on behalf of the sole appellant Nan Bachcha who was convicted under section 302 I.P.C.

20. In view of the aforesaid discussions, facts and circumstances of the case, the prosecution story becomes doubtful. The prosecution was expected to prove the case beyond reasonable doubt to held the appellant guilty. On the same evidence benefit of doubt was given to one of the co-accused Jamrehi Nath Singh to whom the role of exhortation was assigned. Jamrehi Nath Singh, is father of the appellant and two sons were implicated, hence in view of the abovenoted discussion, the appellant is also entitled for benefit of doubt.

21. Accordingly this appeal is allowed. The impugned order of conviction and sentence dated 12.1.1984 passed by 4th Additional Sessions Judge, Fatehpur passed in Sessions Trial No.263 of 1982 (State vs. Jamrehi and Nan Bachcha) arising out of Case Crime No.175/1981, under section 302 I.P.C. PS.Khaga is hereby set aside. Since the appellant is on bail, hence his bail bonds and sureties are hereby discharged provided he furnish sureties in compliance of the provision under section 437A Cr.P.C. before the trial court. The court concerned shall ensure the compliance of the order. Office to communicate this judgement and order to the court concerned at earliest.

(2016) 9 ILRA 1304
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

S.C.C. Revision No.- 202 Of 2016

Ramdev Yadav **...Revisionist**
Versus
Dr. B.K. Singh. **...Opposite Party**

Counsel for Revisionist:
Nipun Singh, Anurag Khanna

Counsel for Opposite Party:
Amitabh Agarwal

FACTS

The present revision under Section 25 of the Provincial Small Cause Courts Act, 1887 was preferred against the judgment and order dated 19.5.2016 passed by the Additional Sessions Judge, Gautam Budh Nagar, decreeing SCC Suit No. 14 of 2013 (Dr. B.K. Singh v. Ramdev Yadav), concerning the first and second floor portions of building No. A-528A, Sector-19, NOIDA. The plaintiff-respondent, claiming to be the owner and landlord, alleged that the defendant-revisionist was tenant of the first floor at Rs. 25,000/- per month and of the second floor at Rs. 21,000/- per month under a tenancy commencing 2.6.2012 by registered rent agreement, which expired on 30.4.2013; and after determination of the tenancy by notice dated 14.5.2013 under Section 106 of the Transfer of Property Act, 1882, instituted the suit on 31.5.2013 for eviction and damages.

The defendant-revisionist admitted tenancy of the first floor but denied tenancy of the second floor, contending that one Raja Ram was tenant of that portion, and further contended that the notice under Section 106 was invalid and not served. The trial court, on the pleadings, framed eleven issues, the principal ones concerning whether the defendant-revisionist was tenant of the second floor, whether the tenancy was validly determined, the validity of the notice, and whether the tenancy had been extended. The trial court decreed the suit holding the defendant-revisionist to be tenant of both floors at a combined rent of Rs. 46,000/- per month, that the tenancy for both floors was for a fixed period which expired by efflux of time, that it had not been extended, and that no notice under Section 106 was therefore necessary; a decree of eviction with graded damages was accordingly passed, adjustable against the security deposited.

A preliminary objection was raised by the plaintiff-respondent's counsel that the defendant-revisionist, having failed to fully comply with the conditions of the interim order dated 28.7.2016 (which required deposit of entire arrears in respect of both portions), was not entitled to be heard. It was explained on behalf of the defendant-revisionist that he had bona fide withheld deposit of arrears qua the second floor alone, as his tenancy of that portion was seriously disputed, while depositing arrears for the first floor and current monthly damages for both.

ISSUES FOR CONSIDERATION

(i) Whether the defendant-revisionist, having not fully complied with the conditions of the interim order, was entitled to be heard on merits.
(ii) Whether the finding that the defendant-revisionist is tenant of the second floor portion, in addition to the first floor, suffers from any error of law or jurisdiction.
(iii) Whether the tenancy in respect of both portions was a fixed-term tenancy requiring no notice under Section 106 of the Transfer of Property Act, 1882 for its determination.
(iv) Whether, if the tenancy had not come to an end by efflux of time, it stood validly determined by the notice dated 14.5.2013, and whether the suit founded thereon was maintainable.

HELD

On the preliminary objection, the Court held that non-compliance with an interim order does not result in an absolute bar to being heard in all circumstances; whether a party in default should be denied hearing depends on the facts of the case, relying on Prestige Lights Ltd. v. State Bank of India, (2007) 8 SCC 449. As the default was limited to the seriously disputed second-floor arrears, was not a case of contumacious or prolonged violation, and admitted dues had been bona fide deposited, the defendant-revisionist was not denied hearing.
On the first point, the Court held that the finding of the trial court that the defendant-revisionist was tenant of both the first and second floor was based on cogent material — including cheque payments covering the combined rent of Rs. 46,000/-, his admission of paying electricity dues for both floors through a common meter, and his admission that access to the second floor was only through his first-floor drawing room — and did not suffer from any perversity or jurisdictional error warranting interference in revision.
On the second point, the Court held that the written rent agreement dated 2.6.2012, on a plain reading and as reflected in the plaint itself, related only to the first floor portion and fixed a term of 11 months, following the principle in Satendra Singh v. Vimal Kumar Bhalotia, 2015 (2) AWC 1341 (SC), that an 11-month tenancy under a rent agreement is a fixed-term tenancy requiring no notice under Section 106. However, there was no evidence that the second floor tenancy was covered by the same agreement or was for a fixed term; the trial court had therefore erred in treating the second floor tenancy also as a fixed-term tenancy not requiring notice for its determination — it was a tenancy at will, determinable only by notice under Section 106.
On the third point, the Court held that a notice determining a tenancy at will is a condition precedent to a suit for eviction, and while the technical rule under Section 106 must be construed liberally, a construction that deprives the tenant of the statutorily minimum notice period is impermissible. As the second-floor tenancy was month-to-month, a 30-day notice period applied; taking the notice dated 14.5.2013 to have been served on the same date, the notice period expired only on 14.6.2013, whereas the suit was filed on 31.5.2013 — before expiry of the statutory notice period. Distinguishing Shree Ram Urban Infrastructure Ltd. v. Court Receiver, AIR 2014 SC 2286, and the Court's own decision in Union Bank of India v. Priyugi Narain Tripathi (SCC Revision No. 585 of 2014, decided 28.11.2014) — both of which dealt with suits filed after expiry of the statutory notice period despite a shorter notice being given — the Court held that a suit filed before expiry of the statutory notice period is premature and not saved by those authorities. The suit for eviction from the second floor was accordingly held to be prematurely instituted and bad in law.

RESULT

Revision allowed in part. The judgment and order dated 19.5.2016 and the consequential decree of the court below are upheld to the extent of decreeing eviction from the first floor portion, and set aside in respect of eviction from the second floor portion. The plaintiff-respondent is held entitled to damages/rent for the first floor portion alone, at 10% annual enhancement — Rs. 27,500/- per month for 1.5.2013 to 30.4.2014, Rs. 30,250/- per month for 1.5.2014 to 30.4.2015, and Rs. 33,275/- per month thereafter till possession — adjustable against the security deposit of Rs. 50,000/- for the first floor and any amount already paid. The judgment and order of the court below stand modified accordingly.

CASE REFERRED
Prestige Lights Limited Vs. State Bank of India (2007) 8 SCC 449
Satendra Singh Vs. Vimal Kumar Bhalotia 2015 (2) AWC 1341 (SC)
Shree Ram Urban Infrastructure Limited Vs. Court Receiver AIR 2014 SC 2286

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

1. The judgment and order dated 19.5.2016 passed by the Additional Sessions Judge, Gautam Budh Nagar decreeing SCC Suit No. 14 of 2013 (Dr. B.K. Singh Vs. Ramdev Yadav) is the subject matter of revision under Section 25 of the Provincial Small Causes Court Act, 1887 (hereinafter referred to as the Act).

2. The dispute is about the first and the second floor portions of the building A-528A, Sector-19 NOIDA, District Gautam Budh Nagar.

3. The plaintiff respondent Dr. B.K. Singh claims himself to be the owner and landlord of the said property and alleges that the defendant revisionist Ramdev Yadav is a tenant of the first and second floor at the rent of Rs. 25,000/- and Rs. 21,000/- respectively.

4. The plaintiff respondent after determining the lease of the defendant revisionist vide notice dated 14.5.2013 instituted the aforesaid suit for arrears of rent and eviction on 31.5.2013 alleging that the tenancy of the defendant revisionist commenced w.e.f. 2.6.2012 under a registered rent agreement. The said tenancy came to an end on 30.4.2013 but the defendant revisionist failed to vacate it despite letters informing him that the lease has expired and that he does not want to extend the same. A notice dated 14.5.2013 under Section 106 of the Transfer of Property Act, 1882 (in short referred to as the T.P. Act) was also sent to the defendant revisionist but in vain. In the suit he claimed eviction of the defendant revisionist and damages @ Rs. 60,000/- per month.

5. The defendant revisionist contested the suit admitting himself to be the tenant of the first floor portion but denying the tenancy of the second floor. It was contended that he never took the second floor portion on rent of Rs. 21,000/- as alleged rather one Raja Ram is a tenant occupying the same. The notice issued under Section 106 of the T.P. Act is not legal and valid. It has not been served upon him.

6. On the basis of the above pleadings of the parties, the court of first instance formulated as many as 11 issues. The main issues were issue nos. 1,4,6,9 and 11. The said issues were whether the defendant revisionist is not the tenant of the second floor; whether his tenancy has been validly determined; whether the notice issued under Section 106 of the T.P. Act is valid; whether the tenancy of the defendant revisionist was extended from 1.5.2013 to 30.4.2014; and to what relief, if any, the plaintiff respondent is entitle to.

7. The suit was decreed holding that the defendant revisionist is tenant of the first and second floor portions of the building at a rent of Rs. 25,000/- and Rs. 21,000/- respectively, total

Rs. 46,000/- per month. The tenancy of the defendant revisionist was for a fixed period and it expired by efflux of time. It was also held that the tenancy was never extended as alleged and the defendant revisionist was liable to eviction from the property on the expiry of the lease period. Therefore, no notice under Section 106 of the T.P. Act was necessary. Thus, the question of determination of tenancy and the validity of notice was left undecided. Accordingly, a decree of eviction was passed with damages @ Rs. 56,000/- for the period 1.5.2013 to 30.4.2014 @ Rs. 55,660/- from 1.5.2014 to 30.4.2015 and @ Rs. 60,160/- thereafter till the vacation of the property. The amount deposited by the defendant revisionist as security and during pendency of the suit was directed to be adjusted towards the damages.

8. The aforesaid judgment and order has been impugned herein in this revision.

9. Sri Ravi Kiran Jain, Senior Counsel contends that the defendant revisionist has not complied with the interim order passed by this Court on 28.7.2016 and as such is not even entitle to be heard.

Preliminary Objection:-

10. First, taking the preliminary objection that the defendant revisionist is not entitled to any audience as he has not complied with the conditions of the interim order, it may be relevant to quote the relevant portion of the interim order dated 28.7.2016:-

" Till the next date of listing, the dispossession of the revisionist from the two tenanted portions in dispute shall remain stayed provided he deposits the entire arrears of rent in respect of both the portions within a period of two weeks from today and continues to deposit damages/monthly rent for the use and occupation w.e.f. 1st August 2016 @ Rs. 61,160/- per month by the 7th of each succeeding month."

11. The aforesaid order required that the defendant revisionist shall deposit the entire arrears of rent in respect of both the first and second floor portions within two weeks and would continue to deposit damages/monthly rent for its use and occupation w.e.f. August 2016 @ Rs. 61,160/- per month which was the amount of damages awarded by the court below w.e.f. 1.5.2015.

12. The defendant revisionist pursuant to the above interim order had deposited the entire arrears of rent with regard to first floor portion but not in respect of the second floor portion though the damages/rent for both portions for the month of August 2016 is @ Rs. 61,160/- has been deposited.

13. Sri Anurag Khanna in this regard submits that as there was serious dispute as to whether the defendant revisionist is a tenant of the second floor portion he was advised not to deposit any arrears in respect thereof. He has bonafidely not deposited the arrears of rent of the second floor portion. The default, if any, in complying with the interim order would only result in bringing to an end the stay of his eviction and nothing more.

14. In ***Prestige Lights Limited Vs. State Bank of India (2007) 8 SCC 449*** in paragraph 24 of the said reports it has been observed that "an order passed by the competent court, interim or final has to be abided without any reservation. If such order is disobeyed or not complied with, the Court may refuse the party violating such order to hear him on merits."

15. The Court further observes therein that it does not however mean that in each and every case in which the party has violated the interim order he has no right to be heard at all and the court will not refuse to hear him in all circumstances.

16. The aforesaid authority does not lay down any absolute rule that a party violating the interim order has no right to be heard in all circumstances. Whether a party should be heard or not depends upon the facts and circumstances of the case at the discretion of the court.

17. The present case is not one of those cases where there is violation of the interim order with impunity and the party had taken advantage of it for a long time. Thus, when the interim order was passed only on 28.7.2016 and the parties have agreed for final hearing of the matter, no delaying tactics were adopted and the admitted part of the amount in respect of the first floor was deposited bonafidely leaving the other part as it was seriously in dispute, I do not consider it to be a fit case to deny hearing to the defendant revisionist for the default committed by him in complying with the conditions of the interim order.

18. Sri Anurag Khanna, Senior Advocate assisted by Sri Nipun Singh learned counsel for the defendant revisionist submitted that the finding on issue no. 1 that the defendant revisionist is a tenant of the first and second floor portion both is perverse and illegal. He is only the tenant of the first floor. The tenancy is not for a fixed period but on month to month basis. The agreement of tenancy is only in respect of first floor portion and in the absence of any agreement regarding second floor, the tenancy of the said portion is not fixed time tenancy. Since the tenancy was not for a fixed term, the suit for eviction can not be maintained without determining the tenancy in accordance with the provisions of Section 106 of the T.P. Act which provides for 30 days notice. In the present case notice was given on 14.5.2013 and the suit was filed on 31.5.2013 before the expiry of the notice period and as such was not maintainable.

19. Sri Ravi Kiran Jain, Senior Advocate assisted by Sri Amitabh Agrawal, learned counsel for the plaintiff respondent to counter the submissions advanced on behalf of the defendant revisionist submits that the tenancy of the first floor was under a written agreement but that of the second floor was oral in nature but both were fixed time tenancies which expired with the efflux of time in accordance with Section 111 of the T.P. Act and required no notice for their determination as contemplated by Section 106 of the T.P. Act.

20. Besides the preliminary question as to whether the defendant revisionist should be given any audience despite non compliance with the conditions of the interim order of this Court, the main points which arises for consideration before me are:-

i) Whether the finding that the defendant revisionist is a tenant of second floor portion suffers from any error of law or jurisdiction;

ii) Whether the tenancy in respect of both the portions is a fixed time tenancy and requires no notice under Section 106 of the T.P. Act for its determination; and

iii) Whether in case the tenancy has not come to an end by the efflux of time, it stood validly determined by the notice dated 14.5.2013 and the suit on its basis was maintainable.

First Point:

21. The first point with regard to tenancy in respect of both the floors would not detain me much.

22. The court of first instance in deciding issue no. 1 in that regard on the basis of the entire evidence on record which included the payment of rent and security deposit made by the defendant respondent and his own statement as DW-1 came to the conclusion that he is a tenant of both the floors. The payment of rent vide cheques dated 13.10.2012 and 1.12.2012 both for the sums of Rs. 46,000/- established that the defendant revisionist accepts himself to be the tenant of both the floors at the rent of Rs. 25,000/- and Rs. 21,000/- total Rs. 46,000/- per month. The defendant revisionist failed to submit any plausible explanation for payment of the aforesaid amount, if he was a tenant of the first floor only @ Rs. 25,000/- per month.

23. In addition to the above, the court below has recorded that DW-1 in his cross examination has accepted that the electricity bills of both the floors are raised on the basis of common electric meter and that he makes payment thereof which also proves that he is a tenant of both the portions.

24. The submission of Sri Anurag Khanna that there is a sub meter for the second floor portion and he realizes electricity dues of the said portion from its tenant and make the payment collectively is not wroth acceptance in the absence of any evidence of the alleged tenant of the second floor that he is an independent tenant using electricity from the electric connection of the defendant revisionist.

25. The cross examination of DW-1 which is part of the supplementary affidavit filed by him reveals that he has admitted that the way of the second floor is through his drawing room on the first floor. No one would permit any stranger to use his drawing room as a passage or staircase for going to his portion on the first floor. This also proves that the tenancy in respect of first and the second floor vests in a common person and there is no division of tenancy.

26. The finding that the defendant revisionist is a tenant of the first floor and the second floor both is based on material on record. There is no perversity in the said finding which may warrant any interference in exercise of revisional jurisdiction.

27. In view of the aforesaid facts and circumstances, the opinion formed by the trial court that the defendant revisionist is a tenant of the first and the second floor both is not perverse and does not suffer from any jurisdictional error.

Point No.2:-

28. The court below has held that the tenancy of the defendant revisionist in respect of both the portions on the first floor and second floor was a fixed time tenancy which came to an end by efflux of time.

29. The issuance of notice dated 14.5.2013 is admitted to the plaintiff respondent, though it is contended that it was not necessary. Notwithstanding the necessity of notice, it mentions that the defendant revisionist had taken the first floor and the second floor on lease on monthly rent of Rs. 25,000/- and Rs. 21,000/- total Rs. 46,000/- per month. The lease is on month to month basis commencing from first day of English calender month and ending on the last day of the month. The lease had expired on 30th April 2013 as per the lease agreement as informed earlier.

30. The aforesaid notice no where states that the lease was for a fixed period and it come to an end on the expiry of the lease period.

31. The plaintiff respondent in paragraphs 3 and 4 of the plaint stated that rent agreement was written between the parties on 2.6.2012 which was duly registered under which the first floor portion of the building was let out to the defendant revisionist at a rent of Rs. 25,00/- per month.

32. Paragraph 3 of the plaint is reproduced herein below:-

यह कि प्रतिवादी व वादी के मध्य एक किराया अनुबंध दिनांक 2.6.2012 में लिखा गया था. जिसमें आवासीय सम्पत्ति ए-528ए सेक्टर 19. नोएडा का **प्रथम तल** 25,000/-रूपये प्रतिमाह की दर से दिया जाना लिखा गया था, उपरोक्त अनुबंध वही संख्या 1 जिल्द संख्या 3381, पृष्ठ संख्या 65-75 पर कमांक 3114. पर उपनिबंधक तृतीय, नोएडा के कार्यालय पर दर्ज है।

33. It clearly mentions that under the registered rent agreement only the first floor portion was let out.

34. Paragraph 4 of the plaint states that on 2.6.2012 the second floor portion was also let out @ Rs. 21,00/- per month and in this way the defendant revisionist became the tenant @ Rs. 46,000/- per month.

35. Paragraph 4 of the plaint reads as under:-

यह कि दिनांक 2.6.2012 में भी द्वितीय तल विवादित सम्पत्ति का मु० 21,000/-रूपये प्रतिमाह की दर से किरायेदारी पर प्रतिवादी को दिया गया था। इस प्रकार प्रतिवादी विवादित सम्पत्ति पर 46,000/-रूपयें प्रतिमाह की दर से किरायेदार था।

36. The aforesaid averments made in paragraph 4 reveals that the plaintiff respondent has not pleaded any rent agreement in respect the second floor portion and that the tenancy of the second floor portion was separate from that of the first floor portion.

37. The plaint further vide paragraph 13 states that a notice dated 14.5.2013 under Section 106 of the T.P. Act was given to the defendant revisionist to handover possession of the disputed property on the expiry of the notice period.

38. The averments of paragraph 13 of the plaint amply demonstrates that the plaintiff respondent had consciously issued notice under Section 106 of the T.P. Act so as to determine the tenancy of the defendant revisionist accepting him to be a tenant on month to month basis and not a fixed time tenant.

39. The tenancy agreement in its recital very clearly spells out that the lessor had agreed to let out the first floor of the said property to the lease on monthly rent of Rs. 25,000/-. It further records that the lessor and lessee confirmed having taken over the premises from 1st June 2012 to 30th April 2013 and that it will be in force for a period of 11 months.

40. A plain reading of the rent agreement establishes that it was in connection with the first floor portion only and that the said tenancy was for a fixed period of 11 months only though the rent was payable on month to month basis.

41. There is no evidence on record to establish that the second floor portion was let out under any written agreement or that the terms of its tenancy were the same as were for the first floor portion. There is no material even to show that the tenancy of the second floor portion was also for 11 months only.

42. In view of the above, the tenancy of the first floor portion alone was covered by the aforesaid rent agreement and was for a fixed period of 11 months. The tenancy of the of the second floor portion was not within its fold.

43. In ***Satendra Singh Vs. Vimal Kumar Bhalotia 2015 (2) AWC 1341 (SC)*** the tenancy was for 11 months under the rent agreement. It was held to be for a fixed period which required no notice under Section 106 of the Transfer of Property Act, 1882 for its determination.

44. The court of first instance while deciding issue nos. 4 and 6 regarding the period of the notice and the determination of tenancy simply recorded that as the rent agreement was for a period of 11 months from 1.6.2012 to 30.6.2013 the tenancy was for a fixed term for which no notice was necessary and therefore even if it is assumed that the notice under Section 106 of the T.P. Act was invalid and not served upon the defendant revisionist, it has no bearing on the matter.

45. The court below had very easily brushed aside the relevant aspect of the rent agreement to the effect that it was only in respect of the first floor portion and not in connection with the

second floor tenancy. Thus, it committed a manifest error in holding the tenancy of both portions to be for fixed period.

46. In the absence of any evidence to establish that the tenancy in respect of second floor portion was also covered by the aforesaid rent agreement and was for a fixed period, the court below also erred in holding that no notice determining tenancy was required for both the tenaments.

47. In view of the above, in the light of the above rent agreement only the tenancy of the first floor portion can be recognized as a fixed term tenancy which came to an end on the expiry of the lease period requiring no notice for its determination whereas the tenancy of the second floor portion was at will determinable on notice under Section 106 of the T.P. Act.

Point No. 3:-

48. A notice determining tenancy is a condition precedent for instituting a suit for eviction of the tenant at will. The notice to quit contemplated by Section 106 of the TP Act is a technical rule but it should not be construed in a pedantic and impracticable way so as to find fault with it. The courts have always preferred to construe notice to quit in a liberal way but any construction of it which deprives the tenant of the minimum period of notice stipulated under Section 106 of the TP Act is not permissible in law.

49. In the instant case as far as the tenancy of the second floor portion is concerned, it may be said to have been determined vide notice dated 14.5.2013. The said notice to quit calls upon the defendant revisionist to deliver possession of both the portions including the second floor portion on the expiry of the notice period. However, the notice by itself does not specify any period. Under Section 106 of the TP Act a tenancy which is on month to month basis is determinable vide notice of 30 days. The tenancy of the second floor portion is accepted to be on month to month basis and as such in the absence of any notice period it will be deemed to be 30 days. There is no material to show the date of service of notice. Therefore, taking the notice to have been served on the date of the notice itself the notice period would expire on 14.6.2013.

50. In the aforesaid facts and circumstances of the case, the defendant revisionist had the time to vacate the second floor portion under his tenancy by the aforesaid date ie. 14.6.2013 but the suit was filed on 31.5.2013 even before the statutory period of the notice had expired.

51. In this factual background the defendant revisionist was deprived of the minimum notice period. The cause of action for the suit for eviction in respect of second floor portion was not even complete on the date it was filed. It would have matured only on the expiry of the statutory period of the notice.

52. In this view of the matter, the aforesaid notice to quit in so far as the second floor portion is concerned, could not have been made the basis or the cause of action for the suit for eviction of the defendant revisionist.

53. ***In Shree Ram Urban Infrastructure Limited Vs. Court Receiver AIR 2014 SC 2286*** the Apex court held that if the notice under section 106 of the TP Act falls short of the statutory period but the suit is filed after the expiry of the statutory period of notice it would not be bad in law.

54. I myself in SCC Revision No. 585 of 2014 (Union Bank of India Vs. Priyugi Narain Tripathi and 5 others) decided on 28.11.2014 considering the provisions of Section 106 (3) of the T.P. Act held that even if the notice period falls short of the statutory period provided, it will not be defective and the suit on its basis would not be bad when it is filed after the expiry of the statutory period of the notice.

55. The aforesaid two authorities are of no assistance in the present case as here the suit has been filed not after the expiry of the notice or statutory period of notice but before the expiry of the statutory period of notice. In other words, notwithstanding the insufficient period of notice mentioned in the notice when the suit is filed after the expiry of the statutory period neither the notice would be treated as defective nor the suit to be bad in law but the position the other way round is not the same where the suit is filed before expiry of the notice period or the statutory period of the notice.

56. In view of the above, the suit for eviction of the defendant revisionist from the second floor portion was instituted prematurely without allowing the notice period to expire rendering it to be bad in law.

57. Thus, in the over all facts and circumstances of the case, the judgment and order dated 19.5.2016 and the consequential decree passed by the court below is partly upheld, in so for as, it decrees the suit for eviction of the defendant revisionist from the first floor portion and is set aside in respect of the eviction from the second floor portion. The plaintiff respondent is entitle to damages/rent for the first floor portion from the date of the expiry of the lease period at the 10% enhanced rent on annual basis ie., for the period 1.5.2013 to 30.4.2014 @ Rs. 25,000/- +2,500/- = 27,500/- per month; for the period 1.5.2014 to 30.4.2015 @ Rs. 27,500/- +2,750 /- = 30,250 per month; and after 1.5.2015 till the date of possession @ Rs. 30,250/- + 3,025/- = 33,275/- per month. The aforesaid amount is adjustable against the security of Rs. 50,000/- deposited in respect of first floor portion or any amount paid in the suit or these proceedings.

58. The revision is allowed in part as above and the judgment and order of the court below stands modified to the extent indicated above.

59. The revision is accordingly allowed in part.

(2016) 9 ILRA 1314
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 428 Of 1995

Subrati **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for Appellant:
Mohd. Arif Khan, Raj Bux Singh, Ram Ujagir Pandey, Rishad Murtaza, Sarojini Bala Yadav, Shamim Raza

Counsels for Respondent:
Govt. Advocate

Penal Code, 1860 — Section 376 — Rape — Conviction — Appeal against conviction and sentence of 7 years rigorous imprisonment — Prosecutrix, aged about 10 years, subjected to rape while working in the fields — First Information Report lodged promptly within hours by the victim herself, in her own words, prior to medical examination — Medical evidence (torn hymen, perineal tear, lacerated labia minora, torn and extensively lacerated vaginal mucosa, fresh bleeding) wholly corroborating the oral testimony of the prosecutrix — Held, sole testimony of the prosecutrix, if found trustworthy, reliable and unimpeachable, is sufficient to sustain conviction without corroboration; prosecutrix to be placed on a higher pedestal than an injured witness. Appeal dismissed; conviction and sentence confirmed.

Evidence Act, 1872 — Testimony of related/interested witnesses — Prosecution witnesses (mother, uncle of the victim) being relatives, contended to be interested witnesses whose evidence ought to be discarded — Held, relationship of a witness with the victim does not by itself render the witness 'interested'; the term 'interested' postulates a direct interest in securing conviction of the accused arising from animosity or otherwise — A close relative is ordinarily the last person to screen the real culprit and falsely implicate an innocent person — Evidence of related witnesses cannot be rejected mechanically on the sole ground of relationship, but must be examined with caution — Foundation must be laid for a plea of false implication — On facts, no such foundation existed and evidence of related witnesses found consistent, reliable and inspiring confidence.

Evidence of Child Witness — Credibility and precautions — Prosecutrix aged about 10 years (6 to 8 years as per radiological age determination) — Held, evidence of a child witness cannot be rejected outright, but must be evaluated with greater circumspection to rule out tutoring and to ascertain that the testimony is a voluntary and truthful expression of the witness — On facts, statement of the child witness found natural, innocent, unshaken in cross-examination, and free from any indication of tutoring; her testimony corroborated by medical evidence — Conviction based on the reliable testimony of the child witness upheld.

Evidence Act, 1872 — Section 6 — Res gestae — Statement of the mother of the victim, made immediately upon finding her daughter injured and bleeding shortly after the incident, held to be relevant under Section 6 of the Evidence Act as part of the same transaction — Conduct of the mother in searching for the victim upon her failure to return home held to be natural and credible.

Criminal Trial — Test Identification Parade — Non-holding of — Effect — Contention that absence of test identification parade renders identification of the accused unreliable, since the accused was not previously known to the victim — Held, substantive evidence is the identification of the accused in court; a prior test identification parade is only a corroborative piece of evidence and its holding is a rule of prudence, not a rule of law — In the absence of a test identification parade, identification of the accused in court can still be relied upon where the witness (including a child witness) is otherwise found trustworthy and reliable — Victim's identification of the accused in court, coupled with her consistent narration and medical corroboration, held sufficient to sustain conviction.

Held:
(i) The First Information Report, lodged promptly by the victim herself before her medical examination, ruled out possibility of embellishment or false implication.
(ii) Testimony of related witnesses (mother and uncle of the victim) cannot be discarded merely on the ground of relationship, no foundation having been laid for the plea of false implication.
(iii) Sole testimony of the child prosecutrix, found truthful, consistent and free from tutoring, and corroborated by medical evidence, is sufficient to sustain conviction under Section 376 IPC without further corroboration.
(iv) Absence of test identification parade does not vitiate conviction where in-court identification by a trustworthy witness is otherwise reliable.
(v) Subsequent incident of the victim being taken away from the hospital by other persons, being a separate occurrence registered as a distinct crime, held to have no bearing on the present case.
(vi) Sentence of 7 years' rigorous imprisonment, being just and appropriate given the brutality of the offence against a minor, not liable to be reduced. Appeal dismissed; conviction and sentence confirmed; appellant's bail bonds cancelled and sureties discharged; appellant to surrender to serve out remaining sentence.

RESULT
Appeal dismissed.

Cases Referred:
1. Dalip Singh and others v. State of Punjab, AIR 1953 SC 364
2. Masalti and others v. State of U.P., AIR 1965 SC 202
3. Guli Chand and others v. State of Rajasthan, 1974 (3) SCC 698
4. Vadivelu Thevar v. State of Madras, AIR 1975 SC 614
5. Israr v. State of U.P., 2005 (51) ACC 113
6. Galivenkataiah v. State of A.P., 2008 (60) ACC 370
7. Ravi v. State of U.P., 2004 (11) SCC 266
8. State of Andhra Pradesh v. S. Rayappa and others, 2006 (1) AAR 259 (SC)
9. Satvir v. State of U.P., (2009) 4 SCC 289
10. Jaishree Yadav v. State of U.P., 2006 (1) SCC (Cri) 160
11. Javed Alam v. State of Chhatisgarh, (2009) 6 SCC 450
12. Mohd. Ali @ Guddu v. State of Uttar Pradesh, (2015) 7 SCC 272
13. State of U.P. v. Krishna Master and others, AIR 2010 SC 3071
14. Dattu Ramrao Sakhare v. State of Maharashtra, 1997 (5) SCC 341
15. Panchhi v. State of U.P., (1998) 7 SCC 177
16. Ashok Debbarama @ Achak Debbarma v. State of Tripura, (2014) 4 SCC 747
17. Kailash Laxman Khamkar v. State of Maharashtra, 2010 Crl.L.J. 3255

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

1. Challenge in this appeal is to the judgment and order dated 11.08.1995 passed by IIIrd Additional Sessions Judge, Sultanpur, in S.T. No. 250 of 1990 (State vs. Subrati), under Section 376 I.P.C., P.S. Musafirkhana, District Sultanpur, whereby the accused appellant was convicted and sentenced to 7 years rigorous imprisonment under Section 376 I.P.C.

2. Filtering out unnecessary details, the prosecution case is that a report was lodged by the victim stating that she was aged about 10 years. On 16.03.1990, she had gone to the fields for some work. In the adjoining fields, the accused was collecting grass. The accused came to the victim and requested her to accompany him so that he would give her plums. The victim refused. At which the accused picked up the victim, pressed her mouth and took her towards the western side. He dropped her on the ground, took off all her undergarments and raped her. The victim raise hue and cry at which, the accused fled away. The victim was bleeding. After some times, the mother of the victim came on the spot and brought back the victim to her house, at which the first information report was lodged. On the basis of first information report, the investigation commenced.

3. The prosecution examined as many as 7 witnesses. PW-1 is the victim, who proved the first information report as Exhibit Ka-1. PW-2 is Smt. Rampata, the mother of the victim. PW-3 is Kalicharan who went to the police station with the victim and lodged the report. PW-4 is Brijlal who proved the memo by virtue of which blood stained and plain earth was collected by the I.O. which is Exhibit Ka-2. Further the blood stained undergarments of the victim was taken into possession in the presence of this witness. The recovery memo was proved by this witness as Exhibit Ka-3. PW-5 is Dr. Talat Jahan who examined the victim and found the following injuries on the body of the victim:-

"Forchette torn in the mid line. Perennial tear present extending upto 2 mm. away from the inner margin. Libra minora lacerated. Vaginal Mucosa torn and hanging out of the vagina. Vaginal mucosa torn extensively on all sides. Hymen torn. Fresh bleeding from the vagina present.

Two slides vaginal smear sent for detection of spermatozoa and gonacocei."

4. The victim was sent by the doctor for determination of age. This witness has proved the medical report as Exhibit Ka-4 and the pathological report as Exhibit Ka-5. Head Constable Ram Murti Singh is PW-6 who scribed the chik report which was orally dictated by the victim informant. Further details of the case were written in the G.D. which proved by this witness as Exhibit Ka-7. The investigation was conducted by PW-7 S.I. Ram Chet Singh in whose presence the case was registered. He copied the copy of chik and G.D. in the case diary and recorded the statement of the victim who was present at the police station. After that the victim was got medically examined but before that, the accused Vijay Pratap and others kidnapped the victim and her aunt (Bua) for which a separate case was registered under Crime No. 91 of 1990, in which case, the victim was recovered but the accused fled away. Then the victim was again sent to district hospital for medial

examination. The I.O. inspected the spot on 17.03.1990. He recorded the statements of the mother of the victim and Ram Charan and inspected the spot. He proved the site plan as Exhibit Ka-8. The Investigating Officer found blood on the place of incident. He collected the blood stained and ordinary earth from the place of occurrence and kept it in two boxes, sealed them and prepared the memo which was signed by this witness. He made attempts to apprehend the accused but the accused could not be apprehended, hence he obtained the process for attachment of the property of the accused but came to know that the accused was detained in the district jail where the statement of the accused was recorded. In the mean time, this witness obtained the medical report and the pathological report of the victim. After investigation, he submitted charge sheet which was proved by him as Exhibit Ka-9. On 22.03.1990, after the statement of the victim was recorded under Section 164 Cr.P.C., the victim was handed over to her family members. Supurdginama was proved by this witness as Exhibit Ka-10.

5. After the prosecution evidence was closed, the statement of the accused was recorded under Section 313 Cr.P.C. In which he denied the occurrence. Further he has stated that he was enemical to Kalloo and Ram Kripal of the same village. He had been falsely implicated due to this enmity. The accused produced Constable Ram Kripal Sharma as DW-1 who proved the copy of the G.D. as Exhibit Kha-1.

6. After perusal of all the evidences available on record and hearing the counsel for the parties, the learned trial court has passed the impugned judgment as specified in para one of the judgment.

7. I have heard Sri Ram Ujagir Pandey as well as Ms. Sarojini Bala Yadav, counsel for the appellant, learned A.G.A. and perused the material available on record.

8. Counsel for the appellant has submitted that the trial court has not considered the evidence adduced by the defence. Besides the trial court has lost sight of the fact that all the witnesses adduced by the prosecution are interested witnesses, hence, they cannot be relied upon. Further, he has submitted that the accused was not known to the victim, hence, the appeal is liable to be allowed.

9. Per contra, learned A.G.A. Has submitted that there was no reason for the victim to falsely implicate the accused. The judgment is well reasoned and needs no interference.

10. As far as the first information report is concerned, on the basis of the first information report, the police machinery is brought into motion. Perusal of the chik report Exhibit Ka-1 reveals that the incident took place on 16.03.1990 in the afternoon. The report was lodged on the same day at 02:15 P.M. The distance of the police station from the place of occurrence being 8 Kms., thus, the first information report is prompt and chances of embellishment and and false implication are bleak.

11. I have carefully perused the chik report. A bare perusal of the chik report reveals that the chik report was dictated by the victim herself whose age as per first information report was about 10 years. A bare reading of the first information report reveals that this first information report was dictated orally to the Head Moharrir of the police station by the victim in her local regional language. The victim has narrated the complete incident in her own language categorically. Challenging this first information report, counsel for the appellant has submitted that the first information report has been lodged after consultation but this argument has no legs to stand, inasmuch as, the informant being the victim has specifically stated that she lodged the report prior to her medical examination.

12. Counsel for the appellant has also submitted that PW-1 is the victim and the informant. PW-2 is Smt. Rampata, the mother of the victim. PW-3 is Kalicharan, the uncle of the victim and belong to the same family. All are interested witnesses, hence their evidence cannot be relied upon. As far as the evidence of interested witnesses is concerned, there is no quarrel that PW-1, PW-2 and PW-3 are related to each other. Learned A.G.A. has submitted that the evidence of related witnesses cannot be thrown out merely on the ground of their relationship. As far as, the reliability of the witnesses is concerned in ***Dalip Singh and others vs. State of Punjab (AIR 1953 SC 364)***, it has been laid down as under by the Hon'ble Apex Court as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship for from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judge on its own facts."

13. Observations of the Hon'ble Apex Court in ***Masalti and others vs. State of U.P., AIR 1965 SC 202,*** are worth mentioning:-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

14. The above decision has been followed in ***Guli Chand and others vs. State of Rajasthan, 1974 (3) SCC 698,*** in which VadiveluThevar vs. State of Madras, AIR 1975 SC 614 was also relied upon. The following observations made by the Hon'ble Apex Court in Israr vs. State of U.P. (2205 (51) ACC 113) in para-12 of the judgment are also important:-

".....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."

15. The above position has been highlighted again in the case of ***Galivenkataiah vs. State of A.P., 2008 (60) ACC 370,*** in which reference has been made to some other cases also.

16. In the case of ***Ravi vs. State of U.P., 2004 (11) SCC 266***, the following observations have been made by the Hon'ble Apex Court:-

"It is well settled in a catena of cases that the evidence of eye witnesses cannot be rejected merely because they are related. The relatives will not exonerate real culprits and falsely implicate others."

17. Hon'ble Supreme Court in the case of ***State of Andhra Pradesh vs. S. Rayappa and others, 2006 (1) AAR 259 (SC)*** dealing the evidence of related / interested witnesses has observed as under:-

".....By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

18. In para 8 Hon'ble Apex Court has further observed as under:-

"The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased, they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously...."

19. In the case of ***Satvir vs. State of U.P., (2009) 4 SCC 289***, the Hon'ble Supreme Court has observed in para 24 as under:-

"The eye witnesses have been cross examined at length by the learned counsel, but nothing tangible has been extracted from their evidence to create any shadow of doubt that they are not truthful witnesses. They have given reliable, consistent and creditable version of the crime and their evidence inspires confidence. It is well settled that if the witness is related to the deceased, his

evidence has to be accepted if found to be reliable and believable because he would inter alia be interested in ensuring that real culprits are punished."

20. In ***2006 (1) Supreme Court Cases (Cri) 160, (Jaishree Yadav vs. State of U.P.),*** the Hon'ble Apex Court has laid down that the evidence of interested witnesses cannot be thrown out on the ground of their relationship.

21. As far as the evidence of PW-2 Smt. Rampata is concerned, she is the mother of the victim. She has stated that when the victim did not return home for quite sometime, she went to the fields to search her daughter. While, she was searching for her daughter, she found her daughter who was crying in pain and she was bleeding, both her thighs and legs were blood stained and she was lying naked. Her undergarments were lying aside. She dressed her daughter and brought her back home. She further stated that after she brought her home, she took off the panty of the girl and covered her with a saree. This finds support from the statement of the victim PW-1, who has specifically stated that when her mother brought her back home from the fields, she was covered by her mother with a saree and she was taken to the police station by her aunt (Bua) and uncle Kalicharan. This also finds support from the copy of G.D. Exhibit Ka-7 in which the presence of aunt (Bua) and uncle Kalicharan is noted.

22. The conduct of the mother of the victim to go to search for her daughter when her daughter did not return home is very natural and digestible. The statement of the mother of the victim immediately after the incident would be relevant under Section 6 of the Evidence Act.

23. In ***Javed Alam vs. State of Chhatisgarh, (2009) 6 SCC 450***, it has been laid down that Section is an exception to rule of evidence that hearsay evidence is not admissible. Test for applying rule of res gestae is that statement (or fact) should be spontaneous and should form part of the same transaction ruling out any possibility of concoction.

24. Even PW-4 Brijlal has admitted that the victim belongs to his family. He has stated that he saw the accused running away with grass. He was surprised as to why the accused was running away. Lateron he came to know that he had raped the victim. The evidence of PW-4 is not very significant, hence, it does not need any discussion.

25. As far as PW-3 Kalicharan is concerned, he has stated that when he came to know about the occurrence, he went to the house of the victim. He was told about the incident, where he waited for the father of the victim but when he did not return, he accompanied his sister Pulau and the victim went by tractor of Shiv Prasad to the police station where the victim dictated the report to the Head Moharrir of the police station. This again finds support from copy of G.D. Exhibit Ka-7 in which the presence of Kalicharan finds place. This witness was suggested that he lodged the report on the instigation of Sher Bahadur and Pancham against the accused but he denied the suggestion. Even otherwise, this suggestion has no legs to stand, inasmuch as, the report was dictated by the victim herself.

26. Coming to the evidence of the victim PW-1, her statement bears a certificate by the trial judge that questions of general nature, were put to this child witness and the trial judge concluded that the witness was capable of understanding.

27. Counsel for the appellant has submitted that it was not safe to convict the accused on the solitary statement of the child witness who could have easily been tutored.

28. As far as the statement of the victim is concerned, in ***(2015) 7 Supreme Court Cases 272, (Mohd. Ali @ Guddu vs. State of Uttar Pradesh)***,in which the Hon'ble Apex Court has held that there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based.

29. It is trite law that law permits that the testimony of the prosecutrix can be accepted without any corroboration in material particulars, for she has to be placed on a higher pedestal than an injured witness. Thus, if the sole testimony of the prosecutrix is worthy of credence and reliable then no corroboration is required. I am conscious of the fact that in cases of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape.

30. As far as the evidence of a child witness is concerned, it is settled, on record that the victim is below the age of 10 years, inasmuch as, in the first information report she has mentioned her age to be about 10 years. As per the radiological report, her age as determined by the doctor was between 6 to 8 years.

31. In ***AIR 2010 Supreme Court page 3071 (State of U.P. vs. Krishna Master and others)***, the Hon'ble Apex Court has observed that the evidence of child witness cannot be rejected out right but it should be evaluated carefully with greater circumspection. The Court has to ascertain whether it is free from influence. It has further been held that if on a careful scrutiny, the testimony of a child witness is found truthful, there can be no hindrance in the way of accepting the same and recording the conviction of the accused on the basis of testimony of a child witness.

32. Further in ***Dattu Ramrao Sakhare vs. State of Maharashtra, 1997 (5) SCC 341***, Hon'ble Apex Court has held as under:-

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

33. The Hon'ble Apex Court in ***Panchhi vs. State of U.P., (1998) 7 SCC 177***,has observed about 'child witness', which reads as under:

"The evidence of a child witness cannot be rejected outrightly but the evidence must be evaluated carefully and with grater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The Court has to assess as to whether the statement of the victim before the Court is the voluntary expression of the victim and that she was not under the influence of others."

34. In cross-examination this witness has categorically narrated the whole incident. She has stated that due to pain, she became unconscious. She was also suggested in cross-examination that she was stating against the accused because she was tutored by the Sub-Inspector which was negativated by this witness. The testimony of the victim and the informant remained unshaken and is supported by the evidence of PW-5 Dr. Talat Jahan who has stated that the injuries were indicative of rape.

35. In this regard the Hon'ble Apex Court in ***(2014) 4 SCC page 747, Ashok Debbarama @ Achak Debbarma vs. State of Tripura***, has held that the identification for the first time in Court is good enough and can be relied upon if the witness is otherwise trustworthy and reliable. It is only as a matter of prudence that the courts require and insist upon test identification parade and they it would entirely depend upon facts and circumstances if testimony of the witness is otherwise found to be trustworthy and reliable.

36. I have carefully examined the statement of the victim whose statement is very innocent and she does not appear to be tutored. She underwent the test of cross-examination by an Advocate and there is nothing in her evidence by virtue of which she could be termed to be a tutored witness.

37. PW-1, the victim has specifically stated that she was chopping Bersem in the field, suddenly the accused came to her and asked her to accompany him to eat plums. He also introduced himself to the victim by telling his name and address.

38. Thus, the medical evidence has wholly corroborated the oral evidence of the victim.

39. Counsel for the appellant has submitted that this story narrated by the victim is not reliable, inasmuch as if the accused wanted to rape the victim there was no reason why he would reveal his identity, especially when the victim specifically stated in her cross-examination that from the time when the accused carried her from the field till he committed rape, neither he asked the victim her name nor told his own name to the victim. This argument of the learned counsel for the appellant does not find favour with the Court, because this could be the way in which the accused tried to seduce this small girl. It appears that the victim belonged to a very poor family because she has stated that she does small jobs in the house. The victim has stated in her statement that the accused committed rape on her. She started bleeding at which the accused fled away. The statement of PW-1 is natural and inspires confidence.

40. Counsel for the appellant has also submitted that since the accused was not known to the victim and no test identification parade was conducted in the case, hence there is nothing on record to prove that it was the accused who committed rape on the child but as suggested to the victim it was Sher Singh who committed rape on the girl. The victim has identified the accused in Court. She has denied of Sher Singh having raped her.

41. The Hon'ble Apex Court has constantly held what is substantive evidence is the identification of an accused in court by a witness and that the prior identification in a test identification parade is used only to corroborate the identification in court. Holding of test identification parade is not rule oflaw but rule of prudence. Normally, identification of the accused in a test identification parade lends assurance so that the prosecution identification in court during trial can be safely relied upon. However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon since the victim (child witness) is otherwise trustworthy and reliable.

42. Counsel for the appellant while placing reliance upon ***Kailash Laxman Khamkar vs. State of Maharashtra, 2010 Crl.L.J. 3255***, in which the Hon'ble Apex Court has held as under:-

"In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all resistance, then such material must exist. Importantly, surrounding circumstances may time throw beacon light on that aspect."

43. The present case in hand is not a case of attempt but the accused has successfully committed the act of rape, hence, the prosecution has successfully proved that the accused has committed rape on the victim.

44. Counsel for the appellant has also submitted that when the victim went to the hospital for medical examination, she was lifted and kidnapped by Ram Kripal Singh, Pancham Singh, Nannhey Nat and Vijay Prakash Yadav which were admitted by the victim and even the I.O., hence, the whole occurrence becomes doubtful. I think, the incident if any of taking away, the girl and her relatives from the hospital forcibly is a separate incident. It has no bearing on this rape case.

45. Rape is a monstrous, brutal and sexual offence and in this particular case even a small girl below the age of 10 years has not be spared.

46. Counsel for the appellants has submitted that though not proved on record that the application was moved before the concerned Magistrate to hold test identification parade, but the I.O. did not hold the test identification parade due to which the prosecution case falls down like a heap of cards. Although the I.O. has denied and stated that he did not receive any directions for holding test identification parade.

47. The I.O. PW-2 Ramchet Singh in cross-examination has specifically stated that no direction were issued to him to hold test identification parade. In this regard, the statement of DW-1

was also considered by me keeping in view the copy of G.D. Exhibit Kha-1. But perusal of Exhibit Kha-1 and the statement of DW-1 Constable Ram Kripal Sharma do not show that any orders for holding test identification parade were passed by any officer. Thus, the prosecution has proved its case beyond all reasonable doubts.

48. As far as the statement of the accused recorded under Section 313 Cr.P.C. is concerned, he has stated that he was falsely implicated due to his enmity with Lallu and Ram Kripal but this statement has not supported by any short of evidence. I do not think a minor girl would spare the real culprit and implicate an innocent person on the instigation of an outsider.

49. In the case in hand, the crime is rampant for unfathomable reason. The pain and suffering of a victim is a brutal assault on her physical frame, when she is raped. It is a nightmare for her.

50. Counsel for the appellant has also submitted that a very harsh sentence has been imposed by the trial court in sentencing the accused for seven years rigorous imprisonment under Section 376 I.P.C. As per the record, the present age of the appellant would be below 50 years. I think a society which is civilized and replete with cultural values of thousand years old, should respect child and human rights. Child abuse and the rape of a girl child can never be tolerated and the culprits deserved to be dealt with iron hands of law. In this case, a tender angelic girl has been brutally ravished and there is no ground to reduce sentence which is a just sentence in the present case.

51. Thus I conclude, on the basis of what has been said and discussed above, the appeal deserves to be dismissed.

52. Accordingly the appeal is dismissed.

53. The conviction and sentence of the appellant as awarded by learned trial court by the impugned judgment and order is confirmed.

54. The appellant is on bail, his bail bonds are cancelled and sureties are discharged. He shall be sent to jail to serve out the remaining sentence.

55. Let certified copy of this judgment be sent to the trial court concerned for compliance.

(2016) 9 ILRA 1325
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 572 Of 2016

Ashish Kumar Pandey **...Appellant**
Versus
Bajrang Bali Pandey & Ors. **...Respondents**

Subject Matter

(A) Indian Succession Act, 1925 — Section 213 — Right as executor or legatee — Beneficiary under a Will seeking probate of his own accord — Maintainability — Application for probate filed by a beneficiary under a Will rejected by the court below on the premise that a beneficiary is not required to obtain probate. A beneficiary under a Will may, in certain circumstances covered by Section 213(2) read with Section 57(a) and (b) of the Act (i.e., where the Will does not fall within the specified classes, or the property covered is outside the territorial limits mentioned in Section 213(2)), not be required to obtain probate before enforcing rights under the Will. However, this exemption is permissive and not prohibitory. Nothing in the Indian Succession Act, 1925 bars a beneficiary from voluntarily applying for and obtaining probate of a Will executed in his favour, particularly where such probate is required to be produced before banks, insurance companies, or other authorities/departments (e.g., for release of locker contents, deposits, or post-retiral dues) who insist upon a probate or succession certificate to satisfy themselves of the genuineness of the Will. The court below therefore erred in law in holding that the probate application was not maintainable at the instance of a beneficiary.

(B) Indian Succession Act, 1925 — Section 213 — Scope and jurisdiction of the Probate Court — Whether Probate Court can adjudicate title, correctness or extent of bequest, or require impleadment of persons claiming a share in the bequeathed property.The jurisdiction of a court of probate is a limited one, confined to ascertaining whether the document propounded as the last Will and testament of the deceased was duly and validly executed and attested in accordance with law, and whether the testator, at the time of execution, possessed a sound and disposing mind. The question whether a particular bequest is good or bad, or whether the testator in fact had title to, or an exclusive share in, the property bequeathed, does not fall within the purview of the probate court. Rejection of the probate application on the ground that other persons/the deity's trust, who might also have an interest in the offerings bequeathed, ought to have been impleaded and their rights adjudicated by a competent civil court before probate could be granted, is beyond the limited scope of an enquiry under Section 213 and is not sustainable. [Ishwardeo Narain Singh v. Smt. Kamta Devi, AIR 1954 SC 280; Chiranjilal Shrilal Goenka v. Jasjit Singh & Ors., (1993) 2 SCC 507 — relied on].

(C) Indian Succession Act, 1925 — Section 213 — Rejection of probate application for non-disclosure of details of bank/locker or insurance company in which movable assets of the deceased were held — Legality. Failure of a probate applicant to disclose the name of the bank in which a locker stood, or the name of the insurance company with which a policy was taken, is not a matter falling for consideration in probate proceedings, which are confined to due execution and genuineness of the Will and the testamentary capacity of the testator. Rejection of the probate application on this ground is beyond the scope of Section 213 of the Act and is not legally sustainable.

(D) Precedent — Division Bench judgments in Smt. Satnam Kaur v. Satyendra Pal Singh & Ors., 2015 (109) ALR 573 and Smt. Bimla Gaindher v. Smt. Uma Gaindher & Anr., 2004 (55) ALR 591 — Whether authority for the proposition that a beneficiary under a Will cannot obtain probate.The court below misread and misapplied the ratio of Smt. Satnam Kaur (supra), which, following Smt. Bimla Gaindher (supra), holds only that a beneficiary under a Will is not compulsorily required to obtain probate where the Will falls outside the classes specified in clauses (a) and (b) of Section 57, or where the property is situate outside the territorial limits mentioned in sub-section (2) of Section 213 of the Act. Neither decision lays down, nor can be read as laying down, that a beneficiary is debarred or precluded from applying for and obtaining a probate of the Will in his favour if he chooses, or requires, to do so for other lawful purposes, such as production before banking, insurance or other authorities.

(E) Indian Succession Act, 1925 — Section 299 — Appeal — Rejection of probate application set aside — Matter remitted for adjudication on merits — Costs.The impugned order rejecting the probate application being founded on an erroneous appreciation of law and a misreading of binding precedent, is unsustainable and is set aside. Appeal allowed; matter remitted to the District Judge concerned to register the probate application and adjudicate the same on merits in accordance with law. No order as to costs.

HELD

The appellant, a beneficiary under the Will dated 24.04.2015 executed by one Anil Kumar Upadhyay @ Munna (maternal uncle of the appellant and respondent nos. 1 to 3), filed Probate Case No. 14 of 2015 before the Additional District Judge, Court No. 1, Mirzapur, seeking probate of the said Will in respect of movable and immovable properties bequeathed to the appellant and respondent nos. 1 to 3 and 6 to 8. Respondent nos. 1 to 5 filed no objection, while respondent nos. 6 to 8, though supporting the appellant's case, separately claimed probate qua the share bequeathed in their own favour.

The court below rejected the probate application, principally on the ground that since only 13/1/4 anas share out of the offerings made by devotees to Maa Vindhyavasini was bequeathed to the appellant and respondent nos. 6 to 8 (in equal shares), it indicated that other persons/the trust also held a share therein, and that all such interested parties and the trust ought to have been impleaded and the matter agitated before a competent court by way of suit; and further, on the ground that the appellant had not disclosed the particulars of the bank where the locker was situate, nor the name of the insurance company.

On appeal under Section 299 of the Indian Succession Act, 1925, the Division Bench held that the jurisdiction of a probate court is confined to determining the due execution, attestation and genuineness of the Will and the testamentary capacity of the testator, and does not extend to adjudicating questions of title or the correctness/extent of a bequest; nor can want of disclosure of bank/insurance particulars be a ground for refusing probate. The Bench further held that the court below had misread the Division Bench decision in Smt. Satnam Kaur v. Satyendra Pal Singh & Ors. (following Smt. Bimla Gaindher v. Smt. Uma Gaindher & Anr.) as laying down that a beneficiary cannot obtain probate; in fact those decisions only hold that a beneficiary is not compulsorily required to obtain probate in cases falling outside Section 213(2) read with Section 57, and do not bar a beneficiary from voluntarily seeking probate for use before banks, insurance companies or other authorities.

Accordingly, the appeal was allowed, the impugned order dated 28.10.2015 was set aside, and the matter was remitted to the District Judge concerned with a direction to register the probate application and decide the same afresh on merits in accordance with law. No order as to costs.

Result:

Appeal Allowed; Impugned Order Set Aside; Matter Remitted.

Case Law Referred

Ishwardeo Narain Singh v. Smt. Kamta Devi, AIR 1954 SC 280 — Relied on / Followed

Chiranjilal Shrilal Goenka v. Jasjit Singh & Ors., (1993) 2 SCC 507 — Relied on / Followed

Smt. Satnam Kaur v. Satyendra Pal Singh & Ors., 2015 (109) ALR 573 (DB) — Considered and explained; reliance placed thereon by the court below held to be misconceived
Smt. Bimla Gaindher v. Smt. Uma Gaindher & Anr., 2004 (55) ALR 591 (DB) — Referred to

(Delivered by Hon'ble Krishna Murari, J.
&
Hon'ble Prashant Kumar, J.)

1. This appeal under Section 299 of the Indian Succession Act, 1925 (hereinafter referred to as the 'Act') is directed against the judgment and order dated 28.10.2015 passed by Additional District Judge, Court No. 1, Mirzapur rejecting the application made by the appellant for grant of probate.

2. We have heard Shri Rajeev Misra, learned counsel for the appellant and Shri Siddharth for the respondents.

3. Facts, in brief, giving rise to the dispute are as under.

4. One Anil Kumar Upadhyay @ Munna, who was maternal uncle of the appellant and respondent nos. 1 to 3, executed a Will in favour of the appellant and respondent nos. 1 to 3 and 6 to 8 in respect of his all the moveable and immoveable properties. After his death on 09.05.2015, the appellant herein filed a Probate Case No. 14 of 2015 before the Additional District Judge, Court No. 1, Mirzapur for grant of probate in respect of Will dated 24.04.2015.

5. Respondent nos. 1 to 5 filed their no objection before the Additional District Judge for grant of probate in favour of the appellant. Respondent nos. 6 to 8, however, filed a written statement supporting the case of the appellant. However, they also claim probate of the Will in respect of the property bequeathed in their favour under the said Will.

6. Court below rejected the application for probate vide impugned judgment and order dated 28.10.2015 on the ground that the fact that only 13/1/4 anas share out of the offerings made by the devotees to Maa Vindhyavasini was bequeathed in favour of the appellant and respondent nos. 6 to 8, each having equal share, goes to show that there were others, who were also having share in it and, thus, it was incumbent that all those interested persons and the trust be made a party and suit be filed on the basis of the Will before the competent court and because of the same, the probate could not be issued. The other reason for rejecting the application for probate was that the details of the Bank where the locker is situated as also the details of the insurance company has not been disclosed, as such also, the probate application was liable to be dismissed.

7. The question, which arises for our consideration, is whether a beneficiary under a Will can maintain a petition for obtaining probate under Section 213 of the Act?

8. Learned counsel for the appellant contends that the impugned judgment suffers from manifest error of law, inasmuch as the probate court has only limited jurisdiction to decide whether the Will is genuine or not and it cannot adjudicate the right of the testator. It is also submitted that further reasons recorded by the

court below that no probate can be granted as the applicant has failed to disclose the details of the Banks where the locker was situated or the name of the insurance companies, is also patently illegal and beyond the scope of Section 213 of the Act.

9. In reply, Shri Siddharth appearing for the respondents states that he does not have any objection to the grant of probate of the Will. He has, in effect, supported the case set up by the appellant.

10. Section 213 of the Act provides right to the executer to obtain probate of the Will. The said Section reads as under.

'213. Right as executor or legatee when established:

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed."

11. Sub-section (2) of Section 213 provides that this Section shall not apply in the case of Wills made by Muhammadans or Indian Christians and shall only apply in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina, where such Wills are of the classes specified in clauses (a) and (b) of Section 57.

12. Section 276 provides the procedure to obtain probate. Section 273 of the Act declares conclusiveness of the probate. The said Section reads as under.

'**273. Conclusiveness of probate or letters of administration.**- Probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted:

Provided that probates and letters of administration granted-

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout the other States.

The proviso to this section shall apply in India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.

The proviso shall also apply in India after the separation of Pakistan from India to probates and letters of administration granted before the date of the separation, or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan."

13. Under Section 294, the Court is under an obligation to preserve the original Wills. Section 299 gives right of appeal against an order of decree of probate. In **Ishwardeo Narain Singh Vs. Smt. Kamta Devi, AIR 1954 SC 280**, the Hon'ble Apex Court held as under.

"This court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. Therefore the only issue in a probate proceeding relates to the genuineness and due execution of the Will and the court itself is under duty to determine it and preserve the preserve the original Will in its custody. The Succession Act is a self contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fasecule of the provision of Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes con- clusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question, of title or of the existance of the property itself."

14. The same view has been reaffirmed by the Hon'ble Apex Court in the case of **Chiranjilal Shrilal Goenka Vs. Jasjit Singh & Ors., (1993) 2 SCC 507.**

15. The court below has placed reliance on a Division Bench judgment of this Court in the case of **Smt. Satnam Kaur Vs. Satyendra Pal Singh & Ors., 2015 (109) ALR 573** for holding that a beneficiary of Will is not required to obtain a probate of Will.

16. Not only the reliance placed by the court below on such judgment is misfounded, but as a matter of fact, the court below has misread the said judgment. No such proposition, as has been quoted in the impugned order by the court below has been laid down by the Division Bench judgment in the case of the **Smt. Satnam Kaur** (supra). In the said case, the probate court rejected the application for grant of probate on the ground that probate of Will is not required because the property is not situate within the territorial jurisdiction mentioned in Section 213 of the Act. The judgment passed by the probate court was based upon another Division Bench judgment of this Court in the case of **Smt. Bimla Gaindher Vs. Smt. Uma Gaindher & Anr., 2004 (55) ALR 591,** wherein the grant of probate of Will was dismissed on the ground that probate was not required because the property is not situated within the territorial jurisdiction mentioned in sub-section (2) of Section 213 of the Indian Succession Act.

17. In the case of **Smt. Bimla Gaindher** (supra), it was held that if the Will, in case, does not fall within the classes specified in clauses (a) and (b) of Section 57 of the Act and territorial jurisdiction of the property covered under the Will does not fall within the area specified in sub-section (2) of Section 213 of the Act, the beneficiary under the Will is not required to obtain a probate of Will. It was argued on behalf of the appellant that under the provisions of Section 57 read with Section 213 of the Act, a beneficiary of Will may not be required to obtain a probate order acting upon a Will in his favour, but in case, he wants to obtain a

probate of Will executed in his favour, then none of the provisions contained in the Indian Succession Act prohibits him to do so.

18. The Division Bench of this Court in the case of **Smt. Satnam Kaur** (supra) while considering the earlier judgment in the case of **Smt. Bimla Gaindher** (supra), has held as under.

"We have observed herein above that a beneficiary under a will may not be required to obtain a probate of Will under the provision of Section 213 of the Act but in case he wants to get a probate of Will to be used before the other authorities, there is no bar for him to apply for grant of probate. We may clarify our view by giving an example. If a person has bank deposits and other movable property kept in locker of the bank or anywhere else, executes a Will providing that after his death the movable property will devolve upon a particular person and after the death when such person approaches the bank claiming possession of such movable property and demands money on the basis of such Will, the bank authorities always demand either a succession certificate or a probate of a Will in order to ascertain the genuineness and authenticity of the Will. Similarly if a person executes a Will about the post retiral benefits then in that case also, the concerned department demands either succession certificate or in case of a Will, a probate to pay him post retiral dues. In all such cases although the beneficiary of the will may not be required to obtain a probate for will in view of the Section 213 of the Act, but for the payment of such amount and possession of movable property, he has to approach the competent authority for grant of succession certificate or probate of a will, as the case may be."

19. The court below has failed to consider the aforesaid observations of the Division Bench and dismissed the application merely on the ground that according to law laid down by the Division Bench of this Court, probate of Will is not required. The court below failed to consider that a person may not be required to obtain a probate of Will under Section 213 of the Act, but he may require a probate of Will for other purposes.

20. Thus, the court below has not considered the law in right perspective and, as such, the impugned order suffers from illegality and infirmity, which makes it unsustainable and is liable to be set aside.

21. In the result, the appeal succeeds and stands allowed.

22. The impugned judgment and order dated 28.10.2015 passed by Additional District Judge, Court No. 1, Mirzapur in Probate Case No. 14 of 2015 is set aside. The matter stands remitted back to the District Judge, who shall register the probate application and proceed to adjudicate the same on merits in accordance with law.

23. However, in the facts and circumstances, we do not make any order as to costs.

(2016) 9 ILRA 1331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016
BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 682 Of 2016
&
Connected With Other Matters

M/S Yamuna Expressway Industrial Development Authority ...Petitioner
Versus
Deputy Commissioner Of Income Tax, Circle3, Noida. ...Respondent

Counsels for Petitioner:
Abhinav Mehrotra, Balbir Singh, Rubal Maini

Counsels for Respondent:
C.S.C. Ashok Mehta, Gaurav Mahajan, Manu Ghildiyal.

FACTS

In this batch of writ petitions, the petitioner, Yamuna Expressway Industrial Development Authority (YEIDA), a statutory body constituted under the U.P. Industrial Development Act, 1976, challenged notices under Section 148 of the Income Tax Act, 1961 for reassessment of Assessment Years 2009-10 to 2013-14, and the consequential orders rejecting its objections to the reassessment proceedings, on the ground that the conditions precedent for reassessment did not exist and the authorities had acted without application of mind. YEIDA had not filed returns of income after its constitution and did so only in response to notices under Section 142(1) issued on 7.8.2014, filing largely blank return forms with 'Nil' or 'Not applicable' entries and separate computation sheets. Notices under Section 148 were subsequently issued for all five Assessment Years, and 'reasons to believe' were communicated to YEIDA broadly on the grounds that: (i) sundry creditors had decreased year-on-year requiring verification; (ii) TDS had not been deducted on interest, advertisement, and consultancy payments under Sections 194A, 194C and 194J respectively; and (iii) depreciation on electrical equipment had been claimed at 15% instead of 10%. In respect of A.Y. 2009-10, the order rejecting objections additionally and erroneously referred to a search and seizure operation, though no such search had in fact occurred.

The respondents, in their counter affidavit, contended that YEIDA was not a 'local authority' exempt under Section 10(20) (the earlier exemption under Section 10(20A) having been omitted by the Finance Act, 2002), that assessment proceedings for earlier years had already been completed denying such exemption, and that the reassessment notices had been validly issued after recording reasons and obtaining approval under Section 151.

ISSUES FOR CONSIDERATION

(i) Whether the 'reasons to believe' recorded by the Assessing Officer for reopening assessment under Section 147/148 of the Income Tax Act, 1961 disclosed application of mind and satisfied the jurisdictional conditions precedent for reassessment, as distinct from a mere change of opinion.

(ii) Whether the reason relating to decrease in sundry creditors, when the actual year-wise figures showed both increases and decreases, reflected non-application of mind.
(iii) Whether the reasons relating to non-deduction of TDS on interest, advertisement, and consultancy payments — matters already disclosed in the Balance Sheet and Income and Expenditure Account filed with the returns — could justify reassessment, or amounted to a mere change of opinion/further verification of already disclosed material.
(iv) Whether the reason relating to the rate of depreciation claimed on electrical equipment constituted a valid ground for reassessment or merely a different view on the same disclosed facts.
(v) Whether the order dated 10.8.2016, which erroneously referred to a non-existent search and seizure operation, reflected non-application of mind vitiating the rejection of objections for A.Y. 2009-10.

HELD

The Court, after examining the statutory scheme under Sections 147 and 148 of the Income Tax Act, 1961, and the settled law explained in Calcutta Discount Co. Ltd. v. ITO, (1961) 41 ITR 191 (SC); Ganga Saran & Sons (P) Ltd. v. ITO, (1981) 130 ITR 1 (SC); CIT v. Kelvinator of India Ltd., (2010) 2 SCC 723; Phool Chand Bajrang Lal v. ITO, (1993) 4 SCC 77; ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd., (2008) 14 SCC 208; and State of U.P. v. Aryaverth Chawal Udyog, (2016) 91 VST 1 (SC), reiterated that reassessment jurisdiction requires a 'reason to believe' founded on tangible, relevant material with a rational nexus to the belief of escapement of income, and cannot be exercised merely on a change of opinion on facts already disclosed and available at the time of original return/assessment.
Applying these principles, the Court held that the reason relating to decrease in sundry creditors was factually incorrect and demonstrated clear non-application of mind, since the figures for the years in question showed both increases and decreases, yet the Assessing Officer had consistently and inaccurately recorded only a decrease requiring verification. The Court further held that the grounds relating to non-deduction of TDS on interest, advertisement, and consultancy expenses, and the rate of depreciation claimed, were all matters already disclosed in the Balance Sheet and Income and Expenditure Account filed along with the returns; no fresh material or subsequent information had come to light, and the reasons reflected, at best, an unexplained change in the process of forming an opinion on facts that were fully available and could have been examined during regular proceedings. The Court also noted that with respect to TDS, the issue stood independently addressed through orders already passed under Section 201 by the ACIT (TDS), further undermining the claim of escapement. The order dated 10.8.2016 relating to A.Y. 2009-10, which referred to a non-existent search and seizure operation, was found to be a glaring instance of non-application of mind, a position learned Additional Solicitor General for the respondents did not dispute when confronted.
The Court clarified that it was not examining the correctness of any assessment or YEIDA's taxability under the Act, both being matters for the regular statutory process, but confined itself strictly to the jurisdictional question of whether the conditions precedent for reassessment under Section 147/148 were satisfied, holding that they were not.

RESULT

Writ petitions allowed to the extent that the notices issued under Section 148 and the orders rejecting the petitioner's objections to reassessment under Section 147/148 for all the Assessment Years in question are quashed, with costs of Rs. 25,000/- in each set of cases. The Court clarified that the respondents are not precluded from proceeding afresh for reassessment on valid and just grounds permissible in law, and that the judgment does not affect any regular assessment already made, save that any reassessment order passed pursuant to the quashed notices shall also stand quashed.

CASE REFFERED

Ganga Saran & Sons P. Ltd Vs Income Tax Officer & others, (1981) 130 ITR 1 (SC)
Commissioner of Income Tax, Delhi Vs Kelvinator of India Limited, (2010) 2 SCC 723
Phool Chand Bajrang Lal And Anr.vs IncomeTax Officer, (1993) 4 SCC 77

Assistant Commissioner of Income Tax Vs Rajesh Jhaveri Stock Brokers Pvt. Ltd., 2008 (14) SCC 208, State of Uttar Pradesh and others VsM/s Aryaverth Chawal Udyog & Others, 2016 (91) VST 1 (SC)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Balbir Singh learned Senior Advocate assisted by Sri Abhinav Mehrotra and Ms. Rubal Maini, Advocates for petitioner and Sri Ashok Mehta, Sri Gaurav Mahajan, and Sri Manu Ghildiyal, Advocates for respondent.

2. In all these writ petitions, petitioner M/s Yamuna Expressway Industrial Development Authority (hereinafter referred to as "YEIDA") has challenged reassessment proceedings and notice issued under Section 148 of Income Tax Act, 1961 (hereinafter referred to as "Act 1961') on the ground that said proceedings are patently illegal and without jurisdiction, since conditions precedent to justify re-assessment proceedings do not exist and authorities are proceeding without application of mind.

3. Details of relevant Assessment Year (hereinafter referred to as "A.Y.) in respective writ petitions and date of notice etc. are stated as herein:-

Serial no.	Writ petition no	A.Y.	Date of notice under Section 148	Date of order passed on objection filed by Assessee against reassessment notice
1	682 of 2006	2009-10	29.03.2016	10.08.2016
2	184 of 2016	2010-11	30.11.2015	08.01.2016
3	182 of 2016	2011-12	30.11.2015	08.01.2016
4	237 of 2016	2012-13	30.11.2015	08.01.2016
5	183 of 2016	2013-14	30.11.2015	08.01.2016

4. Basic facts are common. As agreed by learned counsel for parties, we have taken up Writ (Tax) no. 682 of 2016 and Writ (Tax) no. 182 of 2016 as leading cases for the purpose of referring pleadings therefrom. Parties also agreed that though counter affidavit has been filed only in three cases i.e. Writ Tax no. 182 of 2016, Writ Tax no. 183 of 2016 and Writ Tax no. 184 of 2016, but pleadings therein may be read in remaining two writ petitions.

5. By notification dated 24.04.2001, issued under Section (3) of Uttar Pradesh Industrial Development Act, 1976 (hereinafter referred to as "UPIDA, 1976'), a statutory body namely 'Taj Expressway Industrial Development Authority" was constituted. Subsequently, title of body was

changed by notification dated 11.07.2008, as "Yamuna Expressway Industrial Development Authority" (i.e. "YEIDA"), issued under Section 3 read with Section 2(d) of UPIDA, 1976.

6. UPIDA, 1976 is a statute enacted to provide for constitution of an Authority for development of certain areas in State of U.P. into industrial and urban townships and for matters connected therewith.

7. Petitioner YEIDA, did not file Income Tax Returns after its constitution. For A.Ys. 2009-10 to 2013-14, Deputy Commissioner of Income Tax, Circle 3, NOIDA (hereinafter referred to as "DCIT") issued notice dated 07.08.2014, in similar terms, requiring YEIDA to prepare true and correct Returns of its income for above A.Ys., for which it was assessable under Act 1961. It informed YEIDA that Returns should be in appropriate form, as prescribed in Rule 12 of Income Tax Rules, 1962 (hereinafter referred to as "Rules 1962"). Notices dated 07.08.2014, issued separately in respect to all the aforesaid A.Ys. though worded similarly and mention that same is being issued under Section 142(1) of Act 1961. Pursuant thereto YEIDA filed Returns in prescribed form. In all the Returns, most columns were either left blank mentioning "Not applicable' or "Nil' or some documents were attached and mentioned "Attached with separate sheets'. In the documents filed as computation of income, along with Returns, YEIDA declared its income and taxable liability in respect to relevant years, as under:-

Serial no.	A.Y.	Gross total income Rs.	Tax liability	Refund of TDS, if any Rs.
1	2009-10	-15736298	Nil	Nil
2	2010-11	Nil	Nil	2,99,643
3	2011-12	Nil	Nil	98,286
4	2012-13	Nil	Nil	59,29,391
5	2013-14	Nil	Nil	50,34,984

8. In respect to A.Ys. 2010-11, 2011-12, 2012-13, 2013-14, DCIT sent letters dated 30.11.2015, under Section 148 of Act 1961 requiring YEIDA to submit returns again for the aforesaid A.Ys. A similar letter in respect to A.Y. 2009-10 was issued by DCIT under Section 148 on 29.03.2016. In respect to all A.Ys. except A.Y. 2009-10, YEIDA submitted a common letter dated 14.12.2015 requesting DCIT to treat Returns of Income, previously filed by it, towards compliance of notice under Section 148 of Act 1961. Similar letter in respect to A.Y. 2009-10 was submitted by YEIDA on 28.04.2016. DCIT then sent letters/notices dated 16.12.2015 under Section 143(2)/142(1), similarly worded in respect to all A.Ys. except A.Y. 2009-10 enclosing questionnaire.

9. Since reasons for issuing notice under Section 148 of Act 1961 were not communicated to YEIDA, DCIT, subsequently, on an application submitted by YEIDA, communicated "reasons for believe" that Income has Escaped Assessment. The reasons appended as "Annexure-A' show

date mentioned by DCIT was 20.11.2015 but communicated to YEIDA along with letters dated 16.12.2015 referring to YEIDA's application dated 14.12.2015.

10. The aforesaid letters dated 20.11.2015, containing reasons for the purpose of Section 147/148 of Act 1961, are almost similarly worded in respect to all A.Y.'s except A.Y. 2009-10. Five paragraphs in all four letters except for A.Y. 2012-13 where it had six paragraphs. In order to show similarity of reasons given in all letters, Para 5 in respect to A.Y.'s 2010-11, 2011-12, 2013-14 and Para 5 and 6 in respect to A.Y. 2012-13 are reproduced as under:-

A.Y. 2010-11

5. "On perusal of Income and Expenditure A/c and Balance sheet for A.Y. ***2010-11*** *it is seen that the assessee has debited expenses totaling Rs. 59,41,73,401/- and shown income of Rs. 55,52,71,837/- only resulting in deficit of Rs. 3,89,01,564/- for the A.Y. 2010-11. On further examination the following issue emerges:-*

(i) As per Income and Expenditure Account for A.Y. 2010-11 ***. the Assessee has debited Rs. 49,59,19,544/- towards "interest paid on loan".*** *The assessee is liable to deduct TDS on payment of interest u/s as 194A of I.T. Act,1961* ***. However ACIT(TDS) has informed that no TDS has been deducted u/s 194A of I.T. Act, 1961*** *the assessee for the relevant previous year.* ***Hence this payment is to be disallowed u/s 40(a)(ia) of I.T. Act.***

(ii) ***Advertisement expenses of Rs. 2,31,65,429/-*** *this year compared to Rs. 1,47,64,131/- last year.* ***If the same was executed through contract, TDS is deductible u/s 194C of the I.T. Act, 1961. If no TDS was deducted and paid the expenses are liable to be disallowed 40(a)(ia).*** *The same needs to be verified.*

(iii) ***Consultancy Expenses of Rs. 4,85,36,284/-*** *this year compared to Rs. 22,35,504/- last year.* ***The same is liable for TDS u/s 194J of the I.T. Act, 1961. If no TDS was deducted and paid the expenses are liable to be disallowed 40(a)(ia****). The same needs to be verified.*

(iv) The sundry creditors have decreased to Rs. 2827.83 Crores as compared to 798.77 crores last year which needs verification.

(v) The assessee has claimed depreciation on electrical equipment @ 15% instead of 10% during the relevant previous year which is prima facie inadmissible."

A.Y. 2011-12

5. "On perusal of Income and Expenditure A/c and Balance sheet for A.Y. 2011-12 it is seen that the assessee has debited expenses totaling Rs. 2,24,04,18,556/- and shown income of

Rs. 131,88,26,660/- only resulting in deficit of Rs. 92,15,91,896/- for the A.Y. 2011-12. On further examination the following issue emerges:-

(i) The Assessee has ***not deducted TDS on interest*** *of payment of 3,35,23,91,732/-* ***as reported by ACIT(TDS)*** *vide letter dated F.No. ACIT(TDS)/2014-15/3426 dated 27.03.2015 order passed u/s 201(1), 201(1A) of Income Tax Act, 1961. The assessee is liable to deduct TDS on payment of interest u/s 194A of the I.T. Act, 1961,* ***but he has failed to deduct TDS. Hence they are liable to be disallowed u/s 40(a)(ia).***

(ii) ***Advertisement expenses*** *of Rs. 2,00,95,431/- this year compared to Rs. 2,31,65,429/- last year. If the same was executed through contract,* ***TDS*** *is deductible u/s 194C of the I.T. Act, 1961. The* ***same needs to be verified****.*

(iii) ***Consultancy Expenses*** *of Rs. 3,33,33,898/- this year compared to Rs. 4,85,36,284/- last year. The same is liable for TDS u/s 194J of the I.T. Act, 1961 and* ***needs to be verified.***

(iv) The ***sundry creditors*** *have decreased to Rs. 3933.63 Crores as compared to 2827.83 crores last year* ***which needs verification****.*

(v) The assessee has claimed depreciation on electrical equipment ***@ 15% instead of 10%*** *during the relevant previous year which is prima facie inadmissible."*

A.Y. 2012-13

5. "On perusal of Income and Expenditure A/c and Balance sheet for ***A.Y. 2012-13*** *it is seen that the assessee has debited expenses totaling Rs. 3,20,21,98,370/- and shown income of Rs. 2,44,79,44,943/- only resulting in deficit of Rs. 75,42,53,427/- for the A.Y. 2012-13. On further examination the following issue emerges:-*

6. (i) The Assessee has ***not deducted TDS on interest*** *of payment of 3,80,12,68,874/- as reported by ACIT(TDS) vide letter dated F.No. ACIT(TDS)/2014-15/3426* ***dated 27.03.2015 order passed u/s 201(1), 201(1A) of Income Tax Act, 1961****. The assessee is liable to deduct TDS on payment of interest u/s 194A of the I.T. Act, 1961, but he has failed to deducted TDS. Hence they are liable to be disallowed u/s 40(a)(ia).*

(ii) ***Advertisement expenses*** *of Rs. 2,39,35,369/- this year compared to Rs. 2,00,95,431/- last year. If the same was executed through contract, TDS is deductible u/s 194C of the I.T. Act, 1961. The* ***same needs to be verified.***

(iii) ***Consultancy Expenses*** *of Rs. 4,76,91,925/- this year compared to Rs. 3,33,33,898/- last year. The same is liable for TDS u/s 194J of the I.T. Act, 1961 and* ***needs to be verified****.*

*(iv) The **sundry creditors** have decreased to Rs. 3617.41 Crores as compared to 3933.63 crores last year which **needs verification**.*

*(v) The assessee has claimed depreciation on electrical **equipment @ 15% instead of 10%** during the relevant previous year which is prima facie inadmissible."*

A.Y. 2013-14

5. "On perusal of Income and Expenditure A/c and Balance sheet for A.Y. 2013-14 it is seen that the assessee has debited expenses totaling Rs. 2,28,24,31,417/- and shown income of Rs. 2,01,12,60,432/- only resulting in deficit of Rs. 27,11,70,984/- for the A.Y. 2013-14. On further examination the following issue emerges:-

*(i) The Assessee has **not deducted TDS on interest** of payment of 2,22,43,16,262/- as reported by ACIT(TDS) vide letter dated F.No. ACIT(TDS)/2014-15/3426 dated **27.03.2015 order passed u/s 201(1),** 201(1A) of Income Tax Act, 1961. The assessee is liable to deduct TDS on payment of interest u/s 194A of the I.T. Act, 1961, but he has failed to deducted TDS. Hence they are **liable to be disallowed u/s 40(a)(ia).***

*(ii) **Advertisement expenses** of Rs. 2,97,94,287/- this year compared to Rs. 2,39,35,369/- last year. If the same was executed through contract, TDS is deductible u/s 194C of the I.T. Act, 1961. If no TDS was deducted and paid the expenses are liable to be disallowed 40(a)(ia). The same **needs to be verified**.*

*(iii) **Consultancy Expenses** of Rs. 6,09,04,803/- this year compared to Rs. 4,76,91,925/- last year. The same is liable for TDS u/s 194J of the I.T. Act, 1961 **and needs to be verified.***

*(iv) The **sundry creditors** have decreased to Rs. 3800.58 Crores as compared to 3617.41 crores last year which **needs verification**.*

*(v) The assessee has claimed **depreciation** on electrical equipment **@ 15% instead of 10%** during the relevant previous year which is prima facie inadmissible."*

11. In respect to A.Y. 2009-10, YEIDA received the document dated 15.03.2016 along with letter dated 16.05.2016 issued by DCIT containing reasons for initiating proceedings under Section 148 of Act 1961 and para 5 thereof reads as under:-

A.Y. 2009-10

*5. "On examination of **Balance Sheet** and **Income and Expenditure** A/c for A.Y. 2009-10, the following issues emerge:*

(i) "On perusal of Income and Expenditure A/c for A.Y. ***2009-10*** *it is seen that the assessee has declared Rs. 1,57,36,299/- as expenditure over income for the relevant previous year.*

(ii) ***Advertisement expenses*** *of Rs. 1,47,64,131/- has been shown this year compared to Rs. 10,17,011/- last year.* ***If the same was executed*** *through contact, TDS is deductible u/s 194C of the I.T. Act, 1961.* ***If no TDS was deducted and paid the expenses are liable to be disallowed u/s 40 (a) (ia).***

(iii) ***Consultancy Expenses*** *of Rs. 22,35,504/- this year compared to Rs. 2,17,45,061/- last year. The same is liable for TDS u/s 194J of the I.T. Act, 1961.* ***If no TDS was deducted and paid the expenses are liable to be disallowed u/s 40 (a) (ia).***

(iv) The ***sundry creditors*** *have decreased to Rs. 798.77 Crores as compared to 2.02 crores last year.*

(v) The assessee has claimed ***depreciation*** *on electrical equipment* ***@ 15% instead of 10%*** *during the relevant previous year which is prima facie inadmissible."*

12. YEIDA filed objection to the said notice dated 04.01.2016 in respect to all A.Y.'s except A.Y. 2009-10. The objection filed by YEIDA with respect to A.Y. 2009-10 is dated 21.06.2015. DCIT communicated orders dated 08.01.2016 in respect to A.Y.'s 2010-11, 2011-12, 2012-13, 2013-14 and rejected objections. In respect to A.Y. 2009-10 similar order has been passed on 10.08.2016 by Assistant Commissioner, Income Tax, Circle-3, NOIDA (hereinafter referred to as "ACIT").

13. In the order dated 08.01.2016, DCIT has considered two objections in detail namely, Assessee failed to deduct TDS under Section 194-A, 194C and 194J of Act 1961 and further that, Assessee if had understated income and claimed excessive loss, deduction, allowance or relief in the return, it shall be deemed to be a case of Escaped Assessment under Section 147 Explanation 2 (b). With regard to other objections, it has simply rejected the same stating as under:-

"where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return."

14. Order passed on 10.08.2016 is slightly in different terms and there ACIT who has passed the order, has taken a new ground and it said as under:-

"In this case, ***a search was conducted as some other assessee where certain documents of the assessee, were found and seized. The assessee has well acknowledged the papers (Page No. 4 & 5) of Annexure A-2 and offered the same for tax but now after attending many days of assessment proceedings filed objection on the basis that other pages are just estimation or not related to the assessee or explained in the Books of the Account of the assessee****. As referred by the Hon'ble Supreme Court in the case of ACIT Vs Rajesh Jhaveri Stock Broker Pvt.*

Ltd. If he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. It the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion."

In view of above, ***I hold that the AO was well within his rights to invoke the proviso to section 147 of the I.T. Act.***

Likewise other objections relating to other reasons are rebutted as they lack assertion and logically futile. In light of above, the AO has sufficient reasons to believe that the income of the assessee has escaped assessment and therefore the jurisdiction assumed u/s 147 is legally and factually sound. With this the objections raised by the assessee are disposed off and it is directed to comply with the proceedings as per the due process of law."

15. The respondents have filed counter affidavit sworn by Sri Rajesh Kumar, DCIT, Circle-3, NOIDA. It is averred that Section 10 (20A) of Act 1961 has been omitted by Finance Act, 2002. Hence no exemption from Income Tax is now available to the category which was earlier covered by Section 10(20A). Now only, a "local authority' under Section 10 (20) is exempted but YEIDA is not a local authority. The assessment proceedings for A.Y.'s 2005-06, 2006-07 and 2007-08 were completed on 11.03.2013, 03.03.2014, 27.03.2015, respectively. The exemption claimed by YEIDA under Section 10 (20) was denied. The appeal preferred by YEIDA against assessment order in regard to A.Y. 2005-06 has been dismissed on 21.03.2014. In regard to A.Y. 2012-13 assessment was also completed on 18.02.2016 which has been challenged in one of the connected writ petitions, up for consideration, being Writ (Tax) No. 237 of 2016.

16. Coming to other facts, respondents have said that YEIDA came into existence on 24.04.2001. Earlier it was existing with a different title namely "Taj Expressway Industrial Development Authority" which was changed as "YEIDA' by notification dated 11.07.2008. The basic object of constitution of YEIDA is securing Infrastructure Development of industrial area of Yamuna Expressway Corridor. The functions of YEIDA included acquisition of land in the industrial development area, by agreement or through proceedings under Land Acquisition Act, 1894, prepare a plan for industrial development area, to demarcate and develop sites for institutional, industrial, commercial and residential purposes and according to plan, to provide infrastructure for institutional, industrial, commercial and residential purposes, to provide amenities, to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes, to regulate the erection of buildings and setting up of industries and to lay down the purpose for which a particular site or plot of land shall be used namely for industrial or commercial or residential purpose, as the case may be. YEIDA is not a "local authority', within the term Section 10(20) of Act 1961. This Court in Writ Petition no. 1338 of 2005, decided on 28.02.2011, negativing status of Local Authority claimed by New Okhla Industrial Development Authority (hereinafter referred to as "NOIDA'). Its review application has

also been rejected by this Court. It is said that, though the judgment dated 28.02.2011 was in respect to NOIDA but status, nature of activities, nature of income etc. of NOIDA, YEIDA and Greater New Okhla Industrial Development Authority i.e. NOIDA are similar, hence whatever has been hold in the case of NOIDA shall hold good for YEIDA also.

17. Petitioner ought to have filed Return of Income within due date, as per Section 139(1) of Act 1961, but it failed. It is only in response to notice issued under Section 142(1) of Act 1961 on 07.08.2014, that Returns in respect to aforesaid Assessment Years were submitted by YEIDA. The Return Forms, however are virtually blank. Except name of petitioner, address, PAN and Assessment Year, almost everything has been left blank. Assessment proceedings under Section 147 of Act 1961, by issuing notice under Section 148 were initiated validly, after obtaining prior approval of competent authority as prescribed under Section 151 of Act 1961. Notices were issued after recording reasons. The objections filed petitioners have been rejected by a detailed order.

18. Sri Balbir Singh, learned counsel for petitioners, vehemently contended that there was no Escaped Assessment and there is total non application of mind on the part of competent authority in initiating reassessment proceedings. He urged that re-assessment is not permissible for change of opinion. Whatever material was available at the time of filing Return, there is no change and even otherwise impugned orders would apparently show total non application of mind on the part of concerned authority.

19. Sri Ashok Mehta, learned Additional Solicitor General, on the contrary, sought to support impugned orders rejecting objection of petitioner, and notices issued for re-assessment on the ground that Assessee was liable to deduct Tax/TDS under various provisions of Act 1961, as mentioned in the notices issued under Section 148 of Act 1961. The objections raised by YEIDA have also been considered in detail. Hence, under Article 226 of Constitution of India no interference is called for.

20. In all these writ petitions we are not concerned, as to whether YEIDA is amenable to income tax under Act 1961, or not or that an Assessment Order is correct, since that is an issue pending for consideration before concerned Revenue authorities. Our endeavor is confined to consider, whether objections raised by petitioner against re-assessment proceedings under Section 147/148 have been decided by application of mind or whether authorities concerned have recorded, in fact, "reasons to believe" for initiating re-assessment proceedings or not and the requirement of statute is justified, for the reasons that is a jurisdictional issue and not mere procedural one. So far as validity of assessment is concerned, petitioner admittedly has remedy elsewhere under the statute and neither we have been called upon to consider correctness of assessment nor we are otherwise inclined to look into that aspect. We are confined only to consider the question argued, that is, re-assessment proceedings under Section 147/148 of Act 1961 whether satisfy the conditions precedent for such initiation.

21. Now before examining the impugned orders passed by competent authority, as also "reasons to believe" for issuing notices under Section 148 of Act 1961, it would be appropriate to

have a bird eye view of relevant authorities on the subject and statutory exposition of law on this aspect.

22. Section 147 gives power to Assessing Officer to assess or re-assess where it has "reason to believe" that any income chargeable to Tax has escaped assessment for any Assessment Year. This power of re-assessment however, is subject to provisions of Section 148 to 153. Section 147 and 148 reads as under:-

"Income escaping assessment.

147. If the Assessing Officer has reason to believe that any ***income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section****, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

Provided *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of Section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*

Provided further *that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:*

Provided also *that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.*

Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :--

(a) where no return of income has been furnished *by the assessee although his total income or the total income of any other person in respect of which he is assessable under this*

Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) ***where a return of income has been furnished*** *by the assessee* ***but no assessment has been made and*** *it is noticed by the Assessing Officer that the* ***assessee has understated the income*** *or* ***has claimed excessive loss, deduction, allowance or relief in the return***

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but--

(i) income chargeable to tax has been ***under assessed*** *; or*

(ii) such income has been ***assessed at too low a rate*** *; or*

(iii) such income has been ***made the subject of excessive relief*** *under this Act ;or*

(iv) ***excessive loss or depreciation allowance*** *or any other allowance under this Act has been computed;*

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.--For the purpose of assessment or reassessment under this section ***, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section****, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.]*

Explanation 4.--For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

Issue of notice where income has escaped assessment.

148*. [(1)]* ***Before making the assessment, reassessment*** *or recomputation under section 147****, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period,*** *[* * *] as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in* ***the prescribed form and verified in the prescribed manner*** *and setting forth such other particulars as may be prescribed; and the*

provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

***Provided** that in a case--*

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

***Provided further** that in a case--*

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.]

Explanation.--For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

23. In the context of old Income Tax Act i.e. Income Tax Act, 1922, Section 34 wherein dealt with situation of income escaping assessment, this issue as to when re-assessment proceedings can be initiated, came up before a Constitution Bench in **Calcutta Discount Co. Ltd. Vs Income-Tax Officer, Companies District I, Calcutta, and another, (1961) 41 ITR 191 (SC).** The issue was decided by majority of 3/2. Court held, while it is duty of Assessee to disclose full and true, all primary relevant facts, the inference, to be drawn therefrom is the duty of Revenue. Assessee cannot be expected to assisst Revenue for deciding as to what inference on facts should reasonably be drawn or what inference ultimately be drawn. Thus, it would be a material bearing on the

question of under-assessment and it would give a jurisdiction to Assessing Officer to issue notice under Section 34 for re-assessment. Whether grounds, are not adequate would not be examined by Court for the reason that non disclosure of material facts gives sufficient reason to confer jurisdiction. Similarly if Assessee intends to challenge a notice of re-assessment, he has to establish that Assessing Officer had no material at all before him to believe that there had been any non disclosure. The jurisdiction of re-assessment would be available to Assessing Officer only when he has "reason to believe" that income, profits or gains chargeable to income tax have been under assessed. It therefore, held that existence of material to form opinion of escaped assessment is a jurisdictional issue.

24. In the context of Act 1961, Section 147 came up for constitution in **Ganga Saran & Sons P. Ltd Vs Income Tax Officer & others, (1981) 130 ITR 1 (SC**) and Court said;

"It is well settled as a result of several decisions of this Court that ***two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under section 147 (a).*** *First,* ***he must have reason to believe*** *that the income of the assessee has escaped assessment, and, secondly,* ***he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction****. The important words under section 147 (a) are "has reason to believe" and these words are stronger than the words "is satisfied".* ***The belief entertained by the Income Tax Officer must not be arbitrary or irrational****. It must be reasonable or in other words* ***it must be based on reasons which are relevant and material****. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the* ***Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard*** *to which he is required to entertain the belief before he can issue notice under section 147 (a).* ***If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief,*** *the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to he struck down as invalid."*

(emphasis added)

25. In **Commissioner of Income Tax, Delhi Vs Kelvinator of India Limited, (2010) 2 SCC 723**, Court, referring to legislative intention for introducing condition of "reason to believe" said that it is not a power of review. There is a conceptual difference between power to review and power to re-assess. Assessing Officer has not power to review, he has power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, then, in the garb of re-opening the assessment, review would take place. Court said that "change of opinion", if introduced in the context of Section 147, it would confer arbitrary

powers upon Assessing Officer to review assessment at any stage and at any point of time. Court observed "one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open." Thus in order to show that there was a reason to believe, an Assessing Officer must have a "tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of belief.

26. In Phool Chand Bajrang Lal And Anr. vs Income-Tax Officer, (1993) 4 SCC 77, referring to Section 147 and 148, Court said as under:-

"From the plain phraseology of the above Sections of the Act, it appears that two conditions precedent which are required to be satisfied before an Income Tax Officer can acquire jurisdiction to proceed under Clause (a) of Section 147 read with Sections 148 and 149 of the Act, beyond the period of four years but within a period of eight years, from the end of the relevant year, are: (a) that the Income Tax Officer ***must have reason to believe that the income, profits or gains chargeable to tax had either been under assessed or escaped assessment*** *and (b) that the ITO must have reason to believe that such escapement or under-assessment was* ***occasioned by reason, of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Both these conditions must co-exist in order to confer jurisdiction on the Income Tax Officer****. The Income Tax Officer is obliged, before initiating proceedings under Section 148 of the Act to record the reasons for the formation of his belief to reopen the assessment."*

(emphasis added)

27. Court further said that, an Income Tax Officer confers with jurisdiction to re-open assessment under Section 147 (a) read with Section 148 of Act 1961 only, if, on the basis of specific, reliable and relevant information, coming to his possession subsequently, he has reasons which he must record, to believe, that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts, necessary for his assessment, during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. No doubt sufficiency of reasons for forming the belief, is not for the Court to judge, but it is open to an assessee to establish that there, in fact, existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. Only to that limited extent, Court may look into the conclusion arrived at by Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by Income-tax

Officer and further whether that material had any rational connection or a live link for the formation of requisite belief.

28. In **Assistant Commissioner of Income Tax Vs Rajesh Jhaveri Stock Brokers Pvt. Ltd., 2008 (14) SCC 208**, Court said that the word "reason" in the phrase "reason to believe" would mean cause or justification. If Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have "reason to believe" that an income had escaped assessment. The expression cannot be read to mean that Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. Final outcome of the proceeding is not relevant. Only for the purpose of initiation stage, what is required is "reason to believe', but not the established fact of escapement of income.

29. All these authorities have been considered and reiterated recently in **State of Uttar Pradesh and others Vs M/s Aryaverth Chawal Udyog & Others, 2016 (91) VST 1 (SC),** Court after referring its earlier authorities, said that consistently it has been held that, such material on which Assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. It must bring home the appropriate rationale of action taken by Assessing Authority in pursuance of such belief. In case of absence of such material, Court in clear terms has held that the action taken by Assessing Authority on such "reason to believe" as arbitrary and bad in law. The standard of reason exercised by Assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material, cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making assessment, and again a different or divergent view is reached, it would tantamount to "change of opinion". If an Assessing Authority forms an opinion during original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment. Thus, "reason to believe" cannot be said to be the subjective satisfaction of Assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between "change of opinion" and the material present before Assessing Authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to re-initiate proceedings on the basis of change in subjective opinion.

30. Learned counsel for petitioner has also relied on certain judgments of this Court and other High Courts also which have been followed in similar line and exposition of law and we may only refer to those judgments i.e. *Assistant Commissioner of Income Tax Vs Greater Noida Industrial Development Authority (2015) 379 ITR 14 (All); Greater Noida Industrial Development Authority Vs Commissioner of Income Tax (Writ Tax no. 985/2015-order dated 23.12.2015); Ishwar Chandra Vs Union of India & others. (decided by Hon'ble Allahabad High Court on*

04.02.2015); Indra Prastha Chemicals Pvt. Ltd. & others Vs Commissioner of Income Tax & another (2004) 271 ITR 113 (All); Aroni Commercials Ltd. Vs Deputy Commissioner of Income Tax & another (2014) 362 ITR 403 (Bom); Asian Paints Ltd. Vs Deputy Commissioner of Income Tax & another (2008) 296 ITR 90 (Bom); Commissioner of Income Tax Vs TCP Ltd. (2010) 323 ITR 346 (Mad);

31. In the light of above exposition of law, when we go through various reasons in respect to orders dated 08.01.2016, passed in all A.Ys. except 2009-10, we find that there is either a statement of fact as to what has been disclosed by YEIDA in Returns submitted by it and documents appended thereto or there is guesswork that either TDS was deductable and if not deducted, then there is default which has to be verified. This in itself shows that authority concerned has no subsequent material to form opinion but it is factual guesswork or conjectures on the part of authority concerned so as to include and make it part of reasons to justify re-assessment under Section 147/148 of Act 1961.

32. The reasons communicated to YEIDA, we have already quoted in respect to A.Y's. 2010-11, 2011-12, 2012-13 and 2013-14. One of the ground is that Sundry Creditors have decreased and it needs verification. This is a fact disclosed by Assessee in the Returns and it was always open to the Assessing Officer to verify it at the stage of regular proceedings. If in the regular proceedings, Assessing Officer did not find any reason for verification what prompted it or made it obligatory to make verification now, is not clear and this ground in our view is nothing but change of process of opinion, not even a complete change of opinion, and cannot be justified to be a valid ground for reassessment unless there is something further to show that material was available before Assessing Authority so as to cause reason to believe that something has escaped assessment. The process of decrease of Sundry Creditors in the concerned A.Y. and previous year as mentioned by the Assessing Officer can be placed in the form of Chart as under:-

A.Y.	Sundry Creditors in previous years	Sundry Creditors in the relevant year
2010-11	798.77 crores	2827.83 crores
2011-12	2827.83 crores	3933.63 crores
2012-13	3933.63 crores	3617.41 crores
2013-14	3617.41 crores	3800.58 crores

33. The non-application of mind of Assessing Officer is writ large from the fact that there is no consistent increase or decrease but it is in both ways. The Assessing Authority in the reasons, however, has consistently mentioned that Sundry Creditors have decreased and needs verification. When the difference is on both ways i.e. decrease and increase, mention of only one way i.e. decrease by Assessing Authority, not only shows non-application of mind but also shows that it is only conjecture and there is no material to constitute "reasons to believe".

34. There are three grounds relating to non-deduction of TDS:-

(a) TDS on interest of payment was not deducted under Section 194A and it was dis-allowable under Section 40(a), 1(a).

(b) Non-deduction of TDS under Section 194C on advertisement expenses.

(c) Non-deduction of TDS on consultancy expenses under Section 194J.

35. For all the aforesaid allegations of non-deduction of TDS, Assessing Authority after referring to the same has said that the matter requires verification with respect to deduction of TDS on interest payment it has also referred to an order passed by ACIT (TDS) under Sections 201(1) and 201(1)(a) of Act, 1961 on 27.03.2015.

36. Without looking into the question, whether Assessee was liable for deduction of TDS and deposit with Tax Authorities and whether he was liable to face consequences under Section 201 of Act, 1961 for failure to deduct or pay TDS, for us, it is sufficient to mention that Assessing Authority admits disclosure of various payments and expenses incurred by YEIDA on different heads i.e. payment of interest, advertisement and consultancy. These three expenses are disclosed in the documents filed along with return since this is evident from the reasons given by Assessing Authority that on the examination of Balance-sheet, Income and Expenditure Account these facts are evident. If that be so, every material was before the Authority concerned, nothing new has come, nothing has been discovered and nothing was detained by YEIDA and there is no non-disclosure of correct particulars.

37. Besides, there are several conditions under Section 194 A, 194 C and 194 J, and thereunder whether the TDS was actually deductable or not is a matter of investigation and inquiry. But it was always open to make this inquiry in regular proceedings when disclosure of payment under various heads as noted above was already there in the Income and Expenditure Account and Balance-sheet of YEIDA. But when Assessing Authority did not find any justification to make verification at that stage, for change of opinion now, in our view Sections 147/148 would not be attracted.

38. We also find that in respect to TDS, Assessing Authority has said that matter needs verification. We have already given a chart showing that petitioner claimed refund of TDS amount in Returns meaning thereby whatever TDS was deducted and deposited, it had claimed refund. It is nowhere stated that any information was concealed by YEIDA or has been wrongly disclosed or has not been disclosed at all. We also find from record that under Section 201, ACIT (TDS) already enquired from petitioner with respect to A.Y.'s 2011-12, 2012-13 and 2013-14, whether it has deducted tax on the amount of interest paid to NOIDA whereupon YEIDA admitted on oath that as per legal consultation they were advised that no deduction paid to YEIDA was required. Thereupon ACIT (TDS) held that such deduction was necessary and consequently passed order on 19.03.2015 raising demand of tax liability for A.Y.'s 2011-12, 2012-13, 2013-14, as under:-

Financial Year	A.Y.	Interest paid	Short/Non-Deduction under section 201	Default months	Interest under section 201(1A)	Total Tax liability

2010-11	2011-12	3352391732	335239173	60	201143504	536382737
2011-12	2012-13	380126887	380126887	48	182460906	562587841
2012-13	2013-14	2224316262	222431626	36	80075385	302507047

39. If that be so, with regard to TDS, issue was already clear. We find that at the stage, when notices for re-assessment were issued, it cannot be said that there was anything which was not disclosed by Assessee or any subsequent fact or material had come to the notice of DCIT for justifying re-assessment.

40. Last reason/justification, that, YEIDA claimed depreciation on electrical equipment at the rate of 15% instead of 10%, which is prima facie inadmissible, is also unsustainable for the reason that it is a clear case of change of opinion. Assessee at the time of filing Return was not found incorrect but now a different opinion is being formed that depreciation should be lesser than that actually claimed.

41. In order dated 10.08.2016, height of non application of mind is evident from the fact that Assessing Authority while rejecting objection has observed that here is a case of seizure operation though admittedly there was no search and seizure matter. This clearly shows that while passing order dated 10.08.2016, competent authority did not care even to go through relevant record and apply its mind. When confronted, learned Additional Solicitor General has nothing to offer except his regret accepting that here is a clear case of non application of mind on the part of authority concerned.

42. In the entirety of facts and circumstances as discussed above, we are satisfied that the so called reasons mentioned by authority concerned, for all Assessment Years in question, for justifying re-assessment proceedings under Section 147/148 of Act 1961, are illegal, showing non application of mind and an arbitrary exercise on the part of authority concerned.

43. The writ petitions are allowed to the extent of notices issued by authority concerned under Section 148 and orders rejecting objection filed by petitioner against re-assessment under Section 147/148 of Act 1961, are hereby quashed. Petitioner shall be entitled to cost which we quantify Rs. 25,000/- in each set of case.

44. However, we make it clear that this judgment shall not preclude respondents from proceeding afresh in accordance with law for re-assessment, if it is so permissible for valid and just grounds as contemplated in law and relevant provisions.

45. We also make it clear that this judgment shall not effect in any manner the regular assessment already made and if the matter is pending at any other stage but any order of reassessment pursuant to the impugned notice which have been quashed by this judgment shall also stand quashed.

(2016) 9 ILRA 1350
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.09.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal No.- 809 Of 1982

Raju & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsels for Appellants:
Arun Sinha, Kirti Prakash Singh, Nagendra Mohan

Counsel for Respondent:
Govt. Advocate.

Acts/Sections Referred:
Indian Penal Code, 1860 — Sections 147, 148, 149, 302, 307, 379; Code of Criminal Procedure, 1973 — Section 174 (Inquest).

FACTS:
The appellants were tried in Sessions Trial No. 413 of 1979 for offences under Sections 147, 148, 302/149 and 379 IPC arising out of a double murder committed on 09.02.1979 at about 6.00 p.m. near the pulia of Ugu Minor, within the limits of Police Station Fatehpur Chaurasi, District Unnao. The prosecution case traced its origin to a long-standing enmity between the families of the complainant and the accused, arising from earlier cross-murders and criminal litigation between them. On the date of occurrence, the complainant's brothers — Amar Nath alias Suman and Mahendra Nath alias Babua — along with an armed companion, Manna alias Ram Swaroop (PW-1), were returning on foot from Unnao after attending court proceedings, when they were waylaid by the accused persons armed with farsa, gadasa, banka, countrymade pistols and a gun. PW-1 was overpowered, assaulted and thrown into a bamba after his licensed gun was snatched; the two deceased were thereafter fatally assaulted by firearm and sharp-edged weapons and died at the spot. A first information report was lodged the same evening at 7.00 p.m. by the complainant, who died before he could be examined at trial. The trial court, appreciating the ocular and medical evidence, convicted the accused and sentenced them variously to life imprisonment and lesser terms under the aforesaid sections. During the pendency of the appeal, one of the appellants, Piare, died, and his appeal abated.
Before the High Court, the appellants challenged the conviction principally on the grounds that: (i) the FIR was ante-timed, as evidenced by overwriting/cutting of the recorded time in the inquest papers and the unusually long duration taken to complete inquest proceedings; (ii) the inquest report did not mention the weapons used, casting doubt on whether the FIR had in fact been lodged before the inquest; (iii) PW-1 Ram Swaroop, the injured witness, had not himself witnessed the actual assault resulting in the deaths, and his dying declaration recorded by the Additional City Magistrate (proved only as a defence document, DW-1) did not name all the accused or specify their weapons; (iv) PW-4 Ram Singh, the sole eyewitness to the murders, was a chance witness whose presence at the spot on a working day was doubtful; (v) PW-2 Usman Ali, an

eyewitness who turned hostile, could not support the prosecution; (vi) no firearm injury was found on the body of the deceased Mahendra Nath despite the prosecution's case of firing upon him; and (vii) the investigation was defective inasmuch as the Investigating Officer neither verified the pendency of the Arms Act case nor explained the summoning of a dog squad, said to be inconsistent with the accused being known assailants.

POINTS FOR DETERMINATION:

(i) Whether the first information report was ante-timed so as to render the prosecution version doubtful?
(ii) Whether non-mention of the weapons of assault and the manner of occurrence in the inquest report, and the overwriting/delay therein, vitiates the prosecution case?
(iii) Whether the testimony of the injured witness PW-1 Ram Swaroop, who did not witness the actual killing and whose earlier statement to the Magistrate did not name all accused, is reliable?
(iv) Whether PW-4 Ram Singh, described as a chance witness, can be relied upon as an eyewitness to the murders?
(v) Whether the partly favourable testimony of a hostile witness (PW-2 Usman Ali) can be used in support of the prosecution?
(vi) Whether absence of firearm injury on the body of the deceased Mahendra Nath discredits the prosecution version?
(vii) Whether alleged lapses in investigation entitle the accused to acquittal?

HELD:

(i) An ante-timed or suspicious FIR does not by itself render the prosecution case vulnerable; the court must carefully analyse the evidence in support of the prosecution case (Anand Mohan v. State of Bihar, (2012) 7 SCC 225, relied upon). On facts, the occurrence took place at 6.00 p.m., the FIR was lodged within an hour at a distance of three miles by the complainant, whose writing and signature stood proved by an eyewitness, and there was no material to hold the report ante-timed.
(ii) The scope of an inquest under Section 174 Cr.P.C. is limited to ascertaining the apparent cause of death; it need not, and ordinarily does not, record the manner of occurrence, the weapons used or the names of assailants/eyewitnesses, and omissions of these particulars do not discredit the prosecution case (Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450; Amar Singh v. Balwinder Singh, (2003) 2 SCC 518; Guiram Mondal v. State of West Bengal, (2013) 15 SCC 284; Khujji v. State of M.P., (1991) 3 SCC 627; Shakila Khader v. Nausheer Cama, (1975) 4 SCC 122, relied upon). The overwriting in the inquest papers and the time taken therein stood satisfactorily explained by the Investigating Officer on account of the crowd, night hours and lantern failure, and did not go to the root of the prosecution case.
(iii) An injured witness ordinarily commands a higher degree of credibility, there being no reason for him to falsely implicate persons and shield the real culprits (Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 and other authorities, relied upon). PW-1's earlier statement to the Magistrate was recorded while he was in a precarious, injured condition and could be used only for corroboration or contradiction; minor omissions therein did not render his presence at the spot, or the assault upon him, improbable. His restraint in not claiming to have witnessed the actual killings — despite being an interested witness with every opportunity to embellish — enhanced rather than diminished his credibility.
(iv) The label "chance witness" is inapposite in a rural setting where the presence of a passer-by at the place of occurrence cannot be viewed with suspicion merely because he does not reside at that spot (Thangaiya v. State of T.N., (2005) 9 SCC 650, relied upon). PW-4's explanation for his presence — returning from Safipur after enquiring about cement — stood substantially established, minor discrepancies as to detail notwithstanding, and natural variations in the account of a rustic witness recalling events without reference to a watch do not detract from reliability (State of Karnataka v. M.V. Manjunathegowda, (2003) 2 SCC 188, relied upon).
(v) The evidence of a hostile witness is not to be rejected in toto; that part of the testimony which is consistent with and supports the case of the prosecution or the defence may be relied upon after careful

scrutiny (State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360; Vinod Kumar v. State of Punjab, (2015) 3 SCC 220, relied upon). PW-2's testimony, though he declined to name the accused out of fear, corroborated the time, place and manner of the assault and the presence of the injured and the deceased, and to that extent supported the prosecution.

(vi) The absence of firearm injury on the body of Mahendra Nath does not contradict the prosecution case, since the prosecution version and the eyewitness account establish that firearms as well as sharp-edged weapons were used by different assailants upon the two deceased, and the medical evidence of incised wounds on Mahendra Nath was consistent with the eyewitness account.

(vii) A defective or negligent investigation does not by itself entitle an accused to acquittal; the court must examine the ocular and other evidence dehors such lapses to determine reliability, and cannot allow the omission or lapse of an investigating officer to defeat a case otherwise proved (Dayal Singh v. State of Uttaranchal, 2012 (3) J.I.C. 428, relied upon). Failure to verify the pendency of the Arms Act case and the summoning of a dog squad, without more, were held to be at best investigative lapses not causing prejudice to the accused or discrediting the otherwise credible ocular testimony.

RESULT:

Appeal dismissed. Conviction and sentence recorded by the learned 7th Additional Sessions Judge, Unnao in Sessions Trial No. 413 of 1979 confirmed. Bail of the appellants cancelled and sureties discharged; appellants directed to be taken into custody to serve out their sentences. Appeal of appellant Piare, who died during pendency, held to have abated.

Cases referred:

Anand Mohan v. State of Bihar, (2012) 7 SCC 225;
Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450;
Amar Singh v. Balwinder Singh, (2003) 2 SCC 518;
Guiram Mondal v. State of West Bengal, (2013) 15 SCC 284;
Pedda Narayana v. State of A.P., (1975) 4 SCC 153;
Khujji v. State of M.P., (1991) 3 SCC 627;
Shakila Khader v. Nausheer Cama, (1975) 4 SCC 122;
State of Karnataka v. M.V. Manjunathegowda, (2003) 2 SCC 188;
Abdul Sayeed v. State of M.P., (2010) 10 SCC 259;
Sunil Kundu v. State of Jharkhand, (2013) 4 SCC 422;
Thangaiya v. State of T.N., (2005) 9 SCC 650;
State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360;
Vinod Kumar v. State of Punjab, (2015) 3 SCC 220;
Laxman v. State of Maharashtra, (2002) 6 SCC 710;
Vijay Pal v. State (Govt. of NCT of Delhi), (2015) 4 SCC 749;
Dayal Singh v. State of Uttaranchal, 2012 (3) J.I.C. 428.

(Delivered by Anil Kumar Srivastava-II, J.)

1. Heard Shri Nagendra Mohan, learned counsel for the appellants and Ms. Ruhi Siddiqui, learned A.G.A. for the State.

2. Instant appeal has arisen against the judgment and order dated 13.10.1982 passed by learned 7th Additional Sessions Judge, Unnao in Sessions Trial No. 413 of 1979, State versus Piare and others under section 147, 148, 302/149 and 379 IPC, Police Station Fatehpur Chaurasi, District Unnao whereby accused were convicted and sentenced as under :-

(i) Accused Raju was sentenced to undergo life imprisonment under section 302 IPC, seven years rigorous imprisonment under section 307 IPC and two years rigorous imprisonment under section 148 IPC.

(ii) Accused Pappu alias Sheo Mangal was sentenced to undergo life imprisonment under section 302 IPC and two years rigorous imprisonment under section 148 IPC.

(iii) Accused Piare was sentenced to undergo life imprisonment under section 302 IPC and two years rigorous imprisonment under section 148 IPC.

(iv) Accused Munna was sentenced to undergo life imprisonment under section 302 IPC and two years rigorous imprisonment under section 148 IPC.

(v) Accused Jag Roop was sentenced to undergo life imprisonment under section 302 IPC read with section 149 IPC, one year rigorous imprisonment under section 147 IPC and three years rigorous imprisonment under section 379 IPC.

3. According to the report of Chief Judicial Magistrate Unnao the appellant no.3 Piare son of Dorilal has died, hence, his appeal is abated.

4. According to the prosecution version, complainant Padamnath Shukla son of Paras Nath Shukla is resident of Village Ugu, Police station Fatehpur Chaurasi, District Unnao. On 13.7.1974 Ashok Pande, Chhunia Brahmin and Gauri Kurmi have murdered his father Paras Nath Shukla. Munai alias Kashi Prasad Vani Devi and Lature Pahlwan alias Rameshwar of his village have conspired murder of his father. Trial was pending in the Court. On 22.5.1975 Lature Pahlwan alias Rameshwar was killed. Suman alias Amar Nath and Babuwa alias Mahendra Nath brother of complainant were tried and were acquitted by the court. Appeal preferred by the family members of Lature Pahlwan was dismissed by the High Court due to which they were inimical and were planning to kill the brothers of the complainant.

5. On 09.02.1979, case of Babuwa alias Mahendra Nath was listed in the court in which complainant alongwith his brother Suman alias Amar Nath, Babuwa alias Mahendra Nath, Manna alias Ram Swaroop, Ram Sewak and Buche alias Usman resident of village Ugu went to Unnao for pariavi. Manna alias Ram Swaroop was carrying double barrel gun. In the evening all of them came to Hulasi Kuwan by bus and were going to their village Ugu on foot. At about 06:00 PM when they reached near the pulia of Ugu Minor then all of sudden Raju Kurmi armed with farsa Munna Kurmi armed with gadasa, Munai alias Kashi Prasad armed with counrymade pistol, Rajjan Misra armed with Banka, Piare Kurmi armed with countrymade pistol, Pappu alias Sheo Mangal Kurmi armed with a gun and Jagroop came. Jagroop caught hold of Manna alias Ram Swaroop from the back, Raju attacked Manna alias Ram Swaroop by his farsa who received injuries. His gun was snatched by Jagroop. Manna alias Ram Swaroop was thrown in the bamba. Suman alias Amar Nath and Babuwa alias Mahendra ran away towards western side. On exhortation of Manai Pappu alias Sheo Mangal fired upon them by his gun. Babua fell down on the med of wheat field. When Suman alias

Amar Nath tried to help Babua then Piare and Babu fired upon him by countrymade pistol and gun which hit Suman alias Amar Nath in his chest and right side of abdomen. He also fell down along the side of Babuwa. Raju, Munna, Rajjan attacked them by farsa, gadasa and banka. On raising an alarm by complainant and his companions Ram Sigh Kurmi, Mulla Pasi Mahmood came and raised alarm. Thereafter, there was a hue and cry from the side of Jasra and shots were fired. Then accused ran away towards northern side by firing from their arms. They also took away with them the double barrel gun of Manna alias Ram Swaroop. Both the brothers of complainant received several injuries and died at the spot. Manna alias Ram Swaroop was hiding himself behind tree. He was also seriously injured. At the spot police force of outpost Ugu and other person came. Manna was sent to the hospital. Thereafter, complainant lodged the FIR at police station Fatehpur Chaurasi on the same day, i.e., 9.2.1979 at 7.00 PM whereby a case crime no.35/79 under section 147, 148, 149, 302, 307 IPC was registered and investigation was handed over to the Investigating Officer.

6. Investigating Officer reached at the spot and prepared the inquest memo which began on 9.2.1979 at 8.30 PM and continued up to 10.7.1979 up to 2:30 PM. Dead body was sealed and sent for postmortem. Postmortem was conducted on 10.2.1979 at 4.00 PM and 5.00 PM. Cloth of the deceased, plain and blood stained earth, banka, gadasa, two empty cartridges were recovered by the Investigating Officer. Site plan was also prepared. Statement of witnesses were recorded. Clothes of deceased as well as plain and blood stained earth was sent to forensic science laboratory. Statement of witnesses were recorded. After concluding the investigation chargesheet was submitted against the accused.

7. In order to prove its case prosecution has produced PW-1 Ram Swaroop injured eyewitness, PW-2 Usman who has turned hostile, PW-3 Dr. A. Akram who has conducted the postmortem of the body of the deceased and found following anti mortem injuries on the body of Mahendra Nath alias Babuwa whose postmortem was conducted on 10.02.1979 at 4.00 PM. Following ante mortem injuries were found :-

(i) Incised wound 1¼" x ½" x skin deep on the inner side of the left leg over the tendo achillis directed inner to the front of the left leg with a tale of 1" long horizontally placed.

(ii) Incised wound 1" x ¼" x skin deep on the left side of face 1½" away from the left ear directed towards the neck.

(iii) Incised wound 5" x 1½" x spinal chort deep on the left side of neck starting from the angle of jaw to the back of the neck right side directed from the left side of lower jaw to the back of neck, with cutting of muscles vessels, nerve with cutting of the body of third survical vertibra and dividing the spinal chord.

(iv) Incised wound 2" x ¼" x scalp deep on the back side of neck ¼" above the injury no.3 horizontally placed.

(v) Incised wound 2½" x 1/2" x skin deep on the left side of neck ½" above the injury no.4 starting at the body of jaw ½" above injury no.4 horizontall placed.

(vi) Incised wound 3" x ½" x skin deep on the back of the neck cutting the left ear lobule directed towards the back of the head.

(vii) Incised wound 5" x 1" x bone deep and brain matter deep cutting occipital bone horizontally with brain matter coming out directed from the ear to the back of head, left side 2" above injury no.6.

(viii) Incised wound 3" x ½" x bone deep on the left side of the back of head ¾" above the injury no.7 with occipital bone partially out.

(ix) Incised wound 5" x 1" x brain matter deep on the left side of the back of the head starting 1" above the left ear to the back of the head with brain matter coming out of the cut bone 1" above the injury no.8.

(x) Incised wound 2" x ½" x skull deep on the back of head the left parieto occipital bone partially out having 1½" x 1/10" long cut 2" above injury no.9.

(xi) Incised wound 3" x 1" x bone deep on the back of the left side of head horizontally placed one inch above injury no.9.

(xii) Incised wound 3" x ½" x bone deep on the centre of the back of the head on both sides move on the left side with a flap of skin of the head as shown in the postmortem report. The margin is lip shaped.

On internal examination Doctor found that clotted blood present on the face. The eyes and mouth closed.

(i) Partially out of the left parietal bone 4" x ½" long injury.

(ii) Left occipital bone completely out, margins clean out 3½" x 1" x brain matter coming out.

The membrances out at injury no.2 of skull bone.

Body of third cervical vertebra out and spinal chord clean cut at the level of third cervical vertebrae.

Brain matter is coming out clotted blood in the left side of brain and left temporal region. Heart empty. The big arteries and veins and nerves of the left side of neck clean out at several places. Stomach empty. Small intestine containing small quality of digested food materials.

Large intestine containing faecal matter. Death due to haemorrhage, coma and shock as a result of injuries.

8. On the same day at 5.00 PM he conducted the postmortem of dead body of Amar Nath alias Suman and found following anti mortem injuries :-

(i) Incised wound 1¼ " x ¼" skin deep on the front of the right leg 2" above the angle joint directed towards the outer side.

(ii) Incised wound 2" x 1/2" x tendon of muscle deep on the right palm 1/2" below the joint horizontally placed on the inner half.

(iii) Multiple gun shot wound (entrance) 4 in number each 1/4" x 1/4" x through and through on the back of the right upper arm 4½" below the shoulder joint, margines irregular inverted, no blackening and tatooing present, oval in shape directed forward to the chest right side.

(iv) Multiple gun shot wound (exit) 4 in number each 1/2" x 1/2" x through and through, communicating injury no.3 on the inner side of right upper arm and axilla (armpit) margines irregular everted, no blackening and tatooing present.

(v) Multiple gun shot wounds (entrance) 6 in number, each 1/2" x 1/2" x chest cavity deep on the right side of the chest. 2 cm. Away from the anterior axillary joint and 4" from the posterior axillary, line in an area of 4" x 3" directed towards the left side of teh fchest, margines inverted, no blackening and tatooing present, one shot felt at right side and 5 on the left side of chest below the skin.

(vi) Gun shot wound entrance 1½" x 1" x chest cavity deep on the left side of upper part of chest over the sternum uper part oval in shape 4" above left nipple directed from the left to the right side with a hole 1" x 1" in the sternum with fracture with two small gun shot wound of entrance of ¼" x ¼" x skin deep over the upper margine of the wound ¼" away from the main wound, no blackening and tatooing margines inverted.

(vii) Incised wound 1½" x ¼" x scalp deep on the right side of head 4" above the right side of ear vertical.

(viii) Incised wound 2½" x ½" bone deep on the right side of head 3½" above right ear parima with fracture of mastoid bone oblequily placed directed towards the back.

(ix) Incised wound 1½" x ¼" x skin deep on the right side of the forehead ½" above right eyebrow.

(x) Incised wound 2" x ¼" x bone deep on the forehead over the eyebrow horizontally placed with cutting of the right frontal bone 1½" x ¼" long.

(xi) Incised wound 6½" x 2" x brain matter deep on the right side of face and head starting from the right side of nose wall to the back of the right ear cutting the right eye ball right paima of the ear cutting and fracture of right temporal mastoid bone, brain matter clearly seen with clotted blood, vertically placed.

(xii) Incised wound 4" x ½" x bone and brain matter deep on the back of head and cutting the middle of the paima of the right ear, right mastoid and right side of parietal bone vertically placed.

(xiii) Incised wound 2½" x ¼" x bone deep on the right side of neck horizontally placed starting from the angle of jaw to the back of neck cutting the ear bone and angle of jaw.

(xiv) Incised wound 3" x 1/2" x muscle deep on the right side of neck 1/2" below the ear lobule cutting the muscle and vessels of the neck horizontally placed.

(xv) Incised wound 1½" x ½" x skin deep on the right side of neck 1½" below the angle of jaw horizontally placed.

(xvi) Incised wound 3" x 1" x jaw deep on the body of the right lower jaw cutting and fracturing the right lower jaw starting from the chin to the angle of jaw.

(xvii) Incised wound 3½" x 1" x jaw deep on the right side of face starting frofm the angle of right side of face with cutting of right upper jaw.

(xviii) Incised wound 2" x ½" x bone deep on the right side of face over the neck of right lower jaw and zygomatic bone.

(xix) Multiple incised wounds 4 in number on the left side of face and temple region, straing from the left ear to the left side of nose 4" x ½" and bone deep cutting the left.

Zygomatic bone in an area of 8" x 6", 3 wounds 1" x ½" x skin deep only.

On internal examination the Doctor found the right frontal parietal, temporal and mastoid bone cut through and through, membrances cut, the brain matter coming out with clotted blood and lacerated. Six big shots recovered from the left side of chest below the skin, on the right 1 to 5th rib broken at the antero lateral junction. Fleura punctured on the right side, right lung having 4 small holes on the middle and upper lobe, right side of chest cavity containing one lb. Of clotted blood. Heart empty, two pieces of card adding and 4 big shots recovered from the right lung and 2 big shots from the muscles of the right side of back. The stomach was empty. Small intestines containing very small quantity of digested food material large intestine containing fecal matter, rest organs were normal. The cause of death was due to haemorrhage and shock as a result of injuries.

According to doctor A. Akram the cause of death of both the deceased was due to haemorrhage and shock as the result of injuries and due to excessive bleeding.

9. PW-4 Ram Singh is an eyewitness. PW-5 Dr.S.K. Srivastava medico-legally examined the injured Ram Swaroop on 9.2.1979 at 10.45 PM at District Hospital Unnao and found following injuries on his body :-

(i) Incised wound 5 cm x 2 cm x bone deep at the right side of the forehead with cut of the upper plato of the skull, kept under observation, advised X-ray.

(ii) Incised wound 4 cm x 1 cm x bone deep at the middle of the forehead situated 2 cm away from injury no.1.

(iii) Incised wound 12 cm x 2 cm x bone deep at the left side of the skull at its back.

(iv) Incised wound 3 cm x 1 cm x bone deep at the top of the head.

(v) Incised wound 6 cm x 1 cm x muscle deep at the inner side of the palm of the left hand.

(vi) Incised wound 4 cm x 2 cm x bone deep at the palmer aspect of the ring finger of the left hand.

(vii) Incised wound 12 cm x 20 cm x bone deep at the lower end of the left leg with cutting of the bone of the leg through and through.

10. According to Doctor, all the injuries were caused by sharp edged weapons. Injuries no.2, 3 and 4 were simple while injury no.7 was grievous in nature. Injury no. 5, 6 and 1 were kept under observation. Duration was fresh. According to doctor, this injury could have been caused on 9.2.1979 at 6.00 PM by sharp edged weapon.

11. PW-7 S.I. Vivekanand is Investigating Officer who has conducted the investigation and submitted charge sheet against the accused.

12. PW-8 Constable Gyan Prakash is a formal witness who took the dead bodies for postmortem.

13. Accused Piare, Pappu alias Sheo Mangal, Raju Kurmi and Manna were charged under section 302 IPC, 148, Raju was also charged under section 307 IPC, Jagroop was charged under section 107, 379 IPC.

14. Accused have denied the allegations levelled against them and stated that they were falsely implicated due to enmity.

15. Witness DW-1 K.N. Tandon Additional City Magistrate Kanpur was produced in defence as DW-1. Eight papers were also filed in defence. After appreciating the evidence on record learned trial court has recorded a finding of guilt against the accused and convicted and sentenced them accordingly.

16. Learned counsel for the appellants submitted that the first information report is ante-time. In order to elaborate the argument, it is submitted that in the inquest report there are cuttings on the time of lodging FIR at the police station. Initially, it was shown as 08:00 PM which subsequently interpolated as 07:00 PM as the FIR was allegedly lodged at the police station at 07:00 PM. It was further submitted that the bare perusal of the written report shows that it was written by the scribe in a very calm and quite condition but as per the prosecution version occurrence took place at 06:00 PM and the FIR was lodged at the police station at 07:00 PM while the distance is three miles. It is further submitted that inquest proceedings began at 08:30 PM which continued up to 03:00 A.M. On 10.2.1979. What was the reason for taking such a long time in preparation of the inquest report. It is further submitted that as per the statement of PW-7 Investigating Officer reached at the spot at about 06:00 or 06:15 PM while first information report was lodged at 07:00 PM. How he reached at the spot prior to lodging of the FIR? Further it was incumbent upon him to mention the weapons in the inquest report but no such weapon was mentioned which creates a doubt that the first information was not lodged till inquest proceedings were conducted. Only after conclusion of the inquest proceedings first information report was lodged.

17. It is further submitted that prosecution story is fully doubtful. PW-1 Ram Swaroop is not an eyewitness of the incident of murder. According to the prosecution version he was assaulted, thereafter, thrown into the bamba so he could not see the incident wherein murder took place. It is further submitted that evidence of PW-4 Ram Singh is not reliable, trustworthy. He is an inimical witness. Both these witnesses were not present at the spot. It is further submitted that PW-2 Usman Ali has turned hostile. Prosecution cannot take any advantage of his evidence.

18. Further it is submitted that the Ram Swaroop was referred to Kanpur. Additional City Magistrate was called for recording the dying declaration who has recorded the same but prosecution did not produce neither the dying declaration nor additional City Magistrate. Rather Additional City Magistrate was produced as DW-1 who has proved the dying declaration given by PW-1 Ram Swaroop wherein names of two accused were not mentioned. In the dying declaration it is not mentioned that what weapon was being carried by which accused. Further learned trial court has recorded a finding that the condition of the injured was precareous. Presence of eyewitness PW-1 Ram Swaroop at the spot becomes doubtful.

19. It is further submitted that no firarm injury was found on the body of Mahendra Nath. Complainant Padam Nath Shukla could not be produced in the court as he died prior to recording of his evidence.

20. It is further submitted that evidence of PW-4 Ram Singh is totally unreliable, untrustworthy. He is a chance witness. He could not establish his presence at the place of occurrence. No injury was caused to him. If he was present there then he should have also suffered certain injuries. It shows that Ram Singh was not present at the spot. Further Ram Singh has also not stated anything about the injuries of Ram Swaroop. His statement was recorded after three days of incident. Investigating Officer has failed to give explanation for the delay.

21. It is further submitted that dog squad was called at the spot. If the accused were known that what was the need of calling the dog squad which itself shows that the accused were not known to the complainant prior to the incident. Some unknown persons have committed the murder in dark. It is further submitted that according to the prosecution version deceased was coming back to his home after attending his court case pending against him under section 25 Arms Act. It was the duty of the Investigating Officer to verify as to whether any case under section 25 Arms Act was fixed on that date or not but no such effort was made, hence, whole prosecution version becomes doubtful.

22. Per contra, learned A.G.A. Submits that the prosecution has successfully proved its case beyond reasonable doubt. Evidence of PW-1 Ram Swaroop and PW-4 Ram Singh is fully reliable, trustworthy. PW-1 Ram Swaroop is an injured witness who received the injuries in the same incident. After causing injuries to Ram Swaroop accused thrown him in the babma. Thereafter, murder of Mahendra Nath was committed. This incident of murder was seen by PW-4 Ram Singh. It is further submitted that first information report was lodged promptly without unnecessary delay. Investigation on the case was done in accordance with law. Accused were rightly held guilty for the offence committed by them.

23. Before dealing with the ocular evidence of the witnesses firstly we would discuss the postmortem report of deceased Amar Nath and Mahendra Nath and medico-legal report of injured Manna alias Ram Swaroop. Postmortem of the body of deceased Mahendra Nath alias Babua was conducted on 10.02.1979 at 04:00 PM while the postmortem of the body of Amarnath alias Suman was conducted on 10.02.1979 at 05:00 PM by PW-3 Dr. A. Akram, who was posted as Medical Officer, District Hospital Unnao. According to Dr. A. Akram, deceased Mahendra Nath alias Babua had suffered 12 incised wounds as have been mentioned above and he died due to the shock and haemorrhage due to ante- mortem injuries. Injuries could have been caused on 09.02.1979 at 06:00 PM by sharp edged weapon like farsa, gadasa and banka.

24. According to Dr. Akram deceased Amarnath alias Suman had suffered multiple gun shot injuries as well as incised wounds and his death was result of ante-mortem injuries which were sufficient to cause death. These injuries could have been caused on 9.2.1979 at 06:00 PM. Injury No.3 to 6 could have been caused by firearm while other incised wound could have been caused by

sharp edged weapon like farsa, gadasa and banka. In the cross-examination Dr. Akram has admitted that there could be a natural variation of four to six hours in the time of death. Duration of death is shown as one day at the time of postmortem.

25. PW-5, Dr. S.K. Srivastava has conducted the medico-legal examination of the injured Ram Swaroop on 9.2.1979 at 10:45 PM at District Hospital Unnao where he was posted as Medical Officer. Dr. Srivastava found seven incised wound on the body of injured which could have been caused by sharp edged weapon. These injuries could have been caused on 9.2.1979 on 06:00 PM by some sharp edged weapon. Dr. Srivastava has stated that these injuries could not be caused at the time when the injured is in a lying position.

26. Statement of these two medical experts shows that the injuries of deceased as well as injured could have been caused on 9.2.1979 at 06:00 PM. Further the gun shot injuries of deceased Amar Nath could have been caused by some firearm while all the other injuries of incised wound could have been caused by sharp edged weapon.

27. Now, in the background of the medico-legal opinion it is to be seen as to whether prosecution has been successful in establishing the charges against the accused appellants?

28. It has been submitted by the learned counsel for the appellants that the first information report in this case is ante-time. It is further submitted that if the first information report is ante-time then it becomes doubtful and when the first information report is itself doubtful then whole prosecution story becomes doubtful. It has been held in ***Anand Mohan v. State of Bihar (2012) 7 SCC 225*** that if the date and time of FIR is suspicious, the prosecution version is not rendered vulnerable but the Court is required to make a careful analysis of the evidence in support of the prosecution case.

29. According to the prosecution version, occurrence has taken place on 9.2.1979 at 06:00 PM while the first information report was lodged at the police station Fatehpur Chaurasi at 7:00 PM on the same day while the distance of the police station is about three miles. First information report was lodged by Padam nath Shukla son of Paras Nath Shukla who is the brother of the deceased but Padam Nath Shukla could not be produced in evidence as after lodging the FIR he died. In such circumstances PW-4 Ram Singh has proved the first information report. PW-4 Ram Singh is an eyewitness of the incident of murder of decased Amar Nath and Mahendra Nath. So far as the question of trustworthiness of the statement of PW-4 Ram Singh is concerned, we would analyse and scrutinize the same at the later stage of the judgment but at this stage so far as question of proving the exhibit ka-3 written report is concerned PW-4 Ram Singh has stated that he has seen Padam Nath writing and signing. He identified his writing and signatures and proved the same. It is further stated that in his presence Padam Nath has written the report and went to the police station to lodge the first information report. During cross-examination even it was asked as to whether he knows some peculiar type of writing of Padam Nath then the witness states that word 'e' 'j' and 't' were having a special type of writing. This witness was asked to give in writing these three words in court which he has submitted. Thereafter, these writing of Padam Nath in written report is not

further challenged. No expert reprot is brought on record which could disprove the fact that this report exhibit ka-3 is not written by Padam nath, hence, we are of the considered view that exhibit ka-3 written report was written by Padam Nath.

30. Learned counsel for the accused has drawn our attention towards the inquest report as well as police papers which were sent alongwith dead body and submits that there is overwriting at the time as shown in the inquest report when the FIR was lodged. PW-7 Vivekanand is the Investigating Officer of the case who has admitted that there are some cuttings and overwritings in the inquest report but he cannot say as to what was the reason for the overwriting. It is further admitted by him that in the inquest report there is no mention as to what were weapons used by the accused in the commission of crime. So far as the importance of inquest report is concerned it is settled law that the purpose of preparation of inquest report is very limited.

31. It has been held ***in Guiram Mondal vs. State of West Bengal, (2013) 15 SCC 284*** that:-

"The inquest report normally would not contain the manner in which the incident took place or the names of eyewitnesses as well as the names of accused persons. The basic purpose of holding an inquest is to report regarding the cause of death, namely, whether it is suicidal, homicidal, accidental, etc. Reference may be made to the judgments of this Court in Pedda Narayana v. State of A.P. (1975) 4 SCC 153 And Amar Singh v. Balwinder Singh, (2003)2 SCC 518.

In Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450, This Court held that the scope of inquest is limited and is confined to ascertainment of apparent cause of death. Inquest is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal, and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. The details of overt acts need not be recorded in the inquest report. The High Court has rightly held that the manner and approach of the trial court in disbelieving the prosecution story by placing reliance on the inquest report was erroneous and bad in law."

32. In ***Amar Singh vs. Balwinder Singh and others, (2003) 2 SCC 518*** Hon'ble Apex Court has held as under :-

"The provision of holding of an inquest and preparing an inquest report is contained in Section 174 Cr.P.C. The heading of the section is "Police to enquire and report on suicide etc." Sub-section (1) of this section provides that when the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give information to the nearest Executive Magistrate and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such

wounds, fractures, buries, and other marks of injury as may be found on the body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. The section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. The scope and purpose of Section 174 Cr.P.C. Was explained by this Court in ***Pedda Narayana v. State of A.P. (1975) 4 SCC 153*** *and it will be useful to reproduce the same :*

The proceedings under Section 174 have a very limited scope. The object of the proceedings 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 is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report.

It is therefore not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of court.

33. In ***Khujji v. State of M.P. (AIR para 8) (1991) 3 SCC 627*** this Court, after placing reliance upon the abovequoted decision, rejected the contention raised on behalf of the accused that the evidence of eyewitnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. In ***Shakila Khader v. Nausheer Cama (AIR para 5) (1975) 4 scc 122, 125*** it was held that an inquest under Section 174 Cr.P.C. Is concerned with establishing the cause of the death only. The High Court was, therefore, clearly in error in holding that as the facts about the occurrence were not mentioned in the inquest report, it would show that at least by the time the report was prepared the investigating officer was not sure of the facts of the case.

34. Admittedly, there are overwritings in the inquest report but it is clear that in the inquest report itself where there is overwriting 19 is written above it in the bracket in the inquest report of Amar Nath alias Suman. In clear words 19 is again written which goes to show that there might be some accidental or clerical error which was subsequently detected by the concerned officer conducting the inquest proceedings and he rectified the same at the same time. Likewise in police form no.13 of deceased Amar Nath alias Suman and deceased Mahendra Nath alias Babua there is overwriting of 19 for which the PW-7 Investigating Officer has given a categorical statement that these overwritings are there but he cannot explain why these overwritings were made. It could be an accidental error which do not goes to the root of the case.

35. Inquest proceedings began on 9.2.1979 at 8:30 PM and continued up to 02:30 AM on 10.2.1979. It took about six hours to complete the inquest proceedings. PW-7 SI Vivekanand has given an explanation that since two murders of real brothers were committed, there was huge crowd at the spot. Further, it was night time so it took a long time to complete the proceedings. Further, proceedings were completed in the light of patromax. One patromax got out of order then another was called, hence, it took a lot of time to complete the proceedings. We do not find any discrepancy in the statement of PW-7 Vivekanand regarding time taken in the inquest proceedings. PW-6 Constable Ram Awadh Verma is the scribe who prepared the chik FIR as well as made a note of the same in the GD who has specifically denied that the first information report was lodged ante-time.

36. At this stage, statement of eyewitnesses PW-1 Ram Swaroop and PW-4 Ram Singh assumes importance regarding time of the incident because learned counsel for the accused argued that the occurrence has not taken place at 06:00 PM as shown by the prosecution, rather it took place in the dark during night and ante-time report was lodged showing the time of incident 06:00 PM so that the accused can be falsely implicated by the prosecution. PW-1 Ram Swaroop has stated that he was accompanying the deceased alongwith Hari Om, Ram Sewak, Buche alias Usman when they had gone to Unnao in the pairavi of a case under section 25 of Arms Act proceeding against Babua alias Mahendra Nath. They came by bus from Unnao to Hulasi Kuwan and started proceeding towards their home. At about 06:00 PM when they reached on the pulia of Ugu Minor then occurrence took place. This witness has been cross-examined at length regarding time of occurrence. It is stated by him that they reached Hulasi Kuwan at 5:30 PM, thereafter, they proceeded towards their village by pucca sadak. Although, there was another route which is not a convenient route. It is specifically stated that Ugu is about three kilometers from Hulasi Kuwan on constructed road while Ugu is about two and half kilometers from Mathar but this road is uneven and there is a nullah so they used to go to their village from Hulasi Kuwan. It is further specifically stated by the witness that he has stated the time approximately as he has not seen the watch at that time. PW-4 Ram Singh is also an eyewitness who has stated that when he came from his village he stayed at Safipur for about two and half hours. He left his village at 2:00 PM, reached Safipur at about 03:00 PM. He got down from bus at Hulasi Kuwan bus stand at about 5:45 PM. These two witnesses have specifically stated that they are stating the time approximately. Distance of Hulasi Kuwan bus stand from Safipur is about three miles. Bus did not stop on the way. After reaching at Hulasi Kuwan bus stand after two to three minutes he left the place.

37. It has been held by the Hon'ble Apex Court in ***State of Karnataka vs. M.V. Manjunathegowda & Another (2003) 2 SCC 188*** that :-

"One should not fail to take note that the witnesses are rustic villagers. It is difficult to expect them to remember the events with mathematical precision after a lapse of more than two years. It is a common knowledge that ordinarily human memories are apt to blur with the passage of time. More so in the present case, when witnesses are rustic villagers. In such a situation, there are bound to occur certain discrepancies, which are in the form of omission and they cannot be considered as fatal to their evidentiary value, otherwise trustworthy. At the same time, they are unexposed to the technicalities of urban life and they speak plainly what they saw

and did. They are straightforward looking people, truthful and trustworthy. Their testimony cannot be thrown out on the ground that it lacks spontaneity."

Natural discrepancy and variation are bound to occur in the statement of rustic witnesses who belong to rural background. We may also observe that it is not always possible for any person to have an eye over his watch at all the times. Both the witnesses were never knowing that some incident is likely to occur so they must see their watch to remember the time of occurrence. It is quite natural that difference of few minutes could always be there in stating the time. We are of the considered view that the prosecution has successfully established the time of occurrence as 6:00 PM as mentioned in the first information report. We are further of the view that the first information report is not ante- time.

38. Occurrence took place at 06:00 PM while the distance of the police station from the place of occurrence is three miles. First information report was lodged at 07:00 PM. First information report was scribed by Padam nath Shukla who is the real brother of the deceased. It has already come in the evidence that Paras Nath Shukla father of Padam Nath Shukla was murdered on 13.7.1974. There is a long drawn enmity with the complainant Padam nath Shukla, his brothers Amar Nath and Mahendra Nath with the accused which we will discuss in the later part of the judgment but at this stage, it can very well be seen that number of criminal cases were lodged against the deceased as well as accused. In this background if complainant Padam nath Shukla has promptly lodged the first information report then it could not be assumed that the first information report was ante-time as it could not have been lodged within a short span of time of one hour while two real brothers of the complainant were murdered. He left their dead bodies and went to the police station to lodge the first infromation report. Since number of criminal cases were already proceeding between the parties, hence, the complainant must be aware of the fact that the first information report should be lodged promptly. We have no reason to hold that the first information report is ante-time or the occurrence has not taken place at 06:00 PM.

39. Incident in question is in two parts. According to the prosecution version, PW-1 Ram Swaroop alongwith the deceased Mahendra Nath and Amar Nath was coming back from Unnao after attending the court case which was pending against Babua alias Mahendra Nath. Hari Om Ram Sewak and Buche alias Usman were also accompanying them. They left the bus at Hulasi Kuwan bus stand and were going on foot. PW-1 Ram Swaroop was carrying his licensed gun with him. When Jagroop caught hold of him from the back side and all other accused started attacking him by their sharp edged weapons. Raju inflicted injuries by farsa. He fell down on receiving the injuries. His gun was snatched by the accused and he was thrown in the bamba. This is one part of the incident. Second part relates to the murder of Suman alias Amar Nath and Babua alias Mahendra Nath. When Ram Swaroop was thrown in the bamba thereafter deceased ran away then accused inflicted injuries upon them in which Amar Nath alias Suman received gun shot injuries coupled with incised wounds while Mahendra Nath received incised wounds. Second part of the incident was seen by witness Ram Singh.

40. At this stage, now it is to be seen as to whether evidence of PW-1 Ram Swaroop who himself is an injured iwtness whose left leg was amputated and PW-4 Ram Singh is reliable or not. Further it is to be seen as to whether the statement of PW-2 Usman who was declared hostile should be thrown out as a whole or some part of his statement can be relied upon.

41. Now, we will examine the veracity of the statement of witnesses. At the very outset, PW-1 Ram Swaroop has stated the facts up to the stage when he was attacked by the accused. He was thrown away in the bamba. He has nowhere stated a single word about the murder of the deceased that he has seen the accused committing murder of the deceased.

42. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more res integra, as has been consistently stated by this Court in uniform language. See, ***Abdul Sayeed v. State of M.P., (2010) 10 SCC 259; Jarnail Singh v. State of Punjab, (2009) 9 SCC 719; Balraje v. State of Maharashtra, (2010) 6 SCC 673; Ramlagan Singh v. State of Bihar, (1973) 3 SCC 881; Malkhan Singh v. State of U.P., (1975) 3 SCC 311; Machhi Singh v. State of Punjab, (1983) 3 SCC 470; Appabhai v. State of Gujarat, 1988 Supp SCC 241; Bonkya v. State of Maharashtra, (1995) 6 SCC 447; Bhag Singh v. State of Punjab, (1997) 7 SCC 712; Mohar v. State of U.P. (2002) 7 SCC 606; Dinesh Kumar v. State of Rajasthan, (2008) 8 SCC 270; Vishnu v. State of Rajasthan, (2009) 10 SCC 477; Annareddy Sambasiva Reddy v. State of A.P., (2009) 12 SCC 546 and Balraje v. State of Maharashtra, (2010) 6 SCC 673.***

43. In this background, we have to thoroughly examine the statement of PW-1 Ram Swaroop. Admittedly, this witness was having inimical relations with accused. In the examination-in-chief he has stated that he was accompanying the deceased. He was coming back from Unnao after attending a Court case under section 25 Arms Act which was pending against deceased Mahendra Nath alias Babua. It means, that he was having good relations with the deceased, that is the reason that he accompanied him to attend his court case. PW-1 Ram Swaroop was the complainant in the case of murder of Paras Nath who was father of complainant Padam Nath as well as deceased Mahendra Nath and Amar Nath. Ashok Chhunia, Gauri Kurmi, Vani Dutt, Munai, Lature were accused in that case which trial ended in the acquittal. In the year 1975, Lature Pehalwan alias Rameshwar were also murdered in which Mahendra alias Babua and Amar Nath alias Suman deceased in this case were accused that also ended in acquittal. Further some criminal cases were also filed against this witness. In one of the cases he was a party alongwith deceased Amarnath and Mahendra Nath in a case under section 107/117 Cr P.C. It is also admitted by this witness that a lease of some land and bond was executed in his favour by Paras Nath which was cancelled on the application of Vani Dutt. Admittedly, there was a long drawn enmity between the parties. This witness has been cross-examined at length on the point of enmity. Enmity itself is a double edged weapon which can be used either way. It was held ***in Sunil Kundu versus State of***

Jharkhand (2013) 4 SCC 422, that enmity is a double edged weapon but possibility of false involvement because of deep rooted enmity also cannot be ruled out.

44. Now, we have to scrutinize the evidence of PW-1 Ram Swaroop in this background.

45. At the initial stage, we would like to mention that statement of PW-1 Ram Swaroop was recorded by DW-1 K.N. Tandon Additional City Magistrate, Kanpur on 10.02.1979 in the Emergency Ward of L.L.R. Hospital Kanpur. In the said statement the witness have stated the names of Raju, Jagroop, Manna, Pappu, Kashi Prasad. He has narrated the story as to how he reached at the place of occurrence. For the sake of convenience we are quoting the whole statement of the witness which was recorded by K.N. Tandon Additional City Magistrate. This statement was recorded as dying declaration but subsequently Ram Swaroop survived, hence, the statement can only be used as a previous statement of the witness which has the evidentiary value for corroboration or contradiction.

"राम सरूप उम्र करीब 48 साल बयान किया कि कल शाम को उन्नाव से मैं अपने गांव जा रहा था। कल शाम को करीब 0-0 1/4 बजे मैं बस से हुलासी कुवा बस अड्डे पर उतरा। वहां से हमारा घर करीब 3 किलोमीटर है। बस से उतर कर खड़ खड़े से गांव जाते है। परन्तु कल अड्डे पर खड़ खड़े नहीं थे। हम बस अड्डे पर शाम को उतरे तो वहां 2-3 सवारी और उतरी और सवारियां जो उत्तरी उनमें अमरनाथ पुत्र पारसनाथ साकिन उगू पदमनाथ पुत्र पारसनाथ, रामसेवक पुत्र हुलासी साकिन उगू वगैरा थे। हम सब लोग बस अड्डे से शाम को करीब सवा छः साढ़े छः बजे गांव के लिये पैदल चल दिया। गरीब एक किलोमीटर गये होंगे कि अचानक माइनर की पुलिया के नीचे से तथा पास ही में बाग से करीब 5-6-7 आदमी निकले और उनमें से पीछे से आकर मुझे एक आदमी ने दबोच लिया हमारे पास दोनाली बन्दूक थी उसके साथी हमारी बन्दूक छीनने लगे हमने रोकने की कोशिश की तो हमारे उपर फावड़ा और फरसा से यह लोग वार करने लगे और मारकर घायल कर हमारी बन्दूक छीन लिया और हम को नाले में ढकेल दिया। हमारे साथी महोदय और अमरनाथ, राम सेवक गांव की ओर भागे। हमें नाले में ढकेल कर सभी बदमाश हमारे साथियों के पीछे भागे। थोड़ी देर बाद मुझे बन्दूक के फायर की आवाज सुनाई दी जिन बदमाशों ने हमें घेरा व मारा उनमें एक का नाम राजू पुत्र शंकर साकिन उगू जगरूप पुत्र नामालूम साकिन उगू लल्लू पुत्र नामालूम साकिन उगू पप्पू पुत्र नामालूम साकिन उगू काशी प्रसाद पुत्र रामेश्वर साकिन उगू व उनके साथ 2-1 और लोग थे जो उगू के ही हैं पहचानता हूं नाम नहीं जानता । मुझको जगरूप ने दबोचा था ।

1. जगरूप के पास से एक कटटा था, काशी प्रसाद के पास एक फरसा था औरों के पास भी फड़वा और फरसे थे। हमको जगरूप पकड़े थे और राजू ने हमको बाका से मारा। उन लोगों के साथियों ने भी सर पर फावड़ा और बाका से मारा। मेरी लाइसेन्सी बन्दूक थी जिसे राजू और जगरूप ने छीना। महेन्द्र व अमरनाथ के पिता पारसनाथ शुक्ला का कतल 13.07.1974 को हुआ था । उसमें हम मुददई थे इस कतल के समक्ष उनके साथ में था और एफआईआर दर्ज कराई थी। उसमें काशी प्रसाद मुलजिम है। मैं मुददई हूं इसी से काशी प्रसाद रंजिश मानते हैं । और बाकी सब काशी प्रसाद के ग्रुप के हैं। और कुछ नहीं कहना है।"

46. Learned counsel for the accused vehemently argued that the presence of PW-1 Ram Swaroop at the place of occurrence is doubtful. He was not present at the place of occurrence and did not received injuries in the incident. Admittedly, dying declaration was not produced in the evidence by the prosecution, rather it was proved by the defence. Statement recorded by Shri K.N. Tandon DW-1 shows that name of five persons were narrated by the witness Ram Swaroop at the time of statement his condition was precarious at that time as was held by the learned trial court as well as revealed in the evidence of DW-1 K.N. Tandon who has admitted that at the time of statement witness was in injured condition. If we peruse the injuries of PW-1 Ram Swaroop we found that there were seven incised wounds on his body which were caused by sharp edged weapon, four incised wounds were present on his forehead while one was on left leg with cutting of

the bone of the leg through and through. This injury was grevious in nature. Further, left leg of the witness PW-1 Ram Swaroop was amputated. He remained in the hospital for about nineteen months. This shows that the condition of the witness at the time of giving the statement to the Magistrate was very serious. In such circumstances, even if name of two accused could not be stated by him or it is stated by him that one of the accused was carrying fawra does not make statement of witnesses improbable or his presence at the spot doubtful.

47. PW-1 Ram Swaroop has specifically stated that he was caught hold by Jagroop from his back and his licensed gun was snatched. Thereafter, Raju attacked him by his farsa. When he tried to save his gun then again Raju attacked on him by his farsa on his forehead and hand and left leg. He fell down, his gun was snatched and he was thrown in the bamba. If PW-1 Ram Swaroop is treated to be an interested witness then there was every possibility for him to extend his statement up to the stage that he had seen accused committing the murder of the deceased Amar Nath and Mahendra Nath but this witness has not stated a single word about the murder of Amar Nath and Mahendra Nath, rather he stopped himself at the stage when he was thrown away in the bamba. Subsequently, somehow he reached near a tree which was about 25 to 30 steps from the bamba. Thereafter, he got unconscious there. PW-1 Ram Swaroop has specifically stated that when he gave the statement before the Magistrate he was in great pain so he cannot exactly remember as to what weapon Raju was carrying but this witness has specifically denied the fact that all the accused was carrying fawra.

48. Referring to the judgment of the Constitution Bench of Apex Court in ***Laxman versus State of Maharashtra, (2002)6 SCC*** , it was held in ***Vijay Pal versus State (Government of NCT Delhi) 2015 (4) SCC 749*** that :-

"19. The aforesaid judgment makes it absolutely clear that the dying declaration can be oral or in writing in any adequate method of communication whether by words or by signs or otherwise will suffice provided the communication is positive and definite. There cannot be any cavil over the proposition that a dying declaration cannot be mechanically relied upon. In fact, it is the duty of the court to examine a dying declaration with studied scrutiny to find out whether the same is voluntary, truthful and made in a conscious state of mind and further it is without any influence."

49. All the accused persons namely Raju armed with farsa, Manna armed with gadasa, Munai alias Kashi Prasad armed with countrymade pistol, Rajan Misra armed with banka, Pyare Kurmi armed with countrymade pistol, Pappu alias Shivmangal armed with gun and Jagroop are named in the first infromation reprot which was lodged promptly within an hour of the incident. Statement given by the witness PW-1 Ram Swaroop before the Additional City Magistrate assumes importance to the extent of its being a previous statement of the witness. This statement although bears his signatures but could only be used for corroboration or contradiction. When the witness himself is stating that he was having great pain at the time of giving the statement which was recorded on the very next day of incident, i.e., 10.02.1979 in the morning on 10:55 AM. Injuries of witnesses are grave in nature. In such circumstances even if some discrepancies are there they

cannot be made basis for the disbelieving the prosecution version. Further statement of the witness under section 161 Cr.P.C. was also recorded by the Investigating Officer after nine days of the incident wherein witness has stated the whole story but no portion of the statement recorded under section 161 Cr.P.C. has been put to the witness to discredit his trustworthiness.

50. PW-1 Ram Swaroop was carrying his licensed gun at the time of incident which was snatched by the accused Jagroop. Thereafter he was attacked by farsa by accused Raju and thrown to bamba. We do not find any discrepancy in the statement of the witness to discredit his testimony or to find hsi presence at the spot doubtful. Hence, we are of the view that statement of PW-1 Ram Swaroop is fully reliable.

51. Second part of the incident begins after PW-1 Ram Swaroop was attacked and thrown to bamba thereafter deceased Mahendra Nath and Amar Nath were assaulted and fired which hit Amar Nath alias Suman and they were also attacked by the accused by their respective weapons causing incised wounds on their body resulting in their death. In order to prove this incident, PW-4 Ram Singh is produced. His temtimony is challenged on the ground that he is a chance witness. As he has stated that he went to Safipur to bring cement from Rajan while in the statement given to the Investigating officer he has said that he went to Safipur in order to find cement. It is further submitted that presence of this witness is doubtful as he is a teacher by profession. Timing of school are from 10:00 AM to 04:00 PM. On the fateful day this witness should have been in his school but he has stated that he took a short leave of two hours from his principal and left at 02:00 PM from his school. Thereafter, he went to Safipur. From Safipur he reached at Hulasi bus stand. When he reached near the place of occurrence about 100 steps ahead he heard the sound of firing thereafter he saw the accused attacking the deceased. He has further stated that he has not seen the fawra with any accused.

52. If we scritinize the statement of PW-4 Ram Singh we found that he was going back to his village from Safipur. He got down at Hulasi Kuwan and from there he proceeded towards his house on foot. After about two furlongs near Ugu Minor at about 06:00 PM he saw Jagroop and Pappu armed with guns Munai and Pyare armed with countrymade pistols and were saying that "Hkkxus uk ik;s tku ls ekj nks A" He saw that Raju by farsa, Manna by gadasa and Rajan by banka were attacking Suman and Babua. Prior to this he has heard the sound of three fires. At that time Hari Om alias Padam Nath, Ram Sewak and Buche alias Usman were also present there. Manna alias Ram Swaroop was found in the injured condition on the back of a tree.

53. It was held by the Hon'ble Apex Court in the case of ***Thangaiya vs. State of T.N. (2005)9SCC 650*** that :-

"8. ..... If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence

elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. ……..

(emphasis added)

54. PW-4 Ram Singh has stated that he went to Safipur to bring cement from Rajan. He had a talk with him regarding cement three to four days ago. There is a contradiction in the statement given by this witness to the Invesigating Officer wherein it is stated that he has gone to Safipur in search of Cement. PW-4 Ram Singh has further stated that he was in need of cement from the last six months. Rajan belongs to his own village. He told him that he has got a cement permit and he will give him cement out of that. On this score it is argued that the witness is a chance witness. It is further argued that he is a school teacher who should have been in the school at the time. He never went to Safipur and is deposing a false statement. PW-4 Ram Singh has no enmity with the accused. Defence tried to establish enmity by putting a suggestion that a murder trial of Dharmu chamar was instituted against PW-4 Ram Singh and his father wherein Ram Autar who is servant of accused jagroop has deposed against him. This fact is denied by the witness. Defence has failed to bring any evidence on record to prove any enmity of PW-4 Ram Singh with the accused. In the circumstnces, there is no reason as to why PW-4 Ram Singh will depose against the accused.

55. Further one fact is established from the evidence of PW-4 Ram Singh that he went to Safipur in search of cement. Even if he was trying to meet Rajan, that too was for the purpose of sucuring cement which was needed by Ram Singh PW-4. This fact is established that he went to Safipur to bring the cement. There might be some discrepancy as to whether he had a talk earlier with Rajan about the cement but this itself is not sufficient to discredit the statement of the witness. Further PW-4 Ram Singh has given a specific statement that on the fateful day he left his school at 2:00 PM and went to Safipur from where he was coming back to his house when he saw the incident. Nothing could be brought on record to disbelieve this statement. Although it is true that it is burden of the prosecution to prove the guilt against the accused beyond reasonable doubt but when prosecution has successfully discharged its burden and defence intends to discredit the evidence of the particular witness then the veracity of the testimony of the witness should have been demolished by the defence. In the present case so far as the question of PW-4 Ram Singh going to Safipur and coming back from Safipur to his house at the time of incident is concerned it is fully established that the witness PW-4 Ram Singh went to Safipur and was coming back to his house when he saw the incident, hence, we hold that PW-4 Ram Singh is not a chance witness.

56. PW-4 Ram Singh has stated that when he was about to reach near Ugu Minor he heard sound of three fires. He has seen Munai, Pyare, Jagroop and Pappu armed with firearms while Raju Manna and Rajan were attacking Suman and Babua by farsa, gadasa and banka respectively. There is one contradiction in the statement given by this witness to the Investigating Officer and the statement in the Court about the number of fires. In the statement of Investigating Officer hearing of fire is mentioned while in the Court the number is mentioned as three. This is not a such material contradiction which goes to the route of the matter. It is submitted that when Ram Singh PW-4 was also present there and also seen the occurrence then why he was not attacked by the accused. We do

not find any force in the argument as the accused were not having any enmity with Ram Singh so as to why he should have been attacked by them. PW-4 Ram Singh has stated that he had seen Manna alias Ram Swaroop in injured unconscious condition behind a tree. An attempt is made by making a mathematical calculation of the time spent by the witness PW-4 Ram Singh at the spot to show that the first information report which was proved by this witness was not lodged at 07:00 PM. PW-4 Ram Singh has stated that he stayed with Manna for twenty minutes. Thereafter, he was sent to hospital thereafter he came back at the place where deceased were lying. Thereafter, information was sent to the house of deceased within 25 minutes. Family members came there. PW-4 Ram Singh stayed there for an hour. So far as FIR is concerned complainant Padam Nath Shukla was also accompanying deceased and injured. So even if the family members of deceased came there was ample time for Padam Nath to write the written report. Hence, we do not find any time gap which can show that the report was lodged ante time.

57. We hold that the evidence of PW-4 Ram Singh is fully reliable. He had seen the incident of murder of Amar Nath alias Suman and Mahendra Nath alias Babua. He has given a truthful statements of facts before the Court. His presence at the time of occurrence is fully established.

58. Another argument is raised that dog squad was called which shows that the identity of the accused could not be fixed. PW-7 SI Vivekanand also admitted that the dog squad was called at the spot but merely calling of the dog squad could not be a ground to believe that the identity of the accused was not established. No clarification was sought from the Investigating Officer as to why dog squad was called. Unless and until an opportunity is given to a witness to explain part of his statement could not be believed. It might be possible that dog squad was called to trace out the accused who was named in the first information report. We do not find any force in the argument.

59. Learned counsel for the accused- appellant argued that according to the prosecution version fires were shot at Mahendra Nath as well as Amar Nath but no injury of any firearm was found on the body of Mahendra Nath, hence, it belies the prosecution version. Admittedly, according to the postmortem report no firearm injury was found on the body of Mahendra Nath. According to the first information report it is stated that Pappu alias Shiv Mangal has fired upon Babua who fell down, thereafter, when Suman alias Amar Nath tried to help Babua then Pyare by countrymade pistol and Pappu by gun fired upon Suman alias Amar Nath which shot hit Suman alias Amar Nath on the chest and right side of abdomen. PW-4 Ram Singh has stated that he heard the sound of fire. When he reached near Ugu Minor he saw Jagroop and Pappu armed with guns, Munai and Pyare armed with countrymade pistol. Injuries of sharp edged weapon were also found on the body of both the deceased i.e., Amar Nath and Mahendra Nath. Chain of circumstances exclusively shows that the presence of the accused person at the spot is fully established by the evidence of PW-4 Ram Singh as well as PW-1 Ram Swaroop. Hence, we do not find any contradiction or discrepancy in the statement of witnesses as well as in the first information report.

60. PW-2 Usman Ali was also accompanying the deceased and injured Ram Swaroop when they were coming back from Unnao. This witness has initially supported the prosecution version to

the extent that presence of this witness alongwith Ram Swaroop alias Manna who is injured coupled with deceased at the time of occurrence is stated. Further he stated that Manna alias Ram Swaroop was attacked by baka, farsa and gadasa and Babua and Suman were also killed but at the same time this witness has not named the accused so he was declared hostile by the prosecution. It is further stated by this witness in his cross-examination that at the time of incident although it was sunset but there was light of the day. This witness has also stated the place of occurrence. Further he has stated that the accused have formed one party and he is under pressure of the accused and afraid of them. It is admitted by him that he is not deposing against the accused because if he will depose against them he would also be killed. He was confronted with his statement under section 161 Cr PC recorded by the Investigating Officer and he accepted that he has given the statemetn implicating the accused appellant in the commission of the crime. This witness was cross-examined by the defence. Admittedly, this witness was also a witness in the case of murder of Paras Nath. He was co-accused alongwith Suman in the case of murder of Ramjan. It is admitted by him that he has not given any application regarding any threat from the accused. It is admitted by this witness that he has good relations with Paras Nath and his sons that is why he used to go with Suman for pairavi of his cases. It is further stated by this witness that when fires were made he was about 10 to 15 steps away. He could not state as to who was firing upon whom.

61. In ***State of U.P. v. Ramesh Prasad Misra and Anr. (1996) 10 SCC 360***, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Sarvesh **Narain Shukla v. Daroga Singh and Ors. (2007) 13 SCC 360 ; Subbu Singh v. State by Public Prosecutor (2009) 6 SCC 462 ; C. Muniappan and Ors. v. State of Tamil Nadu (2010) 9 SCC 567; and Himanshu @ Chintu v. State (NCT of Delhi) (2011) 2 SCC 36**.

In the case of ***Vinod Kumar Vs. State of Punjab reported in (2015) 3 SCC 220*** Hon'ble the Apex Court has held in paragraph no. 31 as under:-

"31. ..... In ***Bhagwan Singh v. State of Haryana (1976) 1 SCC 389***, it has been laid down that even if a witness is characterised has a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. In ***Khuji @ Surendra Tiwari v. State of Madhya Pradesh (1991) 3 SCC 627***, the Court after referring to the authorities in Bhagwan Singh (supra), ***Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233 and Syad Akbar v. State of Karnataka (1980) 1 SCC 30***, opined that the evidence of such a witness cannot be effaced or washed off the record altogether, but the same can be accepted to the extent it is found to be dependable on a careful scrutiny thereof. "

62. Evidence of hostile witness cannot be discarded as a whole. Such portion of the evidence can be relied upon which inspires confidene and supporting the prosecution version. In the present case, if we scrutinize the statement of PW-2 Usman Ali very carefully then we find that he

has correctly narrated the place of occurrence, time of occurrence. Presence of Ram Swaroop is also established from the statement of Usman Ali. Further presence of both the deceased at the spot is also proved. So far as the question of attack by the accused are concerned, initially the witness has not named the accused but in the cross-examination he has admitted that due to the fear of accused he could not state their names. Even if we discard this much portion of his evidence thenthe remaining facts regarding time place injuries of deceased and injured are concerned they have been proved by this witness which fully corroborates and supports the prosecution version.

63. Another argument was raised that the statement of PW-4 Ram Singh was recorded after three days while PW-4 Ram Singh has stated that he was present at the spot when police came. Further Investigating Officer has stated that he could not record the statement of eyewitness in the night as no eyewitness was available at that time and he was busy in preparing inquest report. PW-4 Ram Singh has nowhere stated that Investigating Officer met him in the night so even if his statement was recorded after three days it does not adversely affect the prosecution version. It was argued that the Investigating Officer has not made any attempt to find out as to whether any case under section 25 of Arms Act of Suman was fixed at the Court of Unnao. It is further submitted that the Investigating Officer has not carried the investigation in accordance with law.

64. We have gone through the statement of PW-7 SI Vivekanand, Investigating Officer, who has stated that he was present at the Ugu outpost when he got the information of this case at about 6:15 PM. Information was given by villagers. On getting the information he reached at the spot. Thereafter, he received the papers of this case alongwith the first information report at about 08:00 of 08:30 PM. He started preparing inquest report at 08:30 PM but no eyewitness was present there. It is further stated by him that he did not think it proper to inquire about the case under section 25 Arms Act. So far as case under section 25 Arms Act is concerned even if no inquiry was made by the Investigating Officer about that case it can be said to be a defect of the investigation but presence of the injured as well as deceased alongwith PW-4 Ram Singh at the place of occurrence is fully established by the ocular evidence on record. We do not find any reason to disbelieve the statement of PW-1 Ram Swaroop and PW-4 Ram Singh. It is settled legal position that any defect in the investigation cannot extend any benefit in favour of the accused unless and until it is proved that prejudice was caused to him.

65. In ***Dayal Singh and others vs. State of Uttranchal 2012 (3) J.I.C. 428*** Hon'ble Supreme Court propounded the law on defective or faulty investigation. It was held that -

"The investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known reasons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can some times prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it."

"Declaration in duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an sabuse of discretion. This Court in the case of State of Punjab & Ors. Vs. Ram Singh Ex. Constable [(1992)4 SCC 54 : (AIR 1992 SC 2188 : 1992 AIR SCW 2595)] stated tht the ambit of these expressions had to be construed with reference to the subject-matter and the context where the terms occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialized persons. The polce manual and even the provisions of the Cr.P.C. Require the investigation to be conducted in a particular manner and method which, in our opinion, stands clearly violated in the present case. ..... Also, in the same case, the court, while referring to the decision in Ram Bihari Yadav and others vs. State of Bihar & Ors. [(1995) 6 SCC 31 : (AIR 1996 SC 122 : 1995 AIR SCW 3810)] noticed that if primacy is given to such designed or negligent investigation, to the omission of lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice."

"In the case of Sathi Prasad vs. The State of U.P. [(1972) 3 scc 613 : (AIR 1973 SC 448)], this court stated that it is well settled that if the polic records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in the court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in the case of Dhanaj Singh alias Shera & Ors. Vs. Stateof Punjab [(2004) 3 SCC 654 : (AIR 2004 SC 1920 : 2004 AIR SCW 1609)], held, "in the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tentamount to playing into the hands of the investigating officer if the investigation is designedly defective."

"The court in the case of Paras Yadav vs. State of Bihar [AIR 1999 SC 644 : (1999 AIR SCW 296)], enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is rquired to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should nto stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party"....." Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be ensure needs of the society. On the contrary, efforts should be ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as

much important if not more, as the interest of the individual accused. The courts have a vital role to play."

66. PW-7 Investigating Officer Vivekanand has stated that he reached at the spot at 06:15 on receiving information from number of persons about the incident. First information report of the case was lodged at 07:00 PM. Investigation officer got the papers including first information report at about 08:00 to 08:30 PM. It cannot be said as has been held in the earlier part of the judgment that the first information report is ante-time. It may so happen that when two murders have been committed and there was a hue and cry as is evident from the evidence of the witness than after the incident people from Jasra side also came and fired so definitely in such a hue and cry if information is received at the police outpost and police reached at the spot it does not vitiate the first information report or makes the FIR of the case doubtful.

67. Prosecution has successfully proved the charges against the accused. Evidence of PW-1 Ram Swaroop and PW-4 Ram Singh is fully reliable. Learned trial court has right appreciated the evidence on record and recorded a finding of conviction against the accused. We are of the considered view that the judgment of the learned trial court is based on the evidence on record. Accordingly, we are of the view that the appeal lacks merit and is liable to be dismissed and judgment and order of the learned trial court is to be confirmed. Accordingly, appeal is dismissed. Judgment and order of the learned trial court is confirmed. Accused are on bail. Their bail is cancelled and sureties are discharged. They shall be taken into custody to serve out the sentence as imposed by the learned trial court.

68. 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. Learned trial court shall send the compliance report within a period of six weeks from the date of receipt of the copy of the judgment.

(2016) 9 ILRA 1376
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 2916 Of 2016

U.P.S.R.T.C. **...Appellant**
Versus
Shyam Bihari & Ors. **...Respondents**

Subject Matter

Motor Vehicles Act, 1988 - Section 173 - Compensation for death in motor accident - Addition towards future prospects in case of deceased in private employment on fixed wages, whose regular monthly salary was not established - U.P. Motor Vehicles Rules, Rule 220-A (as inserted by notification dated 26.09.2011) - Whether the age-based slabs for addition of future prospects under Rule 220-A apply irrespective of whether the deceased was salaried, self-employed, or on fixed wages, and irrespective of the pendency of the reference in National Insurance Co. Ltd. Vs. Pushpa, (2015) 9 SCC 166 - Held, yes; appeal dismissed in limine.

Facts

The Motor Accident Claims Tribunal/Special Judge (E.C. Act)/Additional District Judge, Azamgarh, by judgment and award dated 07.05.2016, awarded a sum of Rs. 7,03,500/- with simple interest at 6% per annum as compensation for the death of one Sunil Singh in an accident involving a bus belonging to the appellant, U.P. State Road Transport Corporation. The Tribunal found the deceased to be in the age group of 20-25 years and technically qualified, and accordingly added 50% of his determined income towards future prospects, in terms of Rule 220-A(3)(i) of the U.P. Motor Vehicles Rules. The Corporation preferred the present appeal under Section 173 of the Motor Vehicles Act, confining its challenge to the grant of future prospects, on the ground that the deceased was in private employment on fixed wages and the claimants had failed to establish his regular monthly salary, and further contending that the question of grant of future prospects to self-employed persons or those on fixed wages stood referred to a larger Bench of the Supreme Court in National Insurance Company Vs. Pushpa, S.L.P. (C) No. 16735 of 2014, vide order dated 02.07.2014.

Issue

Whether the Tribunal erred in awarding addition towards future prospects to the estate of a deceased who was in private employment on fixed wages and whose regular monthly salary was not established by the claimants, particularly having regard to the pendency of a larger Bench reference on the point before the Supreme Court.

Held

The question of addition towards future prospects for a self-employed person or one on fixed wages has evolved through a line of Supreme Court decisions - Sarla Verma (Smt.) & Ors. Vs. Delhi Transport Corporation & Anr., (2009) 6 SCC 121 (limiting addition to actual income save in rare and exceptional cases); Santosh Devi Vs. National Insurance Company Ltd. & Ors., (2012) 6 SCC 421 (holding a 30% addition warranted even for the self-employed/fixed-wage category, given the universal effect of rising cost of living); Reshma Kumari & Ors. Vs. Madan Mohan & Anr., (2013) 9 SCC 65 (a three-Judge Bench standardizing addition at 50% for permanent employees below 40 years and 30% for those between 40-50 years, but declining any addition for the self-employed/fixed-wage category); and Rajesh & Ors. Vs. Rajbir Singh & Ors., (2013) 9 SCC 54 (another three-Judge Bench extending age-based addition of 50%/30%/15% to the self-employed and fixed-wage category as well). These conflicting views of Benches of equal coram led to the reference in National Insurance Co. Ltd. Vs. Pushpa, (2015) 9 SCC 166, which remains pending before a larger Bench. However, the pendency of that reference does not impede adjudication in the present case, since the State of U.P. has, by notification dated 26.09.2011, introduced Rule 220-A in the U.P. Motor Vehicles Rules, prescribing addition towards future prospects on a graded age basis - 50% below 40 years, 30% between 40-50 years, 20% above 50 years, and 50% towards inflation/price index where wages are not sufficiently proved - without drawing any distinction between salaried, self-employed, or fixed-wage deceased persons. As the accident in the present case occurred on 18.01.2013, after the Rule came into force, it applied with full force. The Tribunal, having found the deceased to be in the 20-25 years age group and technically qualified, correctly added 50% towards future prospects strictly in accordance with Rule 220-A(3)(i). The sole ground urged by the appellant therefore did not merit consideration, and no other ground was pressed.

Result

Appeal dismissed in limine as bereft of merit. No order as to costs.

Case Law Referred

Sarla Verma (Smt.) & Ors. Vs. Delhi Transport Corporation & Anr., (2009) 6 SCC 121;
Santosh Devi Vs. National Insurance Company Ltd. & Ors., (2012) 6 SCC 421;
Reshma Kumari & Ors. Vs. Madan Mohan & Anr., (2013) 9 SCC 65;
Rajesh & Ors. Vs. Rajbir Singh & Ors., (2013) 9 SCC 54;
National Insurance Co. Ltd. Vs. Pushpa, (2015) 9 SCC 166 (reference pending).

(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 U.P. State Road Transport Corporation challenging the judgment and award dated 07.05.2016 passed by Motor Accident Claims Tribunal/Special Judge (E.C. Act)/Additional District Judge, Azamgarh awarding a sum of Rs.7,03,500/- with simple interest at the rate of 6% per annum as compensation on death of one Sunil Singh in an accident involving the bus of the appellant.

2. Sole ground pressed before us, during the course of argument, is that Tribunal has wrongly awarded future prospect, even though the deceased was in private employment working on fixed wages and the claimants failed to establish his regular monthly salary. It is further submitted that the question of grant of future prospect to self-employed or person working on fixed wages, has been referred for adjudication to a larger Bench in the case of **National Insurance Company Vs. Pushpa**, S.L.P. (C) No. 16735 of 2014 vide order dated 2nd July, 2014.

3. The question of grant of future prospect, in cases, where the deceased was self-employed or was drawing a fixed salary, has been drawing the attention of the Hon'ble Apex Court in various cases. In the case of **Sarla Verma (Smt.) & Ors. Vs. Delhi Transport Corporation & Anr., (2009) 6 SCC 121**, the Hon'ble Apex Court while dealing with the issue of addition of income of future prospect, in paragraph 24 of the reports observed that where the deceased was self employed or was on a fixed salary (without provision for annual increments etc.), the Courts would only take annual income at the time of death and the departure therefrom shall be made only in rare and exceptional cases including special circumstances. Subsequently, in the case of **Santosh Devi Vs. National Insurance Company Ltd. & Ors., (2012) 6 SCC 421**, referring to paragraph 24 of the judgment in the case of **Sarla Verma** (supra), Hon'ble Apex Court observed as under.

"14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma's case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naive to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.

15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self- employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families.

16. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lac.

17. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and

the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

18. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes the victim of an accident then the same formula deserves to be applied for calculating the amount of compensation."

4. In the case of **Reshma Kumari & Ors. Vs. Madan Mohan & Anr., (2013) 9 SCC 65**, a three Judges Bench of the Hon'ble Apex Court was constituted on a reference made by a two Judges Bench. One of the referred question was as under.

"Whether for determination of the multiplicand, the 1988 Act provides for any criterion, particularly as regards determination of future prospects?"

5. The issue was answered in paragraph 39 and 43 of the report, which reads as under.

"39. The standardization of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. We approve the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more than 50 years. Where the annual income is in the taxable range, the actual salary shall mean actual salary less tax. In the cases where the deceased was self-employed or was on a fixed salary without provision for annual increments, the actual income at the time of death without any addition to income for future prospects will be appropriate. A departure from the above principle can only be justified in extraordinary circumstances and very exceptional cases.

43. While making addition to income for future prospects, the Tribunals shall follow para 24 of the judgment in **Sarla Verma.**"

6. Again in the case of **Rajesh & Ors. Vs. Rajbir Singh & Ors., (2013) 9 SCC 54**, a three Judges Bench of Hon'ble Apex Court held that in case of self-employed or persons with fixed wages where the victim was below 40 years of age, there must be an addition of 50% to the actual income while computing the future prospect. In case, where the deceased was in the age group of 45 to 50 years, addition should be 30%. However, in case, where the deceased is between the age group of 50 to 60 years, there should be an addition of 15% towards future prospect. It may be relevant to quote from paragraphs 8 and 9 from the said report, which reads as under.

"8. Since, the Court in **Santosh Devi** case actually intended to follow the principle in the case of salaried persons as laid down in Sarla Verma case and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.

9. In **Sarla Verma** case, it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter."

7. Subsequently, noticing aforesaid conflicting views in the case of **Rajesh** (supra) and **Reshma Kumari** (supra) by a Bench of equal coram, the issue was referred for adjudication by a larger Bench in the case of **National Insurance Co. Ltd. Vs. Pushpa, (2015) 9 SCC 166**, vide order dated 02.07.2014.

8. Thus, this issue is still pending adjudication by a larger Bench. However, the conflicting views expressed by two Benches of equal coram and pendency of reference will not stand in the way in proceeding with the matter, inasmuch as the State of U.P. has introduced Rule 220-A in the Motor Vehicles Rules vide notification dated 26.09.2011 providing for future prospect to be added in actual salary or minimum wages of the deceased. It may be relevant to produce relevant part of Rule 220-A of the Rules.

"**220-A. Determination of compensation.** –

(1) .....

(2).....

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under -

(i) Below 40 years of age : 50% of the salary,

(ii) Between 40-50 years of age : 30% of the salary.

(iii) More than 50 years of age : 20% of the salary.

(iv) When wages not sufficiently proved : 50% towards inflation and price index."

9. A perusal of the Rule goes to show that it does not make any distinction between the self-employed or salaried person. Further the Rule was introduced in Statute book vide notification dated 26.09.2011 and admittedly the accident, in the case in hand, took place on 18.01.2013, i.e., after enforcement of Rule 220-A, and thus, the same stands attracted with full force.

10. The Tribunal found that the deceased was falling between the age group of 20-25 years and was technically qualified and, thus, added 50% of the income, of the deceased determined by it, towards future prospect, which is strictly in accordance with the Rule 3 (i) of Rule 220 A of the Rules.

11. In view of aforesaid facts and circumstances, the sole ground urged before us does not enure to any benefit of the appellant and the arguments advanced in support of the said ground do not merit any consideration. No other ground was pressed before us.

12. The appeal, thus, being bereft of merit, stands dismissed in limine.

13. However, in the facts and circumstances, we do not make any orders as to costs.

(2016) 9 ILRA 1382
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No.- 2960 Of 2016

Anokhey Lal Saini **...Revisionist**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Revisionist:
Krishna Kumar Singh

Counsel for Opposite Parties:
G.A.

Subject Matter
Negotiable Instruments Act, 1881 - Section 138 - Criminal revision against concurrent conviction of trial court and lower appellate court - Scope of interference with concurrent findings of fact in revisional jurisdiction - Sentencing in summons trial cases - Absence of specific hearing on quantum of sentence - Mitigation of sentence considering absence of criminal antecedents, advanced age, employment in jeopardy, and part-undergone incarceration - Held, conviction confirmed; sentence of imprisonment modified to period already undergone, subject to enhanced default sentence on fine, while quantum and distribution of fine retained.

Facts
In Complaint Case No. 1333 of 2014 (Vibhor Agrawal Vs. Anokhey Lal Saini), the Additional Chief Judicial Magistrate, Court No. 6, Moradabad, by judgment dated 18.4.2016, convicted the accused Anokhey Lal for an offence under Section 138 of the Negotiable Instruments Act, sentencing him to six months' simple imprisonment and a fine of Rs. 2,00,000/- (with a further two months' simple imprisonment in default of payment), directing that Rs. 1,90,000/- of the fine be paid to the complainant and the remaining Rs. 10,000/- to the State Government. The accused's appeal, Criminal Appeal No. 63 of 2016 (Anokhey Lal Vs. State of U.P. and Another), was dismissed by the Sessions Judge, Moradabad, by judgment dated 9.9.2016. The present revision was preferred against the judgments of both the trial court and the lower appellate court.

Issues
1. Whether the concurrent findings of the trial court and the lower appellate court holding the charge under Section 138 N.I. Act proved against the revisionist warranted interference in revisional jurisdiction.
2. Whether the sentence of six months' simple imprisonment, imposed without any specific hearing on the point of sentence (as is not mandated in summons trial cases), was liable to be mitigated having regard to the revisionist's advanced age, absence of criminal antecedents, government employment placed in jeopardy by the conviction, and period already undergone in custody.

Held

The concurrent findings of fact recorded by the trial court and the lower appellate court, arrived at after appreciation of evidence and due application of judicial mind, are not to be disturbed in revisional jurisdiction merely because another view is possible on the same evidence, especially where such findings are neither infirm nor perverse. The conviction under Section 138 N.I. Act was accordingly confirmed. On the question of sentence, since the case was a summons trial, the accused was not entitled, as a matter of right, to a separate hearing on quantum of sentence as would be available in warrant or sessions triable cases; the absence of discussion on sentencing reasons by the courts below was attributable to this, and to the fact that submissions on sentence were not specifically pressed before them. The cardinal principle of sentencing requires that punishment be proportionate to the gravity of the offence, having regard to the facts, the manner of commission, motive, conduct of the accused, and the interests of both the victim and society, and undue sympathy resulting in inadequate sentence undermines public confidence in the efficacy of law. Nevertheless, on the facts of the present case - absence of criminal history, advanced age of the revisionist, his government service and family responsibilities, the jeopardy to his employment consequent upon conviction, the fact that the cheque was issued towards repayment of a loan, the period of over two weeks already undergone in custody, and his willingness to deposit the amount due - these were held to be relevant mitigating factors warranting modification of the sentence of imprisonment, subject to deposit of the fine amount awarded by the trial court.

Result

Revision partly allowed. Conviction of the revisionist Anokhey Lal in Complaint Case No. 1333 of 2014 under Section 138 N.I. Act confirmed. Sentence of imprisonment modified to the period already undergone; fine of Rs. 2,00,000/- retained, in default of payment whereof the revisionist shall undergo additional imprisonment of four months. Of the amount recovered, Rs. 1,90,000/- to be paid to the complainant as compensation and the remainder to the State Government. Office directed to send a copy of the order to the trial court for compliance.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard Sri K.K.Singh, and Sri M.B Mathur, learned counsels for the revisionist, learned AGA for opposite party no.-1 State, Sri Rajesh Yadav, Advocate who has filed vakalatnama on behalf of opposite party no. 2, and perused the records.

2. Criminal complaint case no. 1333 of 2014 (Vibhor Agrawal Vs. Anokhey Lal Saini) was filed by complainant. The trial was concluded, after affording opportunity of hearing to accused the Additional Chief Judicial Magistrate, Court No. 6, Moradabad had convicted the accused Anokhey Lal for charge under section 138 N.I. Act by judgment dated 18.4.2016, and sentenced him with simple imprisonment of six months and fine of Rs. 2,00,000/- (in default of payment of fine, two months additional simple imprisonment). Trial court had also directed that from the amount of fine, Rs. 1,90,000/- will be paid to complainant and remaining Rs. 10,000/- would go to State Government.

3. Against the judgment of trial court, criminal appeal no.63 of 2016 (Anokhey Lal Vs. State of U.P. and Another) was preferred, which was heard and dismissed by the judgment dated 9.9.2016 of Sessions Judge, Moradabad.

4. Against the judgments of trial court as well as lower appellate court, present revision has been preferred.

5. Learned counsel for the revisionist contended that from evidences, the prosecution case was not proved, therefore the revision should be allowed. His alternative argument was that since it is first fault of revisionist, who has no other criminal history and he is an old man, the punishment of six months' imprisonment is on higher side, therefore, this sentence should be modified and mitigated.

6. So far contentions of revisionist side on point of proof of charges are concerned, from perusal of record, it appears that there has been concurrent finding of trial court as well as lower appellate court that charges against revisionist Anokhey Lal relating to allegations of section 138 N.I. Act are proved. These findings were given by lower courts after appreciation of evidences and after using judicial mind. By such appreciation of evidences, after discussing the arguments of defence side, the lower courts had reached to conclusion that prosecution case was proved. Such concurrent finding should not be interfered in revision for the reason that on those evidences there may be probability of reaching to a conclusion different from that of trial court, especially when the findings of lower courts are not infirm or perverse. Therefore, judgments on point of conviction are confirmed.

7. This contention of learned counsel for the revisionist is found acceptable that appropriate reasons were not discussed by trial court or lower appellate court at the time of passing sentence. But the reason of this may be that being summons case, accused-revisionist was not entitled for right of hearing on point of quantum of sentence like that of warrant cases or sessions triable cases. It also appears that at the time of argument before trial court or lower appellate court, contentions on point of sentences were not placed before concerned courts.

8. The cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration. The undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

9. Although, in summons trial cases, no specific provision is there for hearing on point of sentence, but it is always appropriate that in interest of justice, trial courts should consider relevant factors, which may have effect on quantum of sentence. These points are being considered at this stage.

10. There has been no criminal history of the revisionist. It is also found that although revisionist is a elderly man, and also and has his family to maintain. He is in government service, and after this conviction his employment is at jeopardy. He had issued the cheque for repaying the amount of loan due against him. He is in jail for about more than two weeks. These points should be considered for mitigating his sentence. Apart from it, the counsel for the revisionist informs that revisionist is ready and willing to pay amount due against him and sentence of imprisonment may be mitigated. After considering these facts, it appears appropriate that after deposition of amount of fine awarded by trial court, his sentence of imprisonment is modified for sentence already undergone.

11. On the basis of above discussion, this revision is partly allowed. The conviction of revisionist Anokhey Lal in Complaint Case No. 1333 of 2014 is confirmed, but his sentence is modified. His imprisonment for the charge under section 138 N.I. Ac is modified to period already undergone by this time, and fine of Rs. 2,00,000/-. In default of payment of which, he will undergo additional imprisonment for four months. From the amount recovered from revisionist Rs. 1,90,000/- will be paid to complainant as compensation, and remaining amount would go to State Government.

12. Office is directed to immediately send the copy of this order to trial court for compliance.

(2016) 9 ILRA 1386
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Appeal No.- 4840 Of 2005
&
Criminal Appeal No.- 4168 Of 2005

Kallu Kahar **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for Appellant:
Brij Raj Singh, Dashrath Prasad, Kaushlendra Kr. Yadav

Counsel for Respondent:
Govt. Advocate

FACTS

Both appeals were preferred against the judgment and order dated 15.9.2005 passed by the Additional Sessions Judge, F.T.C. No. 4, Banda in Sessions Trial No. 60 of 2005 (State v. Kallu Kanchhi and Kallu Kahar), arising out of Case Crime No. 139 of 2004, under Sections 452, 376, 504, 506 I.P.C., P.S. Giranwa, District Banda. The trial court convicted appellant Kallu Kanchhi under Section 114 I.P.C., sentencing him to five years' rigorous imprisonment and a fine of Rs. 3,000/-, and convicted appellant Kallu Kahar under Sections 376 and 450 I.P.C., sentencing him to ten years' rigorous imprisonment with a fine of Rs. 6,000/- under Section 376 I.P.C., and five years' rigorous imprisonment with a fine of Rs. 3,000/- under Section 450 I.P.C., with default clauses.

As per the F.I.R. lodged by the prosecutrix on 21.8.2004, on 12.8.2004 at about 10:00 p.m., while she was sleeping alone in her house — her husband being away in Punjab for work — the accused-appellants, armed with firearms, allegedly entered her house by unbolting the door-kundi from outside, overpowered her, and while Kallu Kanchhi stood guard with a pistol, Kallu Kahar committed rape on her. On her alarm after the accused fled through the rear door, her Jeth (brother-in-law) Raj Bahadur and Jethani (sister-in-law) Munni Bai, along with villagers, allegedly arrived and saw the accused leaving the house.

The prosecution examined Raj Bahadur (P.W.-1), the prosecutrix (P.W.-2), the Medical Officer (P.W.-3), a Head Constable (P.W.-4), and the Investigating Officer (P.W.-5). The defence filed documentary evidence of an earlier acquittal of Kallu Kanchhi and others in Case Crime No. 101 of 1987, and contended that the prosecutrix was in an illicit relationship with P.W.-1, that the F.I.R. was lodged after an unexplained delay of nine days, that the medical examination (conducted ten days after the incident) revealed no injury, and that material witnesses — including the prosecutrix's husband, mother-in-law, and independent villagers who allegedly witnessed the occurrence — were not produced.

ISSUES FOR CONSIDERATION

(i) Whether the unexplained delay of nine days in lodging the F.I.R., despite the husband's arrival at the village one day after the incident, was fatal to the prosecution case.
(ii) Whether the mode of entry and exit of the accused, and their alleged conduct of remaining stationed near the scene until identified by witnesses, was natural and probable.
(iii) Whether the testimony of the prosecutrix and P.W.-1 (her Jeth), being closely interested witnesses with an alleged motive of enmity and illicit relationship, could be relied upon in the absence of independent corroboration.
(iv) Whether the non-production of the prosecutrix's husband, mother-in-law, the village Pradhan, and other persons who allegedly witnessed the accused near the scene warranted an adverse inference against the prosecution.
(v) Whether the medical evidence, which revealed no injury on examination conducted ten days after the incident, supported or contradicted the prosecution's version.
(vi) Whether any evidence existed to sustain the charge of abetment under Section 114 I.P.C. against appellant Kallu Kanchhi.

HELD

The Court held that although the sole testimony of a prosecutrix can, in principle, sustain a conviction for rape, such testimony — where the witness is an interested party — must be scrutinised with care and caution, and tested against the probabilities of the case. On analysis of the record, the Court found the prosecution version highly improbable: the accused's choice of the longer, more exposed route of entry over an available shorter and lonelier route was implausible; unbolting an inside chain-kundi from outside was found physically improbable; the conduct of the accused in remaining stationed near the scene, risking identification, rather than fleeing or concealing themselves in their adjoining house, was found unnatural; the timeline of events — including the time required for the prosecutrix to compose herself, for P.W.-1 and his wife to wake, cross to the house, and arrive at the spot — did not support the version that the accused were seen standing at the location; and the delay in lodging the F.I.R. for nine days, despite the husband's arrival at the village a day after the incident, remained unexplained.
The Court further held that the non-production of the prosecutrix's husband, mother-in-law, the village Pradhan, and other persons allegedly present at the scene, despite their availability, warranted an adverse inference against the prosecution for withholding the best available evidence, relying on the principle laid down by the Supreme Court in Gopal Krishnaji Ketkar v. Mohamed Haji Latif, AIR 1968 SC 1413. The medical evidence, which did not disclose any injury even ten days after the incident, was found not to support the prosecution case. The Court also found no evidence to connect appellant Kallu Kanchhi with any act of abetment under Section 114 I.P.C., particularly having regard to his acquittal of the charge under Section 450 I.P.C. Accordingly, the prosecution was held to have failed to establish the charges against either appellant by cogent, reliable, and independent evidence beyond reasonable doubt.

RESULT

Both appeals allowed. The impugned judgment and order of conviction and sentence dated 15.9.2005 passed by the Additional Sessions Judge, F.T.C. No. 4, Banda, in Sessions Trial No. 60 of 2005, is set aside. Appellant Kallu Kanchhi is acquitted of the charge under Section 114 I.P.C., and appellant Kallu Kahar is acquitted of the charges under Sections 376 and 450 I.P.C. The appellants, being on bail, need not surrender; their bail bonds and surety bonds are cancelled and sureties discharged. Any fine amount deposited is to be refunded to the appellants on application.

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

1. The present two appeals have been filed against the judgment and order dated 15.9.2005 passed by Additional Sessions Judge, F.T.C. No.4, Banda in Sessions Trial No.60 of 2005 "State

Vs. Kallu Kanchhi and Kallu Kahar", under Sections 452, 376, 504, 506 I.P.C., Case Crime No.139 of 2004, P.S. Giranwa, District Banda, by which the accused appellant of Criminal Appeal No. 4168 of 2005 Kallu Kanchhi was convicted for the offence under Section 114 I.P.C. and sentence with five years rigorous imprisonment and Rs.3,000/- fine and accused appellant of Criminal Appeal No.4840 of 2005 Kallu Kahar was convicted for the offence under Sections 376 and 450 I.P.C. and sentenced with ten years rigorous imprisonment and Rs.6,000/- fine under Section 376 I.P.C. and five years rigorous imprisonment and Rs.3,000/- fine under Section 450 I.P.C. with respective default clauses.

2. The F.I.R. of this case was lodged by prosecutrix on 21.8.2004 at 2:10 p.m. with the averments that, "on 12.8.2004 at about 10:00 p.m. when she was sleeping all alone in her house, as her husband was out to Punjab for earning livelihood, both the accused appellants armed with fire arms entered in her house by opening the door which was bolted by KUNDI from inside by inserting their hands, caught hold of her and when she tried to raise alarm she was over-powered and was threatened of life and while accused appellant Kallu Kanchhi remain standing there with pistol in his hand, the appellant Kallu Kahar committed rape on her and when they left by rear door she raised alarm upon which her sister-in-law (Jethani) Munni Bai and brother-in-law (Jeth) Raj Bahadur as well as persons of village and neighborhood arrived there and saw the two culprits going out from the house of victim. It is also alleged that when the brother-in-law of prosecutrix/victim asked the appellants Kallu Kanchhi and Kallu Kahar that they have committed a wrong, they threatened him of life in case the matter is reported."

3. Upon investigation, charge-sheet was submitted against the two accused-appellants under Sections 452, 376, 504, 506 I.P.C. and the case was committed to Sessions. The Sessions Judge, Banda framed charges under Sections 450 and 376 I.P.C. against Kallu Kahar and under Sections 450 and 114 I.P.C. against Kallu Kanchhi. The accused-appellants denied from charges and claimed trial.

4. The prosecution in order to prove its case has produced Raj Bahadur, the Jeth of prosecutrix as P.W.-1, prosecutrix as P.W.-2, Medical Officer Dr. Smt. R.D. Singh as P.W.-3, Head Constable Raj Kishore as P.W.-4 and Investigating Officer Sabhapati Yadav as P.W.-5. After completion of prosecution evidence, the statements of accused-appellants were recorded under Section 313 Cr.P.C. The accused-appellants did not produce any witness in defence evidence but filed documentary evidence, the certified copy of F.I.R. of Case Crime No.101 of 1987 as well as the certified copy of judgment dated 9.1.1991 in above matter in Criminal Case No.638/IX/1990 per list 47/B.

5. Heard learned counsel for the appellants in two appeals, learned A.G.A. for the State and perused the record.

6. Learned counsel for the appellants contended that impugned judgment and order of conviction is wrong on facts and law; that the prosecution failed to give any explanation for lodging the F.I.R. after inordinate delay of 9 days from the occurrence while the husband of the prosecutrix,

who was alleged to be out of station had arrived the very next day; that there are material contradictions in the statement of prosecutrix; that the prosecution has failed to produce the husband and mother-in-law of prosecutrix as well as any independent eye witness of the occurrence while according to the F.I.R. on her alarm several persons of village and neighbourhood assembled at the spot and allegedly seen the accused persons coming out of the house of prosecutrix, as has also been stated by prosecutrix in her statement on oath before the trial court; that P.W.-1 Raj Bahadur and his wife Munni Devi are closely and doubly related with the prosecutrix as Munni Devi is real sister of prosecutrix while Raj Bahadur P.W.-1 is real brother of husband of prosecutrix and the real sister of prosecutrix has been married to real brother of her husband and thus Raj Bahadur and Munni Devi are real Jeth, Jethani as well as real Bahan, Bahnoi of the prosecutrix; that the medical report does not support the prosecution case and is in contradiction with the averments made in F.I.R. as no bodily injury is alleged to have been found on the person of prosecutrix; that it is proved from the evidence on record that prosecutrix was having illicit relations with P.W.-1 Raj Bahadur (her Jeth/Bahnoi); that the husband of prosecutrix was living out side for earning livelihood and had made the prosecutrix to reside in the house situated inside the village but due to illicit relationship with P.W.-1 Raj Bahadur (her Behnoi/Jeth), in absence of her husband she came to live in the house situated in Purwa adjoining to the house of P.W.-1 Raj Bahadur; that since accused-appellant Kallu Kahar had reported the husband of prosecutrix about the illicit relationship between prosecutrix and Raj Bahadur, due to enmity P.W.-1 Raj Bahadur has got him falsely implicated; that apart from it the father-in-law of prosecutrix (father of P.W.-1 Raj Bahadur) had lodged a false F.I.R. against accused-appellant Kallu Kachchi and five others at Case Crime No.101 of 1987 in which all the accused persons were acquitted vide judgment and order dated 9.1.1991 and so the P.W.-1 Raj Bahadur was having enmity with accused-appellant Kallu Kachchi and since accused-appellant Kallu Kahar joins him in cultivation, the P.W.-1 Raj Bahadur has falsely implicated both of them in order to settle score against the accused-appellant Kallu Kachchi due to enmity and against Kallu Kahar for reporting his illicit relationship with prosecutrix to the husband of prosecutrix as well as for being the associate of accused-appellant Kallu Kachchi; that Investigating Officer has not recorded the statement of husband of prosecutrix even under Section 161 Cr.P.C. and has not mentioned his name as a prosecution witness in the charge-sheet; that the prosecution has failed to produce Vijay Bahadur, the husband of prosecutrix, Munni Devi, the real sister/Jethani of prosecutrix, and village Pradhan etc. who allegedly arrived at the spot and seen the accused persons coming out of the house; that for not producing above material as well as independent witnesses, there is sufficient ground for drawing adverse inference against the prosecution for not producing the best evidence in his possession; that there are material contradictions in prosecution evidence as no source of light is mentioned in the F.I.R. and by way of improvement at one place it has been alleged that the light of a lamp (Diya) was there on the spot while on the other place the light of Brass Dhibari has been stated; that similarly at one place it has been stated by prosecutrix that the accused persons unbolted the inside Kundi of southern door from outside while in her statement under Section 164 Cr.P.C. she has stated that they broken the Kundi; that P.W.-1 & 2 Raj Bahadur and prosecutrix have stated that after committing rape by accused-appellant Kallu Kahar upon both the accused-appellants left from the rear/northern door the prosecutrix raised alarm, on which Raj Bahadur and Munni Devi arrived and seen the two accused-appellants standing in front of their adjoining home while prosecutrix kept standing on

northern door of her house and when P.W.-1 Raj Bahadur asked the accused persons that they have committed wrong and will have to face consequences, they threatened him; that the entire prosecution story false is highly improbable as at the time of occurrence in the month of August (12.8.2004) the people usually continues movements till late in the night and while the house of accused-appellant Kallu Kachchi is adjoining in the East to the house of prosecutrix, the accused are alleged to have entered from the front door through Khalihan of the village at 10:00 p.m. while opted its rear door for leaving; that in view of the nature of offence in such matters despite availability of opportunity of making entrance from nearer and rear door with comparatively lonely surroundings, the alleged entrance of accused persons from front door is highly improbable and similarly after committing the alleged offence and leaving by rear door, their conduct of keeping themselves standing with the northern wall of the house of accused-appellant Kallu Kachchi and not attempting to hide themselves by entering inside his house with the door at few steps is again improbable, and may not be believed particularly in absence of any reliable evidence; that in any case, there is no motive or evidence against the accused-appellant Kallu Kachchi of his being abettor of the offence and there is nothing to show that he abetted the co-accused Kallu Kahar to commit rape on the prosecutrix; that learned trial court without considering the above arguments has acted wrongly in believing the untrustworthy evidence of the prosecutrix and most interested witness P.W.-1 Raj Bahadur, in holding the appellants guilty, without considering that there is presumption of innocent of accused he/they may not be convicted unless the charges are proved against them by cogent, independent and trustworthy evidence to the hilt beyond reasonable doubt; that the trial court has imposed sentence very excessively; that though the prosecution has failed to prove charges against appellants, if the Court finds otherwise their sentence may be reduced upto the period already undergone in view of the law laid down by the Apex court in the cases ***of Raj Kumar @ Raju Yadav @ Raj Kumar Yadav Vs. State of Bihar, (2006) 9 SCC 589*** and ***Ravinder Vs. State of M.P., (2006) 9SCC 590***.

7. Per contra, learned A.G.A. supported the impugned judgment and order of conviction and contended that there is no material contradiction in the prosecution evidence; that since the husband was not an eye witness, he was not required to be produced as witness; that it is wrong to say that the husband did not support the prosecution case in view of the fact that he along with his mother accompanied the prosecutrix to the police station for lodging F.I.R.; that the testimony of P.W.-1 Raj Bahadur may not be discarded because he was most natural and available eye witness; that since the prosecutrix is a married woman and rape was committed on her on pistol point so on the basis of medical examination report which was conducted after 10 days, it may not be inferred that rape was not committed on her; that in the matters of rape the statement of prosecutrix alone is sufficient for conviction and in such matters the independent witness may not be expected; that there is no reason for false implication; that the appeals have been filed with wrong and baseless allegations and are liable to be dismissed.

8. Upon hearing learned counsel for the parties and perusal of record, I find that as per F.I.R. the husband of prosecutrix had gone to Punjab for two months for earning livelihood by doing work as labour and on 12.8.2004 when the prosecutrix was sleeping in her house, at about 10:00 p.m., the accused-appellants entered her house after unbolting the Southern door (opening the

Kundi from outside by inserting hand inside) and accused-appellant Kallu Kahar started committing rape on her and after committing rape when they left by the rear Northern door, she raised alarm on which her Jeth, Jethani Munni Devi and Raj Bahadur, Village Pradhan and several persons of village and neighbourhood arrived and seen the accused going out of her house. The P.W.-1 Raj Bahadur has stated in his statement on oath at page 3 that he had seen the accused running from northern door from a distance of 6-7 steps and stayed by the side of house of accused Kallu Kachchi when he told them that they have committed wrong and will have to face the consequences. The P.W.-1 has also stated that upon raising the alarm by him, Hira Lal Pradhan, Ram Baboo, Mool Chand, Prem Jamadar etc. 15-20 persons had arrived apart from which the prosecutrix had also come out of her house. He has also stated that on hearing the voice of prosecutrix, firstly his wife awaked and made him to awake and thereafter they came out of his house by Southern door and entered the house of prosecutrix by Southern door and saw the running accused persons from a distance of 6-7 steps and after the incident he informed his brother Vijay Bahadur, the husband of prosecutrix by telephone on 13.8.2004 and he as well as the mother-in-law of prosecutrix arrived home on 14.8.2004. The P.W.-2 the prosecutrix has stated that she has two residential houses, one in the village and other in Purwa (township). At page 11 she has stated that by the noise of opening of door by accused-appellants, she did not awake and was over-powered by accused during her sleep who started to commit rape for 10 minutes, in contradiction to the averments made in F.I.R. that upon entrance of accused persons, she had awaken. She has further stated that when the people of village arrived the accused appellants Kallu Kachchi and Kallu Kahar after making exit from her house, made themselves standing by the side of house of prosecutrix, at a few steps.

9. Upon analysis of above evidence on record and hearing the arguments of both the parties, I find that it may not be disputed that in matters relating to rape which are bound to be committed in isolation, the independent witness of the incident of commission of rape may not be expected and so the statement of prosecutrix itself may be sufficient to establish the charges. However, the statement of prosecutrix being the interested witness may not be believed as gospel truth and her statement is to be considered with great care and caution with other evidence on record. The law of probability will always apply to the facts and circumstances of each case.

10. Upon analysis of evidence on record, it is pertinent to mention the following aspects:-

(i) An ordinarily prudent person who is living adjacent to the house of prosecutrix and to whom a shorter way with loneliness to enter her house from rear door is available, may not be expected to choose the longer route and front door enhancing the possibility of his being seen/noticed by the village people or passersby.

(ii) The Kundi of main door towards South was allegedly opened by accused persons by inserting the hands from outside. It is highly improbable for a person to unbolt the Kundi which is admittedly a chain type Kundi inside the door, by a person from outside.

(iii) The two door leaves of main door after being bolted from inside by Kundi, may not have such a wide gap that the Kundi may be unbolted from outside, not only in view of the incident in question but otherwise also in view of safety and security reasons, because in such case, any miscreant may enter the house during night and take away all valuables and other articles. Even in case of such a wide gap a lady who was all alone (as her husband and mother-in-law were out of station) may

not be expected to be so careless in leaving the main door without putting a lock over the Kundi for safety and security of valuables and articles of house.

(iv) Even if the prosecution version is believed that the prosecutrix was raped by accused-appellants, it is quite natural that after leaving of the miscreants, and getting relieved of the alleged terror created by them on pistol point, firstly she would have taken some time in putting all her clothes in order, before raising alarm in partly disrobed and ruined condition which may be as short as at least 2 minutes.

(v) As per statement of P.W.-1 Raj Bahadur, upon hearing the voice of the prosecutrix, firstly his wife Munni Devi awaked from sleep, and then she awaked P.W.-1 and thereafter by opening their main door in South they rushed to the adjoining house of prosecutrix and allegedly not only seen appellants running out and further he on coming out from rear and Northern door also seen them standing by the side of their house at a few steps, when on his asking for the consequences he was allegedly threatened by appellants.

(vi) In above circumstances the P.W.-1 Raj Bahadur and his wife would have taken at least 5 to 10 minutes in arriving upto the place of occurrence and till then it may not be expected from any person/miscreant of ordinary prudence as well as the accused-appellants as the case may be, to keep themselves standing for getting seen and identified as culprit persons.

(vii) Even on believing the prosecutrix with regard to entrance of appellants from Southern door by unbolting the Kundi from out side (on account of it having not been locked even for safety and security), in order to commit rape on the prosecutrix, considering the nature of crime of rape, the accused would have certainly bolted the door by Kundi from inside, as they are not supposed to have dared to commit rape by keeping the entrance door open for anybody or P.W.-1 to come from adjoining house and catch him red-handed in the mid of crime or being seen by some passerby from the open door. After committing the rape when the accused allegedly left by rear and Northern door, they are not supposed to reopen the Southern door so as to facilitate the arrival of P.W.-1 on alarm to be raised by prosecutrix and prosecutrix does not say that with raising alarm, she also opened the Southern door, and so the arrival of P.W.-1 and his wife immediately after the incident in the house of prosecutrix is also doubtful and there is every possibility of the opening of Southern door, upon their arrival and knocking of the door, which would also have taken further one minute or two.

(viii) Usually in every crime, after committing rape, theft or any other offence, the accused leaves the place of occurrence with an intention to hide himself as well as his identity and in view of the facts and circumstances mentioned hereinbefore the accused appellants had enough time to disappear in the darkness of night by entering in their house which is adjoining to the house of prosecutrix (in East) as per site plant Ext-A-7, and the contention that after fleeing from the spot they kept themselves standing at few steps by the side of Northern wall of their house, till arrival of P.W.-1, Village Pradhan and other people of village so that they may be identified as the miscreants, may not be believed under any imagination.

(ix) The village Pradhan and other persons who assembled there may not have assembled on alarm of prosecutrix from inside of her house on which arrival of only the arrival of P.W.-1 and his wife is possible and the village Pradhan and other persons may have arrived only on second call/alarm from outside the house. P.W.-1 Raj Bahadur in his examination-in-chief at page 13 of paper-book has stated that when he reached with his wife, the accused were running towards the room of Kallu Kanchhi and "मैंने शोर किया तो शोर करने पर प्रधान हीरालाल, बाबूराम आदि पहुँच गये".. In the circumstnaces when the

incident is not alleged to be broad day light incident when above persons could be in Khalihan or nearby place, rather is an incident after 10:00 p.m. when people may be sleeping inside their houses, the arrival of above persons would have taken some more time and the contention that accused appellants still kept standing till their arrival is highly improbable and may not be believed.

(x) When the incident of rape came to the knowledge of village people and Pradhan and the husband of prosecutrix also arrived one day after the incident, no plausible reason has been assigned for lodging F.I.R. after 8 days.

(xi) In view of the prosecution case, if the accused/culprits were identified on the spot and kept themselves standing outside the house, at a distance of 15 steps (As per site-plan A-7), in ordinary course the P.W.-1, Jeth of prosecutrix under anger for the crime committed by them, could have committed mar-peet with miscreants and at least some scuffle could have taken place with the accused and the conduct of P.W.-1 in mere asking the miscreants that they have done wrong is quite unnatural and unbecoming of a family member (Jeth) of prosecutrix.

(xii) There is no evidence at all that the accused-appellants were seen at the time of entering in the house of prosecutrix or were going out from it, of any independent witness or of persons who had allegedly assembled there.

11. When the husband of prosecutrix had arrived on 14.8.2004 as stated by his brother P.W.-1 Raj Bahadur, the delay in lodging of F.I.R. on 21.8.2004 is found to have not been properly explained. It is also pertinent to mention that the trial court has ignored the medical report which do not support the prosecution case on the ground of medical examination has been conducted after 10 days and the prosecutrix being married lady. It is noteworthy that the delay was on the part of the prosecutrix herself and she may not be given benefit of her own wrong. Moreover in absence of any evidence of rape in medical examination report, due to delay or otherwise, it may not be presumed that evidence would have disappeared due to lapse of time and rape would have been committed.

12. The husband and mother-in-law of prosecutrix may not be the eye witness of the occurrence but would have been concerned with the rape having been committed with their wife/daughter-in-law and were essential witnesses to adduce their hearsay evidence. The non-production of husband, mother-in-law as well as sister/Jethani and independent persons viz. village Pradhan Hira Lal, Ram Baboo etc., who allegedly seen the accused persons who kept standing at 15 steps after leaving from the house after occurrence, makes sufficient ground for drawing adverse inference against the prosecution.

13. In the case of ***Gopal, Krishnaji Ketkar Vs. Mahomed Haji Latif & Ors, 1968 AIR 1413,*** a Three Judges Bench of Apex Court has held that:

"Where a party in possession of the best evidence, which would throw light on the issue in controversy withholds it - Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him."

14. It is also contended that in criminal case registered on the F.I.R. lodged by father of P.W.-1 and father-in-law of P.W.-2 against Kallu Kachchi and five others they were acquitted, which is proved from documentary evidence filed by defence per list 46/B (which are certified copies of judicial records

and need not be proved by any other evidence). It is also alleged that the accused-appellant Kallu Kahar had reported the husband of prosecutrix about the illicit relationship between prosecutrix and P.W.-1 Raj Bahadur. In view of above facts, the possibility of false implication of accused persons in the case of rape at the instance of P.W.-1 Raj Bahadur may not be ruled out.

15. The evidence on record does not show any evidence of offence under Section 114 I.P.C. against the accused-appellant Kallu Kachchi particularly when he has been acquitted of the charges U/s 450 I.P.C. The nature of offence of rape allegedly committed by Kallu Kahar may not be supposed to have been committed on the alleged abetment of Kallu Kanchhi. The mere allegation that he had accompanied with Kallu Kahar with pistol in his hands is not supported by any other evidence and he is not alleged to have committed the offence in common intention with accused-appellant Kallu Kahar.

16. Upon analysis of entire oral and documentary evidence on record, I am of the considered view that prosecution story is highly improbable and unbelievable and the prosecution has failed to establish charges framed against accused-appellants by any trustworthy, cogent, reliable and independent evidence beyond reasonable doubt and to the hilt. The evidence of P.W.-1 Raj Bahadur and P.W.-2 prosecutrix may not be relied on account of material contradictions and improbabilities therein as discussed above as well as being the evidence of a most interested persons particularly in absence of any corroborative evidence of any independent witness.

17. In view of the discussions made above, the appeals are liable to be allowed and impugned judgment and order of conviction and sentence is liable to be set-aside.

18. Both the appeals are **allowed** accordingly and the impugned judgment and order of conviction and sentence of appellants Kallu Kachchi and Kallu Kahar dated 15.9.2015 passed by Additional Sessions Judge, F.T.C. No.4, Banda is set aside and the accused-appellant Kallu Kanchhi is held not guilty of the offences under Section 114 IPC and accused-appellant Kallu Kahar is held not guilty of the offences under Sections 376 and 450 I.P.C. respectively.

19. The prosecution case stands failed and the accused appellants Kallu Kachchi and Kallu Kahar are acquitted of the charges under Section 114 IPC and Sections 376 and 450 I.P.C. respectively.

20. The accused-appellants are on bail. They need not to surrender. Their bail bonds and surety bonds are cancelled and sureties stand discharged.

21. The amount of fine, if any, deposited by the appellants or any of them will be returned to them on their application, without any delay.

22. Let the lower court record be sent to the court below along with copy of this judgment and order.

(2016) 9 ILRA 1395
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.09.2016

BEFORE

THE HON'BLE ABHAY MAHADEO THIPSAY, J.

Application U/S 482/378/407 No.- 6188 Of 2016

Sudhanshu Ramesh Chandra Bhat ...Applicant

Versus

Union Of India Thru. Directorate Of Revenue Intelligence ...Opposite Party

Counsel for Applicant:
Shubham Tripathi

Counsel for Opposite Party:
Rajesh Singh Chauhan.

Subject Matter
Code of Criminal Procedure, 1973 — Section 167(2), First Proviso — "Default bail" — Whether a bail order passed under the First Proviso to Section 167(2) stands automatically extinguished or cancelled on the mere filing of the charge-sheet/complaint, where the accused has not yet actually been released from custody on account of delay in furnishing/verification of sureties — Held, no.

Facts
The petitioner was arrested on 26.04.2016 by officials of the Directorate of Revenue Intelligence on allegations of an offence punishable under Section 135 of the Customs Act. His bail applications on merits were rejected. On 28.06.2016, invoking the First Proviso to Section 167(2) Cr.P.C., the petitioner sought bail on the ground of completion of 60 days in custody without completion of investigation. The Magistrate granted bail in the sum of Rs. 25,00,000/- with two like sureties. While verification of sureties was pending, a complaint was filed on 11.07.2016. On 13.07.2016, when sureties were offered, the Magistrate declined to accept them, holding that the bail order had become 'ineffective' since the complaint had been filed before actual release. The petitioner approached the Sessions Court, which modified the condition regarding local sureties but did not reduce the bail amount. Thereafter, by order dated 07.09.2016, the Special Chief Judicial Magistrate (Customs), Lucknow reaffirmed that the earlier bail order dated 28.06.2016 was inconsequential and ineffective, and refused to release the petitioner. The petitioner invoked the inherent/revisional jurisdiction of the High Court against the order dated 07.09.2016.

Issue
Whether a bail order passed in favour of an accused under the First Proviso to Section 167(2) of the Code of Criminal Procedure stands automatically extinguished or cancelled on the mere filing of the charge-sheet/complaint, where the accused has not actually been released from custody by that date owing to the pendency of the process of furnishing and verification of sureties.

Held

A bail order passed under the First Proviso to Section 167(2) Cr.P.C., although termed 'default bail', is as effective as bail granted on merits and does not stand cancelled automatically merely upon completion of investigation or filing of the charge-sheet/complaint. The right of an accused under the said proviso is 'availed of' the moment an application for bail is made and the accused is prepared to furnish bail, irrespective of whether the court has passed an order thereon or has indicated terms and conditions, relying on Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453. A fortiori, where a bail order has actually been passed and only the process of furnishing/verification of sureties remains pending, the subsequent filing of a charge-sheet/complaint cannot extinguish or nullify that bail order. The distinction drawn by the Magistrate — that the right stood extinguished because the petitioner was not actually released from custody by the date of filing of the complaint — was patently incorrect and contrary to the law laid down by the Supreme Court. The delay in actual release, attributable to an unreasonably high bail amount and onerous surety conditions imposed by the Magistrate, could not be visited upon the petitioner. The order dated 07.09.2016 was patently illegal, contrary to law, justice and equity, and had resulted in undue hardship to the petitioner.

Result

Revision allowed. Order dated 07.09.2016 passed by the Special Chief Judicial Magistrate (Customs), Lucknow set aside. Original bail order dated 28.06.2016, as modified by the Sessions Court, revived.

Case Law Referred

Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453

(Delivered by Hon'ble Abhay Mahadeo Thipsay, J.)

1. Heard the learned counsel for the petitioner and the learned counsel for the Union of India, opposite party.

2. By consent of the learned counsel, heard finally, forthwith.

3. Learned counsel for the opposite party waives service of notice.

4. The petitioner is aggrieved by an order dated 07.09.2016 passed by the Special Chief Judicial Magistrate (Customs), Lucknow whereby the Magistrate observed that the bail order passed by him earlier on 28.06.2016 was ineffective and refused to release the petitioner on bail. He has, therefore, approached this Court by invoking the inherent powers of this Court praying that the said order be set aside, and that the petitioner be released in accordance with the original bail order passed by the said Magistrate.

5. The order dated 07.09.2016 which has been impugned by filing the present petition came to be passed under the following circumstances.

6. The petitioner was arrested on 26.04.2016 by the officials of the Directorate of Revenue Intelligence on the allegations of the petitioner having committed an offence punishable under Section 135 of the Customs Act. The petitioner was remanded into custody from time to time. His prayer for bail was rejected. However, on 28.06.2016 the petitioner filed an application for bail under the First proviso to Section 167(2) of the Code of Criminal Procedure (the 'Code') contending that he had been in custody

for a period of more than 60 days; and that investigation still being incomplete, the petitioner was entitled to be released on bail. The Magistrate granted bail in the sum of Rs. 25,00,000/- to the petitioner with 2 sureties in the like amount. While the process of furnishing the sureties and the verification of their solvency was going on, a complaint came to be filed before the Magistrate on 11.07.2016. On 13.07.2016 when the sureties were offered, the Magistrate observed that since the complaint had been filed by that time, there was no occasion to furnish the sureties. The Magistrate was of the view that the bail granted by him to the petitioner earlier under the First proviso to Section 167(2) of the Code was 'no longer effective' as a complaint had been filed before the petitioner was actually released from custody. Holding so, he refused to release the petitioner on bail and treated the earlier bail order as 'inconsequential' and 'ineffective'.

7. In my opinion, the Magistrate was clearly in error in understanding the relevant provisions of law.

8. Since the legal position is well settled, it is not necessary to refer to any specific decision of the Apex Court. All that needs to be observed is that a bail granted under the proviso to Section 167(2) of Code is, though termed as 'bail on default' is as effective as bail granted on merits, and does not get cancelled automatically on completion of investigation or charge-sheet being filed.

9. The question of interpretation of the first proviso to sub-section (2) of Section 167 of the Code keeps on coming before the Courts quite often. The provisions of the said proviso have been interpreted by the Superior Courts and the Apex Court from different angles for determining different questions arising in different situations.

10. The question that arises in the present case is as follows:

Whether the bail order passed in favour of an accused under the first proviso to sub-section (2) of Section 167(2) of the Code stands extinguished and/or cancelled automatically on the mere filing of the charge-sheet/complaint, if the accused, by that time has not actually been released from custody?

11. There can be no doubt, that the answer has to be in the negative.

12. I have carefully gone through the impugned order passed by the Special Chief Judicial Magistrate.

13. It was argued before the Magistrate that the bail order would not get cancelled automatically and that even sureties were being offered by the petitioner which should be accepted and the petitioner should be released on bail. It was argued on behalf of the prosecution that the right to be released on bail accrued to an accused under the said proviso to Section 167 (2) of the Code, if not already availed of, gets extinguished on the filing of the charge-sheet/complaint and cannot thereafter be enforced.

14. In this regard, the Special Chief Judicial Magistrate observed that an accused is entitled to be released on bail on the failure of the investigation agency to complete the investigation within the period stipulated by Section 167(2) of the Code, but the process of his furnishing the sureties, bail bonds, etc. should

be over before a charge-sheet/complaint is filed; and if on the date of filing of the charge-sheet/complaint, the accused actually happens to be in custody, his right to get himself released on bail stands extinguished.

15. This is patently incorrect.

16. The attention of the Special Chief Judicial Magistrate was, inter-alia, drawn to a decision of the Supreme Court of India in the case of **Udai Mohan Lal Acharya Vs. State of Maharashtra, reported in 2001(5) SCC 453**. The Magistrate amongst other things, re-produced certain parts from the reported Judgment, but, the parts re-produced by him were not relevant to the question that arose before him; and if at all there was any relevancy, the said parts did not, at all, support the view of the Magistrate.

17. The disputes that generally arise before the courts in the context of the said proviso to Section 167 (2) of the Code relate to more complex questions, such as, whether the order releasing an accused on bail should be passed even without an application from an accused, how the said period is to be calculated, etc. The case law in that regard is basically in relation to the special statutes, like TADA, POTA, NDPS, where the Court has been empowered to extend the maximum period of detention pending investigation in certain cases. A view has been taken in such cases that if the accused does not avail of the right by making an application for bail, then he cannot seek bail under the said proviso, after a charge-sheet/complaint is filed. That, however, does not mean that just because an accused is not actually released from custody, in-spite of having secured a bail order, till the time a charge-sheet/complaint is filed, the bail order automatically gets cancelled.

18. The Special Chief Judicial Magistrate has emphasized that the right of the accused does not survive or does not remain enforceable after filing of the charge-sheet**, 'if not already availed of'** — a phrase used by Their Lordships of the Supreme Court of India — ignoring that simply making an application for his release on bail, has been held to amount to 'availing of the said right'.

19. The cases can be classified in 2 categories. The first would be those in which the accused makes an application for his release on bail in accordance with the said proviso, but while the application for bail is pending a charge-sheet comes to be filed. The other type of cases would be where the accused has made an application for bail in accordance with the said proviso and the bail order has also been passed; and when the process of furnishing sureties is pending, the charge-sheet is filed.

20. A perusal of the reported cases shows that the controversy as to 'whether the right of the accused to be released on bail in accordance with the said proviso could be enforced on the filing of the charge-sheet' has arisen only in the first type of cases. Nobody has seriously contended in any case that even if the bail order was passed, the subsequent filing of charge-sheet would extinguish the right of an accused to be released on bail. This would amount to automatic cancellation of the bail order on filing of the charge-sheet, which is, clearly not permissible.

21. It may be observed that even in the first type of cases, namely- where an application has been made, but no bail order has been passed, it has been held that the right of the accused that has accrued to him, cannot be defeated by the subsequent filing of the charge-sheet. Thus, making an application for bail, by

itself, is sufficient to avail of his right. When such is the position, which ought to have been understood by the Chief Judicial Magistrate, if he had indeed gone through the case law referred to by him in his order, it was patently illegal on his part to have said that the right of the accused was 'not availed of' by him, merely because he was not actually released from custody.

22. Even otherwise, the facts of this case are quite gross. The process of the actual release of the petitioner was unreasonably delayed, without any fault on his part. In the first place, the Magistrate stipulated the bail amount to be Rs. 25,00,000/- (Twenty five lakhs) which was unreasonable. He insisted on not one, but two local sureties in the like amount, and that too from Lucknow only. The petitioner had to move the Sessions Court to get the unreasonable conditions modified and the Sessions Judge also did not reduce the amount of bail, though, he modified the condition regarding furnishing sureties from Lucknow. Then there came the verification of sureties, which also took time. When the solvency of sureties had been verified, and the question of accepting them arose, the Special Chief Judicial Magistrate said that there was no valid bail order, as the bail order had already been extinguished on filing of the charge-sheet. This was in itself unjust, improper and ought to have shocked the judicial conscience of the Special Chief Judicial Magistrate.

23. In the case of **Udai Mohan Lal Acharya** (supra), Their Lordships of the Supreme Court of India have categorically held as under :

"6. The expression 'if not already availed of' used by this Court in Sajay Dutts case (supra) must be understood to mean when the accused filed an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to Sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

24. The Special Chief Judicial Magistrate in-spite of re-producing a certain portion from this, in the impugned order, has acted contrary to what has been laid down therein. When the Supreme Court of India has time and again said that 'mere making of an application for bail would amount to availing of the right accrued to an accused under the said proviso irrespective of whether the Court has actually passed a bail order' or not, there was no question of refusing to release the petitioner on bail when an order for bail had actually been passed.

25. The impugned order is patently illegal, contrary to law, justice and equity. This has resulted in undue hardship to the petitioner.

26. The revision application is allowed.

27. The impugned order is set aside. Consequently, the original bail order dated 28.06.2016 as passed by the Magistrate and as modified by the court of Sessions stands revived.

(2016) 9 ILRA 1400
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ A No.- 20946 Of 2016

Chanda Jain **...Petitioner**
Versus
Union Of India & Anr. **...Respondents**

Counsel for Petitioner:
Santosh Kumar Tripathi, Shailendra Singh

Counsel for Respondents:
A.S.G.I., N.C. Tripathi, Naresh Chandra Tripahti.

FACTS

The petitioner had responded to an advertisement dated 3.8.2015 inviting applications for grant of Short Service Commission in the Indian Army for the Judge Advocate General (JAG) Department, which notified 14 vacancies — 10 for male and 4 for female candidates — with selection to be made through a Service Selection Board process and, under Clause 6(e), 'final selection... in that order up to the number of vacancies available at that time.' The petitioner stood at Serial No. 12 in the merit list prepared for the April 2016 course. The petitioner challenged a subsequent advertisement dated 18.1.2016, which again notified 4 vacancies for female candidates, contending that any vacancies for female candidates becoming available should have been filled from the merit list generated under the first (August 2015) advertisement itself, and that had this been done, she — being within the increased number of vacancies for female candidates — would have been selected.

The respondents, in their counter affidavit, explained that JAG induction is planned course-wise (April and October each year) under Special Army Instructions dated 1.4.1998 and a Government of India letter dated 20.7.2006, with 14 vacancies (10 male, 4 female) per course. Owing to a shortfall of 12 officers inducted during 2014–2015 (44 against a planned 56), the competent authority decided on 25.2.2016 to make up the deficiency by increasing vacancies by 6 each in the April 2016 and April 2017 courses, split equally as 3 male and 3 female additional vacancies per course. This raised the female vacancies for the April 2016 course from 4 to 7. Of the female candidates on the April 2016 merit list, 8 were ultimately issued joining letters — one candidate initially found medically unfit (Serial No. 6) was later cleared by a Medical Review Board and selected, while another selected candidate (Serial No. 5) left training within two weeks, leading to selection of the candidate at Serial No. 9 as well.

ISSUES FOR CONSIDERATION

(i) Whether, under Clause 6(e) of the first advertisement, all vacancies for female candidates that became available by the time of final selection — including the additional vacancies arising from the 2014–2015 shortfall — were required to be filled from the merit list prepared under the first advertisement (April 2016), rather than being carried forward to a later recruitment year.
(ii) Whether the decision to fill only 3 of the 6 additional female vacancies (arising from the shortfall) in the April 2016 course, deferring the remaining 3 to the April 2017 course, was arbitrary or contrary to the terms of the advertisement.
(iii) Whether the selection of an 8th female candidate — one more than the revised quota of 7 for the April 2016 course — obliged the respondents to also select further candidates (including the petitioner) from the same merit list.

HELD

The Court held that planning and structuring of recruitment — including decisions on the source, mode, timing, and phasing of vacancies — falls within the exclusive domain of the employer, and judicial review is confined to instances of statutory or constitutional violation, patent arbitrariness, or mala fides, relying on the Supreme Court's observations in Union of India v. Pushpa Rani & Ors. On facts, the Court found that the decision dated 25.2.2016 to make up the backlog of 12 officers by increasing vacancies by 6 (3 male, 3 female) in each of the April 2016 and April 2017 courses, rather than filling the entire backlog in a single course, was a considered policy decision made to maintain even batch sizes and protect future promotional prospects of inducted officers, and could not be characterised as arbitrary.

The Court further held that the selection of an 8th female candidate for the April 2016 course did not create any entitlement for further candidates to be selected. The additional selection arose from specific circumstances — a candidate initially found medically unfit was subsequently cleared by a Medical Review Board after another selected candidate had already left training within two weeks — and represented a reasonable administrative choice to retain a candidate who had already undergone a substantial period of training, rather than cancelling her selection altogether. This isolated adjustment did not obligate the respondents to fill the entire additional quota of 6 vacancies (rather than 3) for female candidates in the April 2016 course itself. Since only 3 additional female vacancies (making a total of 7) were sanctioned for the April 2016 course, and the petitioner was not within that number, no case for her selection from the April 2016 merit list was made out.

RESULT

Writ petition dismissed. The petitioner was held not entitled to selection from the merit list prepared for the April 2016 course, the phased release of additional vacancies for female candidates over the April 2016 and April 2017 courses being a valid policy decision not shown to be arbitrary or contrary to the terms of the advertisement.

CASE REFERRED

Union of India Vs. Pushpa Rani & Ors

(Delivered by Hon'ble Dilip Gupta, J.
&
Hon'ble Manoj Kumar Gupta, J.)

1. The petitioner, who had responded to the advertisement issued on 3 August 20151 inviting applications from married/unmarried male or unmarried female candidates for grant of Short Service Commission in the Indian Army for Judge Advocate General Department2, has filed this petition for quashing the subsequent advertisement dated 18 January 20163 for the reason that

the vacancies available against female candidates in the second advertisement were required to be filled-up by the first advertisement itself.

2. The first advertisement stipulated that the total number of vacancies were 14 out of which 10 were for male candidates and 4 were for female. The method of selection was indicated in Clause 6 of the advertisement, which is as follows :

"Method of Selection:

(a) Initial shortlisting of applications will be done by Recruiting Directorate, Integrated HQ of MoD (Army) and the decision of DG Recruiting will be final. Details of the shortlisted online applications will be put on Join Indian Army website. In this regard no representation will be entertained.

(b) The shortlisted candidates whose applications are found to be correct shall be detailed for SSB interview at allotted Selection Centres on specified dates.

(c) Two Stage Selection Procedure. Two stage selection procedure based on Psychological Aptitude Test is held at Selection Centres. All the candidates will face stage one test on first day of reporting at Selection Centres. The candidates who fail to pass stage one will be returned on the same day.

(d) Candidates who qualify stage II will submit self attested photocopies of educational documents to Selection Centre for completion of their Dossier/verification.

(e) Candidates who qualify at the Service Selection Board and are found medically fit by a Medical Board, will be placed in the order of merit. The final selection will be made in that order up to the number of vacancies available at that time."

3. The name of the petitioner appears at Serial No.12 in the merit list that was prepared. It is stated that initially there were only four vacancies for female candidates but later on the vacancies for female candidates were increased to 7. According to the petitioner, the second advertisement issued in January 2016 mentions four vacancies for female and so if such vacancies were available in January 2016, the merit list prepared in April 2016 should have included these 4 vacancies for female candidates in terms of the first advertisement and if that was so then the petitioner would have been selected since the total number of vacancies for female stood increased to 11 and one candidate had not joined. In this connection, petitioner has placed reliance on Clause 6(e) of the advertisement which provides that the final selection will be made upto the number of vacancies available at that time.

4. A counter affidavit has been filed by the respondents. In short it states that from 2014 to 2019, 28 candidates have to be inducted into JAG but these 28 vacancies are divided into two courses which commences in April and October every year. Thus, 14 vacancies are there in each

course which include 10 for male and 4 for female candidates. During 2014 and 2015 only 44 officers were inducted in the training as against 56 and to make up the deficiency of 12 officers, the competent authority had decided to increase the vacancies by 6 in each year spreading over two years i.e. for April 2016 course and April 2017 course. Thus, for the 2016 course 6 additional officers had to be inducted into JAG. This would include 3 male and 3 female candidates. It is for this reason that the total number female candidates for 2016 was increased from 4 to 7. It will be useful to reproduce certain paragraphs of the counter affidavit to understand the procedure adopted by the respondents and the same are as follows:

4. That Indian Army Plans the quantum of induction through various entries based on future organizational requirement, well in advance and following a well defined procedure. The frequency of the courses every year has also been incorporated in various Army Instructions/Special Army Instructions issued by the Ministry of Defence, Government of India. JAG entry for women is a part of Short Service Commission Women (Non-Tech) entry (known as SSCW(NT) JAG. The entry is governed by Special Army Instructions dated 01.04.1998 and Government of India letter dated 20.07.2006. The photo copy of the aforesaid Special Army Instructions dated 01.04.1998 and Government of India letter dated 20.07.2006 are being filed as **Annexure CA-1** and **Annexure CA-2** respectively to this affidavit.

5. That in Short service Commission (Women Non-Technical) JAG (Judge Advocate General) is an entry whereby candidates fulfilling the eligibility criteria as laid down in the Army Instructions/Special army Instructions and by the letter issued by the Government of India apply and the selection is made by a Service Selection Board (SSB) adopting the well defined selection procedure.

6. That there are various entries for induction of officers into Indian Army Courses for NDA, CDS, 10+2 TES and TGC commence in January and July every year whereas for Short Service Commission (TEC) and Short Service Commission (Non-Tech) including JAG Courses commence in April and October of a year. It is respectfully stated that each Course is independent and does not have any bearing to other Courses. Each Course is also having independent and well determined vacancies without having any bearing to the vacancies of other Courses.

7. That as per perspective induction plan in JAG entry, 28 candidates are to be inducted into JAG during 2014 to 2019 and 16 candidates during the next 04 years i.e. from 2020 to 2023. Accordingly 28 vacancies were divided between two Courses which commence in April and October every year (14 Vacancies in each Course which includes 10 vacancies for Men and 4 vacancies for Women).

8. That it is relevant to point out here that during the years 2014 and 2015 total induction of Officers in JAG was only 44 against planned intake of 56 (28+28) Officers and this situation caused a deficiency of 12 Officers into JAG cadre. Accordingly to make up deficiency of 12 Officers in JAG cadre, the Competent Authority decided to increase the vacancies of two courses by six vacancies in each, spread over two different years i.e. to April, 2016 Course and to

April, 2017 Course. This spread over of vacancies was done to ensure even batch sizes of JAG officers so as to protect these officers against adverse promotional avenues in future.

9. That for kind convenience and ready reference, the details of vacancies so released are given in the following Chart:

.No.	Name of Course	Vacancies as per initial plan	Vacancies as per revised plan
a)	SSC (NT) JAG= 16 (Men) Apr. 16	10	13 (10+3)
b)	SSC (NT) JAG= 16 (Women) Apr. 16	04	07 (4+3)
c)	SSC (NT) JAG= 17 (Men) Oct. 16	10	10
d)	SSC (NT) JAG= 17 (Women) Oct.16	04	04
e)	SSC (NT) JAG= 18 (Men) Apr. 17	10	13 (10+3)
f)	SSC (NT) JAG= 18 (Women) Apr. 17	04	07 (4+3)

5. Learned Senior Counsel appearing for the petitioner has made the following submissions:

(1) The first advertisement indicated that there were 14 vacancies out of which 10 were reserved for male and 4 for female. Even according to the Department, 6 additional female candidates had to be selected to make up the short fall in the two selections held in 2014 and 2015 and thus in terms of the conditions contained in Clause 6(e) of the first advertisement, all the additional 6 vacancies for female were required to be filled up from the merit list prepared in April 2016;

(2) The petitioner who was found to be medically fit was placed at Serial No.12 and, therefore, should have been granted selection since one candidate did not join; and

(3) Instead of selecting 7 female candidates in the April 2016 batch, the respondents have admittedly selected 8 female candidates. There is no reason why two more vacancies were not also increased.

6. Sri Ashok Mehta, learned Assistant Solicitor General of India assisted by Sri N.C. Tripathi and Sri S.K. Rai has, however, placed reliance upon the averments made in the counter affidavit and has submitted that a decision had been taken by the Department on 25 February 2016 to fill-up the backlog 12 vacancies that had arisen in recruitment years 2014 and 2015 but with a rider that 6 of such vacancies will be filled-up in the recruitment year 2016 and remaining 6 in the recruitment year 2017. His submission is that these 12 vacancies were divided equally between male and female candidates and out of the 6 vacancies for the recruitment year 2016, only 3 female candidates and 3 male candidates were required to be selected in April 2016. The remaining 3 female candidates vacancies would have to be filled-up in the recruitment year 2017. The selection of the fourth female candidate was made because of the reason that the candidate at Serial No.6 who was initially found not meeting the medical requirements was subsequently found medically fit by the Review Board after seven female candidates had been selected.

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

8. The counter affidavit mentions that the Indian Army plans the quantum of induction based on future organisational requirements following a well defined procedure. For grant of Short Service Commission in the Indian Army (non-technical), the terms and conditions are contained in the Circular dated 1 April 1998. Paragraph 4 deals with the educational qualifications while paragraph 6 deals with the selection procedure. The grant of Short Service Commission (non-technical) to women officers is contained in the Circular dated 20 July 2006. It has also been stated in the counter affidavit that in accordance with the induction plan only 28 candidates are required to be inducted in JAG every year from 2014 to 2019 and thereafter 16 candidates for the following four years from 2020 to 2023. 28 vacancies for each year are divided into two courses which commence in April and October every year. Thus, 14 vacancies are available in each course out of which 10 are for male and 4 for female. In 2014 and 2015, the total number of officers who had been inducted in JAG was only 44 as against the planned intake of 56. Thus, there was a deficiency of 12 officers in JAG and to make up this deficiency of 12 officers, the competent authority had on 25 February 2016 decided to increase the vacancies every year in 2016 and 2017 by 6. Thus, for the April 2016 course, out of these six vacancies, 3 were to be filled up by male and 3 by female candidates. This would also be clear from the chart prepared by the Department in paragraph 9 of the counter affidavit which has been reproduced above.

9. In order to appreciate the issues raised in this petition, we consider it appropriate to reproduce the status of the joining letters issued to the candidates for the April 2016 course which has been enclosed as Annexure-3 to the writ petition and is as follows :

"JOINING LETTER ISSUED STATUS FOR SSCW NT (JAG)-16, APR 2016 COURSE

Notified vacancies-04, Revised Vacancies-07

Merit No	oll No.	atch/ Chest No.	Name	DOB	Med. Status	Date of JL issued	Reporting date	Remark
1.	50612	8299/34	NAMIKA PUNDIR	5.03.92	Fit	4.03.16	1 Apr/02 Ap	
.2	50217	9310/22	SHRUTI SUBADHI	7.05.92	Fit	8.03.16	1 Apr/02 Ap	
.3	50689	8299/33	INDHU	6.11.91	Fit	5.03.15	1 Apr/02 Ap	
.4	50085	9310/27	SHIMA DAS	0.10.92	Fit	4.03.16	1 Apr/02 Ap	
.5	50133	8299/18	UNANDINI	2.02.92	Fit	4.03.16	1 Apr/02 Ap	
.6	50665	8299/39	HAHNAZ	1.07.89	Not meeting medial OR			
.7	50139	9310/03	ANIKA SHARMA	1.08.92	Fit	4.03.16	1 Apr/02 Apr 2016	
.8	50592	9310/37	AMRATA MAJHAIL	3.12.90	Fit	1.04.16	2-Apr-16	
.9	50386	8299/31	RIYANKA RATHOR	2.04.90	Fit			
10.	50447	8299/35	RIYA PATHANIA	5.12.89	Fit			
11.	50073	8299/36	GRIMA DUBEY	7.03.92	Fit			
12.	50389	8299/32	HANDA	5.01.89	Fit			

			JAIN					
13.	50059	8299/5	ULLUR DIVYA REDDY	0.01.92	Fit			
14.	50190	8299/21	ITISHA RAWAL	2.10.91	it			
15.	50463	8299/28	IVYA TRIPATHI	6.11.91	Not meeting medial OR			
16.	50066	8299/25	IVEDITA PANDEY	5.03.92	WTD			
17.	50705	9310/23	ICHA SINGH	2.12.90	Fit			
18.	50767	9310/01	HALU SEHGAL	0.09.90	Fit			

10. The petitioner is at Serial No.12 in the aforesaid list. If 7 vacancies (4+3) for women candidates were required to be filled up for the April 2016 course, then the first 8 upto Namrata Majhail should have been selected because the candidate at Serial No.6 was not meeting the medical requirements. Intimation letters were, accordingly, sent to eight candidates.

11. What has been stated by the petitioner is that the candidate at Serial No.5 joined the training but soon thereafter within two weeks left it as a result of which the candidate at Serial No.9 was selected. What has also been stated is that the candidate at Serial No.6 who was not meeting the medical requirements, was cleared by the Medical Review Board and she was also selected and an intimation letter was also issued in April 2016. Thus, in all instead of 7 female candidates who were required to be admitted, the respondents selected 8 female candidates.

12. It is for this reason that the learned Senior Counsel for the petitioner contended that if one additional female candidate had been selected, nothing prevented the Department from selecting 2 more female candidates from the merit list of April 2016. To support this contention, learned Senior Counsel has placed reliance upon paragraph 6(e) of the conditions contained in the advertisement which stipulates that the final selection will be made in order up to the number of vacancies available at that time. Learned Senior

Counsel submitted that as 6 additional vacancies for female candidates were available in April 2016, 10 female candidates should have been selected from the merit list of April 2016 in view of the policy decision taken on 25 February 2016 and three vacancies for female should not have been carried forward for the recruitment year 2017.

13. It is not in dispute that that the advertisement issued in April 2016 was only for 14 vacancies. 10 out of these vacancies were reserved for male candidates and 4 for female candidates. This was the position when the first advertisement was issued on 3 August 2015. The dispute in the present petition is confined to the female candidates. It is a fact that out of the 56 candidates who had to be selected in 2014 and 2015, only 44 had been selected and there were 12 vacancies. The Army had taken a policy decision on 25 February 2016 to fill-up these 12 vacancies also. However, all these 12 vacancies were not to be filled up in the recruitment year 2016. The policy was to fill-up 6 vacancies in 2016 and the remaining 6 in 2017. Out of the 6 for the year 2016, 3 were required to be filled-up by male and 3 by female candidates. It is correct that in this way only 7 vacancies were required to be filled-up from the merit list prepared in April 2016 but in fact 8 female candidates have been selected. The Department has stated that initially the female candidate at Serial No.6 was not fulfilling the medical requirements and, therefore, the candidate next in order of merit at Serial No.8 was selected. One candidate at Serial No.5 joined the training but left within two weeks. Thus, the candidate at Serial No.9 was also selected. However, subsequently the Medical Review Board in August 2016 found that the candidate at Serial No.6 satisfied the medical requirements. In this way, respondent no.6 was also selected. This naturally increased the number of intake of female candidates from 7 to 8. The respondents could have cancelled the admission of candidate at Serial No.9 but instead of doing this they considered it appropriate to increase the intake. This could be for the reason that the candidates had undertaken the training for a substantial period of time. This decision cannot be said to be arbitrary in the facts and circumstances of the case. This was a policy decision.

14. In this connection, we feel tempted to quote a portion of the judgment rendered by the Supreme Court in the case of **Union of India Vs. Pushpa Rani & Ors.4** which is as follows:

"Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. ....."

15. We, therefore, do not find any substance in the submission of learned Senior Counsel for the petitioner that if the Department had increased the intake of female by one, it should have increased the intake of female candidates by 2 so as to fill-up all the 6 additional vacancies in the year 2016 instead of filling-up three in 2016 and then three in 2017. A policy decision had been taken by the Army to only increase the intake by 3. It is for this reason that we also do not find any substance in the submission advanced by learned Senior Counsel for the petitioner that if there were six vacancies available for female candidates in April 2016, then all 6 should have been filled-up from the merit list of April 2016 for the reason that the advertisement itself stipulated that all the vacancies existing at the time of final selection should be filled-up. As noted above, the intake of female candidates had been increased only by 3 for the recruitment year 2016 and the remaining 3 vacancies for female candidates were to be filled-up in the recruitment year 2017.

16. Such being the position, it does not lie in the mouth of the petitioner to contend that 6 vacancies for female were required to be filled-up in the April 2016 course. The petitioner, therefore, cannot contend that she should have been selected from the merit list prepared in April 2016.

17. Thus, for all the reasons stated above, no relief can be granted to the petitioner.

18. The writ petition is, accordingly, dismissed.

(2016) 9 ILRA 1410
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2016

BEFORE

THE HON'BLE DEVENDRA KUMAR ARORA, J.

Misc. Single/ Writ Petition No.- 22784 Of 2016

Shankar Charan Tripathi ...Petitioner
Versus
Union Of India & Ors. ...Opposite Parties

Subject Matter

Constitution of India - Article 226 - Writ of Mandamus - NEET-2016 - Claim of reservation by an Ex-serviceman himself (as distinct from wards/dependents of Ex-servicemen) for admission to MBBS course - Whether absence of any provision for reservation to Ex-servicemen themselves in the NEET-2016 Information Brochure, as opposed to their wards/dependents, entitles a candidate to a writ of mandamus directing creation of such reservation and his nomination to a medical college - Held, no; reservation is a policy matter for the Central/State Government, not one that a writ court can create, and pre-requisites for mandamus (prior demand and refusal, subsisting legal right) were also not satisfied.

Facts

The petitioner, an Ex-serviceman discharged from the Indian Air Force in 1990 who thereafter served in the Madhya Pradesh PCS as Jail Superintendent and presently serves as Joint Commissioner, Commercial Tax Department, sought a direction to the respondents to extend the privilege and benefit of reservation for Ex-servicemen to him for admission to the MBBS course in Uttar Pradesh through NEET-2016, and for his nomination to a Medical College managed by the respondents. The petitioner, who also practises astrology, stated his intention to pursue MBBS to correlate medical science with medical astrology. He appeared in NEET-(UG)-II-2016 (Roll No. 81408640, Registration No. 6029827) securing 16.051601 percentile, and stated that his name appeared in the merit list prepared by JIPMER. He contended that the NEET-2016 scheme of categories nowhere provided reservation for Ex-servicemen despite his having declared that category while filling the form, and that his counseling at SGPGI, Lucknow, on 15.9.2016 was refused on the ground that reservation existed only for wards/dependents of Ex-servicemen and not for Ex-servicemen themselves, which he contended was unreasonable since an Ex-serviceman applicant ought to be preferred over wards of Ex-servicemen. He relied on Dilwan Singh and others Vs. State of Haryana and others, (1996) 8 SCC 369, and Ishwar Singh Vs. Kurukshetra University and others (Punjab & Haryana High Court, decided 11.4.2013). The respondents opposed the petition, contending that the petitioner had no legal or statutory right to nomination for the MBBS course, that the NEET-2016 Brochure provided vertical reservation for SC (21%), ST (2%) and OBC (27%), and horizontal reservation only for children of Freedom Fighters and Ex-servicemen (disabled during war/retired/martyr), with no provision for candidates who are themselves Ex-servicemen.

Issue

Whether a writ of mandamus could be issued directing the respondent authorities to extend reservation meant for wards/dependents of Ex-servicemen to an Ex-serviceman applicant himself, and to nominate the petitioner for admission to the MBBS course, in the absence of any such provision in the NEET-2016 Information Brochure and any prior demand for such reservation having been made and refused.

Held

A writ of mandamus must be preceded by a distinct demand for performance of the duty claimed and a clear refusal thereof, so that the court may be satisfied that the party complained against is determined not to perform what is demanded; mandamus is not a writ of right and is not granted as a matter of course (ex debito justitiae), its grant or refusal lying in the discretion of the court, to be exercised only where a clear legal right and subsisting statutory duty are shown and no alternative remedy is available, relying on Guruvayoor Devaswom Managing Committee Vs. C.K. Rajan, AIR 2004 SC 561. The decisions relied upon by the petitioner were distinguishable: in Dilwan Singh (supra), the grievance concerned a selection policy of considering Ex-servicemen together with dependent children of Ex-servicemen, which was held to impede Ex-servicemen; and in Ishwar Singh (supra), a specific quota for Ex-servicemen had in fact been fixed by the State Government and specified in the Information Brochure, and dependents were wrongly being preferred over such Ex-servicemen. In the present case, by contrast, the NEET-2016 Brochure contained no reservation whatsoever for Ex-servicemen themselves, only for their children/wards. The petitioner was aware of this position at the time of filling the online form and participated in the examination without protest, raising the plea only after failure to secure admission; he had also filed an earlier writ petition (Writ Petition No. 5681 of 2016 (MS)) regarding a software defect in form submission without raising this plea, and had not challenged the prospectus conditions before appearing in the examination. He had further failed to place on record any representation made to the concerned authorities seeking reservation as an Ex-serviceman that had gone unanswered. Reliance on a statement in JIPMER's counter affidavit in Writ Petition No. 22351 of 2016 before the Madras High Court, regarding nominations from central authorities having been discontinued from 2014-15, could not create any right in the petitioner's favour, since fixation of reservation is a policy decision of the Central/State Government and not a matter within the domain of the High Court to prescribe. Reference was also made to Sankalp Charitable Trust and another Vs. Union of India and others, (2016) 7 SCC 487, where the Apex Court held that NEET only provides for conducting the entrance test and prescribing eligibility criteria, and that reservation for any category is not the subject matter of NEET. Accordingly, no mandamus as claimed could be issued.

Result

Writ petition **dismissed** as devoid of merit. Costs easy.

Case Law Referred

Dilwan Singh and others Vs. State of Haryana and others, (1996) 8 SCC 369 (distinguished)
Ishwar Singh Vs. Kurukshetra University and others, Punjab & Haryana High Court, decided 11.4.2013 (distinguished);
Guruvayoor Devaswom Managing Committee Vs. C.K. Rajan, AIR 2004 SC 561;
Sankalp Charitable Trust and another Vs. Union of India and others, (2016) 7 SCC 487.

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

1. Heard Sri Ashok Kumar Pandey, learned Counsel for the petitioner, Dr Deepti Tripathi, Counsel for the Union of India and Sri Sanjay Bhasin, Counsel for the State Government.

2. In the instant writ petition, petitioner has inter-alia sought for a direction to the respondents to extend the privileges and benefit of reservation of Ex-serviceman to the petitioner for admission in MBBS course in the State of Uttar Pradesh, for which examination has been conducted by NEET-2016. It has further been prayed that the respondents authorities be directed to nominate the petitioner for admission in MBBS course in any of the Medical Colleges being managed and controlled by the respondents.

3. According to learned Counsel for the petitioner, petitioner is an Ex-service man, who was discharged from the Indian Air Force in the year 1990. Thereafter the petitioner was selected in Madhya Pradesh PCS Examination and served as Jail Superintendent. While working as Jail Superintendent, he was selected in UPPCS and at present he is working as Joint Commissioner in Commercial Tax Department. The petitioner is an Astrologer and is serving the public through astrology including medical astrology but as he want to serve the humanity through Gathbandhan (Co-relation) of Medical Science and Medical Astrology and so, he wanted to pursue MBBS course.

4. In furtherance of pursuing MBBS course, petitioner appeared in NEET-(UG)-II-2016 with Roll No. 81408640 and Registration no. 6029827 and secured 16.051601 percentile whereas in JIPMER his name finds place in the merit list prepared by JIPMER.

5. It has been contended by the Counsel for the petitioner that in the distribution of seats and definition of categories, nowhere reservation for Ex-servicemen has been provided which is wholly unreasonable and unjustified when the petitioner at the time of filling up the form in NEET has mentioned his category as Ex-serviceman.

6. It has also been submitted that the petitioner participated for Counseling at SGPGI, Lucknow on 15.9.2016 alongwith his records but his Counseling was refused on the ground that reservation is for wards and dependents of Ex-servicemen and not for Ex-servicemen. It is relevant to mention here that wards and dependents are getting the reservation because of being dependent and wards of Ex-servicemen whereas when Ex-serviceman himself is applicant, he is legally entitled to be given preference over the wards of Ex-servicemen.

7. To strengthen the aforesaid assertions, the petitioner has relied upon the decisions of the Apex Court rendered in **Dilwan Singh and others vs. State of Haryana and others** (1996)8 SCC 369 and the decision of Punjab & Haryana High Court in **Ishwar Singh vs. Kurukshetra University and others** (decided on 11.4.2013).

8. Refuting the allegations of the petitioner, it has been argued on behalf of the respondents that the petitioner has no legal or statutory right for being nominated as one of the candidates to pursue MBBS Course in a Government Medical College. The petitioner has failed to show that there is a reservation for Ex-Service Man in the NEET-2016 and he has been denied the said benefit in an unjustified manner.

9. It has been submitted that in the Brochure for NEET-2016 vertical reservation has been provided to SC, ST and OBC in the ratio of 21%, 02% and 27% respectively. There is also provision for Horizontal Reservation in respect of children of Freedom Fighters and Ex-service man [disabled during war /retired/martyr]. However, there is no provision for admitting candidates, who themselves are Ex-servicemen.

10. Having examined the submissions made by the parties, firstly it would be apt to mention that before petitioning a writ of Mandamus, it must be preceded by a distinct demand for performance of the duty, in order to give the party an opportunity to consider whether he should comply or not, and such demand must be shown to have been met by a refusal either by words or conduct, so that the Court may be satisfied that the party complained of, is determined not to do what is demanded. In simple words, the demand must be made prior to the petition/application.

11. At this juncture, it would be relevant to mention that a writ of mandamus is issued only in such cases when either the State fails to perform its duty or when the discretion exercised by the State is not done legally . In **Guruvayoor Devaswom Managing Committee v CK Rajan** AIR 2004 SC 561 , it was held that although the Court ordinarily is reluctant to assume the functions of the statutory functionaries, it will step in by mandamus when the State fails to perform its duty . It shall also step in when the discretion is exercised but the same has not been done legally and validly . To put differently, a writ of mandamus is not a writ of right and is not granted as a matter of course (*ex debito justitiae*). Its grant (or refusal) is at the discretion of the court. Courts are obliged to refuse mandamus, unless, it is shown that there is a clear legal right of the applicant or statutory duty of the respondent and there is no alternative remedy available to the applicant. In order to obtain a writ or an order (or direction) in the nature of mandamus, the applicant has to satisfy (the court of law) that he has a legal right towards the performance of a legal duty by the party (or person) against whom mandamus is sought and such right must be subsisting on the date of the petition.

12. As far as case laws relied upon by the petitioner are concerned, it may be mentioned that in *Dilwan Singh's* case [supra] the controversy was altogether different as in the said case the Selection Board has adopted a policy of calling the ex-servicemen and the dependent children of ex-servicemen together to consider their cases for recruitment according to merit which was treated as an impediment to ex-servicemen. Similarly, in the case of *Ishwar Singh* [supra] the dependents of the defence personnel were given preference over the Ex-servicemen for admission in B.Ed (Regular) course. From the perusal of the said judgment it comes out that there was quota for Ex-servicemen fixed by the Government of Haryana and the same was specified in the Information Brochure issued by the University concerned. Here, the facts are different altogether as in the information brochure there is no provision of reservation in respect of Ex-servicemen but quota has been fixed for the children of Ex-servicemen [disabled during war/retired/martyr].

13. The instant case is to be decided in the light of the aforesaid factual and settled legal proposition. Undoubtedly, the Brochure of NEET-2016 was available with the petitioner at the time of filling the On-line application and was well aware that there is reservation for wards of Ex-

servicemen and not for Ex-serviceman but he remained in deep slumber and participated in the examination without any protest and now has come with the plea as aforesaid. It may be noted that petitioner had earlier filed Writ petition No. 5681 of 2016 (MS) complaining non-acceptance of his form on account of there being defect in the software but at that time also he did not raise the plea as raised in the instant writ petition. It may be added that the petitioner has not annexed any application showing that he has given application to concerned authorities of the State Government/Central Government or CBSE Board which conducted the NEET-2016 with regard to reservation for Ex-serviceman and it was not acted upon. More, he has not challenged the conditions of the prospectus before appearing in the NEET-2016 though it was well within the knowledge of the petitioner that no reservation has been made in favour of Ex-servicemen.

14. The petitioner wanted his nomination merely on the basis of statement made by Jawaharlal Institute of Postgraduate Medical Education and Research, Puducherry (JIPMER) in the counter affidavit filed in Writ Petition No. 22351 of 2016 filed in Madras High Court. In paragraph 12 of the said counter affidavit it is has mentioned that the Institution followed only the nominations of such candidates from appropriate central authorities. However, Ministry of Health & Family Welfare had stopped sending nominations from the year 2014-2015. Merely, on the basis of averments made an affidavit, no right is created in favour of the petitioner. Moreso, fixation of reservation is the policy decision of the Central Government/State Government, as the case may be and it is not within the domain of the High Court to provide reservation to such candidates. The petitioner has failed to bring on record any document issued by the Central Government or State Government providing reservation for such candidate, which is not being adhered to by the concerned authorities.

15. Before parting with, it would be relevant to mention that in ***Sankalp Charitable Trust and another vs. Union of India and others*** (2016) 7 SCC 487, the Apex Court while holding that only NEET would enable students to get admission to MBBS or BDS studies observed that special provisions for reservation of any category are not subject matter of NEET nor are the rights of minority in any manner affected by NEET. NEET only provides for conducting entrance test and eligibility criteria for admission to the MBBS/BDS course.

16. For the reasons aforesaid, no mandamus as claimed/sought for by the petitioner can be issued to the authorities concerned. The writ petition being devoid of merits is liable to be dismissed.

17. Accordingly, the writ petition is dismissed. Costs easy.

(2016) 9 ILRA 1415
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail application No.- 26905 Of 2016

Gaurav Tyagi **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for Applicant:
A.C. Srivastava

Counsel for Opposite Party:
G.A., S.K. Tyagi

Penal Code, 1860 — Section 306 — Abetment of suicide — Bail — Suicide note left by deceased alleging harassment by applicant (tenant) — Genuineness of suicide note disputed — Applicant contended signatures on suicide note dissimilar from admitted signatures of deceased on proceedings under Sections 107/116 Cr.P.C. — Report of private handwriting expert filed by applicant opining signatures to be dissimilar — Investigating Officer, despite efforts, could not obtain specimen handwriting/signatures of deceased from family members for comparison by government expert — No material available to rebut opinion of private handwriting expert — Held, in absence of reliable evidence to convincingly establish that suicide note was actually written and signed by deceased, applicant entitled to bail — Bail granted with liberty to prosecution to move for cancellation of bail before court below in the event government handwriting expert's opinion, obtained through proper investigation, establishes that suicide note was written and signed by the deceased.

Code of Criminal Procedure, 1973 — Section 439 — Bail — Ingredients of abetment to suicide — Mere existence of landlord-tenant dispute, without tangible evidence of instigation or creation of circumstances impelling deceased to end his life, held insufficient to fasten liability of abetment — Sensitivity to commit suicide varies from person to person and depends on individual emotional threshold — Held, evidence on record deficient to establish that applicant instigated or abetted deceased to commit suicide.

Held:
(i) Bail granted, subject to conditions — (a) applicant not to tamper with prosecution evidence; (b) applicant to personally appear on every date, exemption from personal presence to be at discretion of trial court.
(ii) Breach of conditions to entitle court below to proceed for cancellation of bail.
(iii) Bail granted primarily on the ground of absence of reliable evidence, at this stage, to convincingly show that the suicide note was written and signed by the deceased; liberty reserved to prosecution/complainant to seek cancellation of bail before the court below if government handwriting expert's report, obtained through proper investigation, establishes authorship and signature of the deceased on the suicide note.
(iv) Observations made confined to disposal of the bail application and not to be construed as reflecting on the merits of the case.

RESULT
Application allowed.

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

1. Counter affidavit and two supplementary affidavits filed by the respective parties are taken on record.

2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 494 of 2016 u/s 306 IPC, Police Station- Muradanagar, District- Ghaziabad .

3. Heard Sri A.C. Srivastava, learned counsel for the applicant, learned A.G.A.for the State and Sri S.K. Tyagi, learned counsel for the complainant.

4. Perused the record.

5. Submission of learned counsel for the applicant is that the applicant was the tenant of the house, while the deceased was landlord and it is said that the applicant was guilty of abetment, as a result of which, the deceased committed suicide. Further submission is that the prosecution evidence does not bring forth the necessary ingredients of abetment and the facts and circumstances are such which fall short of proving that the applicant either instigated the deceased to commit suicide or abetted the same. Further submission is that the primary evidence, which has been made the basis to implicate the accused-applicant in the crime is an alleged suicide note left by the deceased in which the only thing mentioned was this that the deceased was feeling so perturbed and harassed because of the applicant that he was constrained to commit suicide and that the applicant should be held responsible for the same. Contention is that sensitivity of a human being depends upon a number of factors and human traits including the level of emotions of a particular person play crucial role in this regard. The people may commit suicide even on a trifling reason just as they may withstand the pressure of strongly upsetting circumstances. In the present case, there was a dispute between the landlord and tenant. The dispute was not such which may, in all probability, be said to be sufficient to drive the deceased to commit suicide. There has to be tangible evidence in order to prove that a particular man instigated the victim to commit suicide. Further submission is that it is true that there may be cases where the direct evidence may not be available and there may be circumstances which may demonstrate that there were such impelling circumstances created by accused which were sufficient to drive any reasonable man to commit suicide. But the evidence available on record is very deficient in proving any such conduct of the applicant. Even if the contents of the suicide note are taken such, it is difficult to hold that the applicant actually instigated or abetted the deceased to commit suicide. But much emphasis has been laid by the counsel for the applicant in order to show that the suicide note and the signatures made therein are not actually that of the deceased. It was pointed out that the case diary would indicate that the Investigating Officer made an attempt to get some hand writings and the signatures of the deceased in order to get the same compared with the original suicide note but despite his efforts and visits which he made to the family members of the deceased, he was not provided necessary hand

writings or signatures of the deceased for comparison. Learned counsel for the applicant has shown to the Court a part of the case diary wherein the visits of the I.O. are mentioned and also where inability for some reason or the other to provide the same has been shown by the wife of the deceased. Further submission is that actually there were also some proceedings under Section 107 and 116 of Cr.P.C. for which the deceased had submitted his bail-bonds. Learned counsel for the applicant has drawn the attention of the Court to Annexure-5, which is a paper relating to such proceedings, which contains the signatures of the deceased. Counsel has tried to emphasise that the signatures made therein on the very face of record are looking different from the signature on suicide note. Learned counsel for the applicant has also drawn the attention of the Court to the report of the private Hand Writing Expert which has been obtained on behalf of the accused by way of which the said signatures available on the proceedings under Sections 107 and 116 of Cr.P.C. have been compared with the aforesaid photocopy of the suicide note and the opinion has been given in negative and it has been opined that both the signatures are dissimilar. Further submission is that the prosecution has not been able to procure any material which may rebut the opinion of the private hand writing expert at this stage. The argument is that even if it is presumed that since there was a dispute between the landlord and the tenant, as a result of which the deceased committed suicide, then too it will be stretching things too far to hold the applicant responsible for abetment in the facts and circumstances of this particular case. 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 pointed out that the applicant is in jail since 22.6.2016 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.

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

7. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case and the nature of evidence available on record, this Court is of the view that the applicant may be enlarged on bail.

8. Let the applicant- Gaurav Tyagi involved in Case Crime No. 494 of 2016 u/s 306 IPC, P.S.- Muradnagar, District- Ghaziabad 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.

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

10. It may be further observed that bail of the applicant is being granted by this court primarily on the ground that there is no reliable evidence available on record so far, to convincingly show that the alleged suicide note was actually written and signed by the deceased. If at any stage in future, the Investigating Officer through proper investigation gets or procures the evidence of government handwriting expert to the effect that the suicide note was actually written by the deceased and signed by him, the prosecution/complainant will have the liberty to move cancellation of bail before the court below itself. In case of such eventuality, the court below shall itself have the right and liberty to proceed for cancellation of bail on the strength of this observation made by this Court.

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

(2016) 9 ILRA 1419
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Application U/S 482 No.- 27504 Of 2016

Rajpal **...Applicant**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Applicant:
Sanjeev Kumar Pandey, Rohit Nandan Pandey

Counsel for Opposite Parties:
G.A.

FACTS

The present application under Section 482 Cr.P.C. was moved for quashing the order dated 9.8.2016 passed by the Additional Sessions Judge, Court No. 3, Etah, in S.T. No. 96 of 2012 (State v. Yadram and Others), arising out of Case Crime No. 208 of 2011, under Sections 323, 307, 504 I.P.C., P.S. Mirehchi, District Etah, whereby the trial court rejected the accused-applicant's application under Section 311 Cr.P.C. seeking recall of prosecution witness Somendra for further cross-examination.

The trial court had rejected the recall application on the ground that it did not disclose the points on which the witness was sought to be further cross-examined. It was contended on behalf of the applicant that the trial court had acted wrongly in rejecting the recall application. The State opposed the application, submitting that the law does not permit recall of a witness for further cross-examination in such circumstances and that the impugned order was correct.

ISSUES FOR CONSIDERATION

(i) Whether the trial court erred in rejecting the application under Section 311 Cr.P.C. for recall of the prosecution witness for further cross-examination, in the absence of any disclosed points on which such further cross-examination was sought.

(ii) Whether the applicant made out sufficient ground for exercise of inherent jurisdiction under Section 482 Cr.P.C. to quash the impugned order.

HELD

The Court held that although Section 311 Cr.P.C. confers wide powers on a court to summon or recall any witness at any stage, such powers must be exercised with restraint and judiciously, and the extraordinary provision cannot be used as an afterthought to fill up lacunae or gaps in the prosecution or defence case,

relying on Shyam Kumar v. State of U.P., 2003 (47) ACC 290, where it was held that recall of a witness cannot be claimed as a matter of right and that circumstances such as change of counsel or questions left unasked are not sufficient grounds for recall.

On perusal of the record and the recall application itself, the Court found that the applicant had neither mentioned the date on which the witness was examined nor assigned any reason or indicated the points on which further cross-examination was sought. The impugned order rejecting the recall application was accordingly held to be correct and free from any illegality, irregularity, or impropriety.

RESULT

Application under Section 482 Cr.P.C. dismissed, the applicant having failed to show any sufficient ground for exercise of inherent powers to prevent abuse of the process of the court or to secure the ends of justice. The order dated 9.8.2016 passed by the Additional Sessions Judge, Court No. 3, Etah, in S.T. No. 96 of 2012, was upheld. Interim order, if any, stands vacated.

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

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

2. The present application under Section 482 Cr.P.C. has been moved for quashing the order dated 9.8.2016 passed by Additional Sessions Judge Court No.3, Etah passed in S.T. No.96 of 2012 (State Vs. Yadram and others), under Sections 323, 307, 504 I.P.C., Case Crime No.208 of 2011, P.S. Mirehchi, District Etah.

3. Learned counsel for the applicant contends that Sessions Judge, Etah has acted wrongly in rejecting the application of accused-applicant under Section 311 Cr.P.C. for summoning the prosecution witness Somendra for further cross examination on the ground that it has not been disclosed in the application as to on which points the witness is sought to be further cross-examined.

4. Per contra, learned A.G.A. submits that impugned order is correct and law does not permit for recall of the witness for further cross examination.

5. Though under powers conferred by Section 311, a Court may summon or recall any witness at any stage, but it is settled principle of law that such powers are wide enough and ought to be exercised with restraint and judiciously and the Extra-ordinary provisions can not be used as an afterthought to fill up the lacuna/gaps. In the case of ***Shyam Kumar Vs. State of U.P., 2003(47) ACC 290***, it was held that *"Recalling of witness-- Powers very wide-- To be exercised with restraint and judiciously-- Not a tool to fill up the lacuna-- Change of counsel-- Certain questions left out from being asked from the witness-- Not sufficient to recall the witness for re-examination.*

Accused cannot have the witness recalled for examination as a matter of right. Extra-ordinary provisions cannot be used as an afterthought to fill gaps."

6. The perusal of records as well as application for recall of prosecution witness Somendra shows that the applicant neither has mentioned the date when above was examined, nor has assigned any reason or questions, on which points his further cross examination is required. The impugned order is correct and does not suffer from any illegality, irregularity or impropriety.

7. Upon hearing learned counsel for the parties and perusal of record, I find that the applicant has failed to show any sufficient ground for exercise of inherent powers by this Court so as to prevent any abuse of process of court or otherwise to secure the ends of justice and there is no sufficient ground for for quashing the order dated 9.8.2016 passed by Additional Sessions Judge Court No.3, Etah passed in S.T. No.96 of 2012 (State Vs. Yadram and others), under Sections 323, 307, 504 I.P.C., Case Crime No.208 of 2011, P.S. Mirehchi, District Etah. The application is devoid of merits and is liable to be dismissed.

8. The application u/s 482 Cr.P.C. is dismissed accordingly.

9. Interim order, if any, stands vacated.

(2016) 9 ILRA 1422
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 46710 Of 2016

Vijay Kumar Gupta **...Petitioner**
Versus
State Of U.P. & Ors. **...Opposite Parties**

Counsel for Petitioner:
Manoj Kumar Sharma

Counsels for Opposite Parties:
C.S.C., Qamrul Hasan Siddiqui.

Subject Matter
U.P. Government Servant (Discipline and Appeal) Rules, 1999 — Rules 10 and 12 — Disciplinary/Recovery order and Appellate order — Non-speaking orders — Requirement **of reasons —** Petitioner, a Junior Engineer, was held liable by the disciplinary authority for 50% of alleged financial loss caused in purchase and repair of three pumps, without considering his reply or assigning any reason — Appellate authority, while marginally reducing the recovery to 1/3rd of a reassessed lesser loss figure, likewise passed a wholly non-speaking order — Held, both orders passed in complete disregard of the mandatory requirements of Rules 10 and 12 of the Rules and of the principles of natural justice, being devoid of reasons and passed mechanically without consideration of the explanation/appeal filed by the petitioner.

Facts
The petitioner, working as Junior Engineer, was issued a show cause notice dated 5.5.2012 in connection with alleged irregularity in purchase of three pump-sets for a water intake well in district Banda, and alleged failure to discharge duties, in violation of the U.P. Government Servant Conduct Rules, 1956. By order dated 4.11.2015, the disciplinary authority (Chief Engineer) held the petitioner guilty and directed recovery of 50% of the alleged loss of Rs. 15.30 lakh, i.e., Rs. 7,65,000/-, to be recovered from his monthly salary at Rs. 20,000/- per month. The petitioner preferred an appeal, contending that he had no role in the purchase committee or in installation/release of security money. Pending appeal, the petitioner had earlier obtained an order dated 21.4.2016 in Writ Petition No. 17851 of 2016 directing the appellate authority to consider his prayer for interim protection and restraining recovery for a limited period. By the impugned order dated 12.5.2016, the appellate authority (Managing Director), on the basis of a report indicating actual expenditure on purchase of pumps at Rs. 13.20 lakh, held the petitioner liable for 1/3rd of this loss, i.e., Rs. 4,40,000/-, modifying the recovery order accordingly, again without discussing the petitioner's grounds of appeal or giving any reasons for the finding of guilt or for the quantum of liability fixed.

Issues

1. Whether the order of the disciplinary authority dated 4.11.2015, passed without considering the petitioner's explanation and without assigning reasons for holding him guilty and fixing quantum of recovery, is sustainable in law having regard to the mandate of Rule 10 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999.
2. Whether the appellate order dated 12.5.2016, passed without addressing the three-fold test under Rule 12 read with Rule 13 of the Rules — namely, whether the facts on which the order was based have been established, whether such facts afford sufficient ground for action, and whether the penalty is excessive, adequate or inadequate — is a valid appellate order.

Held
Rule 10 of the Rules mandates that the disciplinary authority shall, after considering the explanation and relevant records, pass an order as it considers appropriate, and where a penalty is imposed, reasons there for must be recorded — Held, the order dated 4.11.2015 did not disclose consideration of the petitioner's explanation, consideration of relevant records, or reasons for imposition of penalty, and was passed in an irresponsible manner in disregard of the statutory mandate. Rule 12 of the Rules requires the appellate authority to consider (a) whether the facts on which the order was based have been established, (b) whether such facts afford sufficient ground for action, and (c) whether the penalty is excessive, adequate or inadequate, before passing orders under clauses (a) to (d) of Rule 13 — Held, the appellate order dated 12.5.2016 did not deal with any of these three mandatory considerations, was apparently non-speaking, and was passed mechanically without application of mind. Following Omar Salay Mohd. Sait v. CIT, Madras, AIR 1959 SC 1238; Udhav Das Kewat Ram v. CIT, 1967 (66) ITR 462; The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and Ors., JT 2010(2) SC 566; Chandana Impex Pvt. Ltd. v. Commissioner of Customs, New Delhi, 2011(269) E.L.T. 433 (SC); and CCT v. Shukla & Bros., (2010) 4 SCC 785 — Held, recording of reasons is an essential requirement of natural justice and a sine qua non for judicial and quasi-judicial orders; reasons are the 'heartbeat' and 'linchpin' of every conclusion, ensuring transparency, enabling the aggrieved party to know why the decision has gone against him, and rendering the remedy of appeal/revision meaningful — Absence of reasons renders an order indefensible and unsustainable, particularly where it is subject to further challenge before a higher forum — Non-recording of reasons amounts to violation of principles of natural justice and denial of justice.

Result
The petitioner having already filed a revision under the Rules, which was pending before Respondent No. 6, the Court did not consider it proper to render any finding on the merits of the disciplinary proceedings at this stage. With the consent of learned counsel for the parties, the writ petition disposed of with a direction to Respondent No. 6 to decide the pending revision strictly in accordance with law by a speaking and reasoned order, within two months from production of a certified copy of the order. Considering the peculiar facts and in the interest of justice, it was further directed that no recovery shall be made from the petitioner pursuant to the impugned orders till the revision is decided.
Writ petition disposed of with directions

Case Law Referred:
1. Omar Salay Mohd. Sait v. Commissioner of Income Tax, Madras, AIR 1959 SC 1238
2. Udhav Das Kewat Ram v. CIT, 1967 (66) ITR 462
3. The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and Ors., JT 2010(2) SC 566
4. State of Orissa v. Dhaniram Luhar, JT 2004(2) SC 172 / (2004) 5 SCC 568
5. State of Rajasthan v. Sohan Lal & Ors., JT 2004(5) SCC 338 : 2004(5) SCC 573
6. Raj Kishore Jha v. State of Bihar & Ors., AIR 2003 SC 4664
7. Vishnu Dev Sharma v. State of Uttar Pradesh & Ors., (2008) 3 SCC 172
8. Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle & Ors., (2008) 9 SCC 407

9. State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026
10. U.P.S.R.T.C. v. Jagdish Prasad Gupta, AIR 2009 SC 2328
11. Ram Phal v. State of Haryana & Ors., (2009) 3 SCC 258
12. Mohammed Yusuf v. Faij Mohammad & Ors., (2009) 3 SCC 513
13. State of Himachal Pradesh v. Sada Ram & Anr., (2009) 4 SCC 422
14. Chandana Impex Pvt. Ltd. v. Commissioner of Customs, New Delhi, 2011 (269) E.L.T. 433 (SC)
15. CCT v. Shukla & Bros., (2010) 4 SCC 785
16. Chabungbambohal Singh v. Union of India, 1995 Suppl (2) SCC 83
17. Jawahar Lal Singh v. Naresh Singh, (1987) 2 SCC 222
18. State of Punjab and Ors. v. Surinder Kumar, (1992) 1 SCC 489
19. Hindustan Times Ltd. v. Union of India, (1998) 2 SCC 242
20. State of U.P. v. Battan and Ors., (2001) 10 SCC 607
21. State of Rajasthan v. Rajendra Prasad Jain, (2008) 15 SCC 711

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Manoj Kumar Sharma, learned counsel for the petitioner, Sri Yatindra, learned standing counsel for respondent no.1 and Sri V. K. Rai, learned counsel for the respondent nos. 2 to 6.

2. This writ petition has been filed praying for the following relief:

(i) issue a writ, order or direction in the nature of certiorari to quash the impugned Punishment & Recovery Order dated 12.5.2016 passed by the Respondent no.5 against the petitioner, with its all consequential effects whatsoever throughout.

(ii) issue a writ, order or direction in the nature of certiorari to quash the impugned show cause notices dated 5.5.2012 and 12.6.2015 alongwith the punishment/recovery based thereupon vide orders dated 4.11.2015 and 19.11.2015 passed by the respondent nos. 2 and 3 respectively to the extent they are related with the petitioner with its all consequential effects whatsoever throughout.

(iii) issue a writ, order of direction in the nature of mandamus commanding the respondents to make the payment of regular full monthly salary of the petitioner with all other admissible service benefits and refund the deducted amount of his salary also along with admissible Bank Rate Interest, to him.

(iv) issue a writ, order or direction in the nature of mandamus commanding to the respondent no.6 to decide the Revision/Representation within a short and specified period of time in a speaking manner by providing real opportunity of hearing to petitioner and communicate the order/result of Revision also to the petitioner at his residential address.

3. Learned counsel for the petitioner submits that neither the petitioner has any role in the purchase of three pumps in question nor he was member of the Purchase Committee nor he has any

role in its installation or releasing the security money and yet without considering his reply and without assigning any reason the respondent no.2 has passed an order dated 4.11.2015 holding the petitioner liable for 50% of the alleged financial loss caused on account of purchase of the three pumps and the amount spent on its repair. He filed an appeal before the respondent no.5 who also decided the appeal in the same fashion without assigning any reason to hold the petitioner guilty of the alleged financial loss in purchase of pumps and also in fixing his liability to the extent of 1/3 cost of pumps. He submits that pursuant to the order dated 21.4.2016 passed in writ petition no.17851 of 2016, an interim protection for non recovery of the amount till decision in appeal was granted by the appellate-authority. He further submits that the order of the disciplinary authority as well as the order dated 12.5.2016 passed by the appellate authority both are totally non speaking and without application of mind. He submits that both the orders are wholly arbitrary and infact indicative of non discharge of statutory duty by the authorities concerned.

4. Sri Vimlesh Kumar Rai, learned counsel for the respondent nos. 2 to 6 submits that petitioner has already filed revision before the respondent no.6 which may be directed to be decided in accordance with law at an early date.

5. I have carefully considered his submissions of learned counsel for the parties. The order dated 4.11.2015 passed by the disciplinary authority and the order dated 12.5.2016 passed by the appellate authority are reproduced below:

4.11.2015

"प्रधान कार्यालय, उत्तर प्रदेश जल निगम, 6 राणा प्रताप मार्ग लखनऊ
पत्रांक-1857/007-2012-02-0106 (झॉ००) दिनांक 04-11-2015

कार्यालय ज्ञाप

कार्यालय अधिशासी अभियंता, यूनिसेफ प्रोजेक्ट यूनिट (वि०/यॉ०), उत्तर प्रदेश जल निगम कर्वी (वित्रकूट) में जूनियर इंजीनियर के पद पर पदस्थ कार्यकाल में श्री वी०के० गुप्ता, जूनियर इंजीनियर द्वारा अपने कर्तव्यों एवं दायित्वों का सत्यनिष्ठापूर्वक समुचित रूप से निर्वहन न करने, उच्चाधिकारियों के आदेशों की अवहेलना करने, जनपद बाँदा के भूरागढ़ रा-वाटर इन्टेक वेल हंतुक के आरूप इन्टरप्राइजेज, लखनऊ से तीन नग पम्प सयंत्र कम करने में अनियमितता करने तथा उत्तर प्रदेश सरकारी कर्मचारी आबरण नियमावली-1056 (यथासंशोधित) के नियम-3 (1) व 3(2) में निहित प्राविधानों का उल्लघन करने, विभाग की छवि धूमिल करने आदि से संबंधित निम्नानुसार तथ्यों के प्रकाश में आने के फलस्वरूप उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली-1000 के अंतर्गत श्री वी० के० गुप्ता, जूनियन को इस कार्यालय के पत्रांक-057/007-2012-02-08 (ज) दिनांक 05.05.2017 द्वारा कारण दर्शक नोटिस निर्गत कसते हुए स्पष्टीकरण चाहा गया था। उक्त कारण दर्शक नोटिस के सापेक्ष श्री वीके गुप्ता, जूनियर इंजीनियर ने अपने पत्र दिनांक 15.07.2015 द्वारा अपना स्पष्टीकरण प्रस्तुत किया। प्रकरण में इस कार्यालय के पत्रांक-1652/007-2012-02-0166 (झॉ००) दिनांक 22.09.20 15 द्वारा मुख्या अभियंता (झॉ००), उत्तर प्रदेश जल निगम, झाँसी से उक्त पम्प संमत्रों के सम्बन्ध में अद्यतन स्थिति की सूचना चाही गयी थी जिसके कम में मुख्य अभियंता (झॉ) उत्तर प्रदेश जल निगम झाँसी द्वारा द्वारा अपने पत्राक-405/गोळे ३०प्र०यू० चित्रकूट /24 दिनांक 03.10.2015 द्वारा अवगत कराया गया कि कय किये गये उका तीनों पम्प स्टोर में अक्रियाशील अवस्था में स्खे हुए है।

प्रकरण में उक्त कारण दर्शक नोटिस के सापेक्ष श्री वी० के० गुप्ता, जूनियर इंजीनियर द्व रा प्रस्तुत स्पष्टीकरण तम्मा मुख्य अभियंता (झॉ०क्षे०), उत्तर प्रदेश जल निगम, झॉसी के उपरोक्त पत्र दिनांक 03.10.2015 द्वारा प्राप्त सूचना/अद्यतन स्थिति

एवं अन्य सुसंगत अभिलेखों/साक्ष्यों पर विचारोपरान्त यह स्थिति परिलक्षित हुई है कि वी० के० गुप्ता, जूनियर इजीनियर द्वारा अपने कर्तव्यों एवं दायित्वों का निर्वहन करने में विफल रहने एवं विभाग को स्व 15,30,000.00 लाख की हानि पहुंचाने तथा जनता को पेयजल का लाभ न मिलने के कारण विभाग की छवि धूमिल हुई है. जिसके लिए वह दोषी है।

अतः उपरोक्तानुसार दोषी पाये जाने के फलस्वरूप श्री वीके गुप्ता, जूनियर इंजीनियर को एतद द्वारा परिनिन्दित करते हुए विभाग को हुई रु० 15.30,000.00 लाख की हानि का 50 प्रतिशत अर्थात रू० 7,55,000.00 लाख की वसूली के आदेश पारित किये जाते हैं। उक्त धनराशि की वसूली इनके मासिक वेतन से (बीस हजार मात्र) प्रतिमाह की दर से की जोगी। यदि सम्पूर्ण धनराशि की वसूली इनके सेवानिवृत्त की तिथि तक पूर्ण नहीं होती है तो शेष धनराशि की बसूली सेवानिवृत्तिक देयकों, ग्रेच्यूटी /अन्य देवको से एक मुश्त की जायेगी।

उक्त आदेश की प्रति श्र० वी० के० गुत्ता, जूनियर इंजीनियर की चरित्र पजिका/व्यक्तिगत पत्रावली में रखी जायेगी।

ह० अपठनीय
29.10.15

(पी० के० सिन्हा)

मुख्य अभियंता (अ-2-2)"

पु० सं ०एवं दिनांक उपरोक्तानुसार

प्रतिलिपि श्री वीक० गुप्ता, जूनियर इंजीनियर, कार्यालय अधिशासी अभियंता, यूनिसेफ प्रोजेक्ट यूनिट (विध/पॉ०) उत्तर प्रदेश जल निगम, सोनभद्र को सूचनार्थ प्रेषित।

ह० अपठनीय
29.10.15

(पी० के० सिन्हा)

मुख्य अभियंता (अ-2-2)"

12.5.2016

"प्रधान कार्यालय, उत्तर प्रदेश जल निगम, राणा प्रताप मार्ग, लखनऊ

पत्रांक-681/007-2012-02-0106 (झॉसे) दिनांक 12-05-2016

कार्यालय ज्ञाप

कार्यालय अधिशासी अभियंता, यूनिसेफ प्रोजेक्ट यूनिट (कि/पॉ०), उत्तर प्रदेश जल निगम, कवीं (चित्रकूट) में जूनियर इंजीनियर के पद पर पदस्थ कार्यकाल में श्री वीके गुप्त जूनियर इंजीनियर द्वारा अपने कर्तव्यों एवं दायित्वों का सत्यनिष्ठापूर्वक समुचित रूप से निर्वहन -करने उच्चाधिकारियों के आदेशों की अवहेलना करने, जनपद बाँदा के भूरागढ़ रा-वाटर इन्टेक वेल हेतु के आरूप इन्टरप्राइजेज, लखनऊ से तीन नग पम्प सयंत्र कप करने में अनियमितता करने तथा उत्तर प्रदेश सरकारी कर्मचारी आचरण नियमावली- 1556 (प्रभासशोधित) के नियम 3(1) व 3(2) में निहित प्राविधानों का उल्लघन करने विभाग की छवि धूमिल करने आदि

से सबाधित प्रतिकूल तथ्यों के प्रकाश में आने के फलस्वरूप जांचोपरान्त मुख्य अभियता (अ-2-2) उत्तर प्रदेश जल निगम लखनऊ के कार्यालय आदेश संख्या-1857/007-2012-02-0188 (Rbsb) दिनाक 04-11-2015 द्वारा श्री व गुप्ता जूनियर इंजीनियर को परिनिन्दित करते हुए इस प्रकरण में विभाग को हुई कुल आर्थिक क्षति रु० 15.30 लाख के 50 प्रतिशत अर्थात रु 7.85,000.00 लाठा की वसूली के आदेश पारित किये गये थे।

मुख्य अभियंता (22) उत्तर प्रदेश जल निगम, लखनऊ के पारित आदेश दिनाक 04-11-2015 के विरुद्ध श्री वीके गुप्ता जुनियर इंजीनियर ने अपने पत्र दिनांक 29-11-20 07-12-2015 एवं 24-01-2010 द्वारा अपील प्रस्तुत की। श्री गुप्ता जूनियर इंजीनियर ॥ ारा प्रस्तुत अपील में उल्लिखित तथ्यों पर मुख्य अभियंता (इ) उत्तर प्रदेश जल निगम, झाँसी से प्रकरण की अद्यतन स्थिति / प्रकरण में विभाग को हुई वास्तविक क्षति की सूचना माँगी गयी जो उनके पत्रांक-118/गोषक पवित्रकूट / 11 दिनांक 20-04-2018 द्वारा प्राप्त हुई जिसमें अवगत कराया गया कि पम्प को कय किये जाने की धनराशि रु 13.30 लाख एवं स्० 2.10 लाख की धनराशि योजना से सम्बविरत जुनियर इंजीनियर द्वारा पम्प की मरम्ममा कसकर जीक कराने में व्यय की गयी जिसके लिए श्री वीके गुप्ता, जूनियर इंजीनियर उत्तरदायी नहीं है बल्कि पम्प को कय करने वाले संबंधित लोककभी सामूहिक रूप से उत्तरदायी है।

श्री वीके गुप्ता, जूनियर इंजीनियर ने मुख्य अभियंता अ-2-2 लखनऊ के पारित आदेशों के विरूद्ध मा० उच्च न्यायालय इलाहाबाद में याचिका संख्या-17851/2018 योजित की जिसमें माननीय उच्च न्यायालय, इलाहाबाद ने अपने निर्णय दिनांक 21-04-2010 में निम्नानुसार आदेश पारित किया गया-

In such view of the matter, this writ petition stands disposed off with a direction upon the appellate authority i.e. respondent no.5 to consider and decide petitioner's prayer made in the appeal for grant of interim protection, within a period of two weeks from the date presentation of certified copy of this order. Appellate authority shall also make all endeavours to dispose off the petitioner's appeal. Till the disposal of prayer for grant of interim protection or for a period of four weeks, whichever is earlier, no recovery shall be made from the petitioner.

श्री वीके गुप्ता, जूनियर इंजीनियर द्वारा प्रस्तुत उक्त अपील एवं मुख्य अभियंता (ऑक्षे०) उत्तर प्रदेश जल निगम, झाँसी से प्राप्त अद्यपन स्थिति पर विचारोपरान्त यह स्थिति परिलक्षित हुई कि पम्प को कय करने में मात्र रु० 13.20 लाख का व्यय हुआ। अतः उक्त व्यय विभाग की कुल आर्थित क्षति हैं, जिसके लिए श्री वीके गुप्ता जूनियर इंजीनियर उक्त हानि के 1/3 भाग हेतु दोषी है। अतएव इनकी अपील पर सम्यकरूपेण विचारोपरान्त मुख्य अभियंता (अ-2-2). उत्तर प्रदेश जल निगम लखनऊ द्वारा पारित आदेश संख्या 1857/007-2012-02-0166 (झॉ००) दिनाक 04-11-2015 को शिथिल करते हुए श्री पंक गुप्ता जूनियर इंजीनियर को परिनिन्दित करते हुए विभाग को हुई रू० 13.20 लाख की हानि का 1/3 भाग अभांत रु० 4.40.000.00 लाख की वसूली किये जाने के आदेश पारित किये जाते हैं। उक्त धनराशि की वसूली इनके मासिक वेतन से (बीस हजार मात्र) प्रतिमाह की दर से की जायेगी। यदि सम्पूर्ण धनराशि की वसूली इनके सेवानिवृत्त की तिथि तक पूर्ण नहीं होती है तो शेष धनराशि की वसूली सेवानिवृत्तिक देयकों, ग्रेच्यूटी/अन्य देयकों से एक मुश्त की जायेगी। तदनुसार अपील निस्तारित की जाती है।

उक्त आदेश की पति श्री वीके गुप्ता, जूनियर इंजीनियर की चरित्र पजिका/व्यक्तिगत पत्रावली में रखी जायेगी।

ह० अपठनीय
(पी ० के ० आसूदानी)
प्रबंध निर्देशक/अपिलेट अधिकारी

6. Perusal of the order of the disciplinary authority dated 4.11.2015 and the order dated 12.5.2016 passed by the appellate authority prima facie shows that both the authorities have passed the orders in an irresponsible manner, in complete disregard to the mandatory provisions of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999 (hereinafter referred to as "the Rules") and without assigning any reason to hold the petitioner guilty. They have completely

ignored the stand taken by the petitioner in his reply as well as in the appeal. Such action of the aforesaid authorities is nothing but an abuse of power which shakes confidence of the aggrieved employee. Their action is also indicative of violation of the statutory provisions under the Rules and the settled principles of natural justice.

7. This Court is constrained to make the above observation in the light of the clear disobedience by the disciplinary authority the provisions of Rule 10 of the Rules which mandates that the disciplinary authority shall, after considering the explanation, if any, and the relevant records, pass such order as he considers appropriate and when a penalty is imposed, reason thereof shall be given. Three important factors which are required in an order of the disciplinary authority under Rule 10 of the Rules, namely, consideration of the explanation, consideration of the relevant records and reasons for impositions of penalty do not prima facie appear in the order.

8. Rule 12 of the Rules mandates the appellate authority to pass such orders as mentioned in Clauses (a) to (d) of Rule 13 of these Rules, in the appeal as he thinks proper after considering:-

(a) Whether the facts on which the order was based have been established,

(b) Whether the facts established afford sufficient ground for taking action; and

(c) Whether the penalty is excessive, adequate or inadequate.

9. Perusal of the order of the appellate authority dated 12.5.2016 prima facie reveals that not a single word has been mentioned in it in terms of the mandate of Rule 12 of the Rules as aforenoted. The order is apparently non speaking and contains no reason for conclusions and has been passed mechanically.

10. In the case **of Omar Salay Mohd. Sait Vs. Commissioner of Income Tax, Madras, AIR 1959 SC 1238,** Hon'ble Supreme Court held in para 42 as under :

"42. We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. ***It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it****. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so.* ***On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions,***

conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

(Emphasis supplied by me)

11. In the case of **Udhav Das Kewat Ram Vs. CIT 1967 (66) ITR 462**, Hon'ble Supreme Court held that Tribunal must consider with due care all material facts and record its findings on all contentions raised before it and the relevant law.

12. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. Highlighting this rule, Hon'ble Supreme Court held in the case of **The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and ors., JT 2010(2)SC 566** para 31 to 33 as under :

"31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. " [Vide State of Orissa Vs. Dhaniram Luhar (JT 2004(2) SC 172 and State of Rajasthan Vs. Sohan Lal & Ors. JT 2004 (5) SCC 338:2004 (5) SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].

33.Thus, it is evident that the ***recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making.*** *The person who is adversely affected may know, as why his application has been rejected.*

(Emphasis supplied by me)

13. Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon'ble Supreme Court in the case of **Chandana Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi , 2011(269)E.L.T. 433 (S.C.)(**para 8) held as under :

"8. Having bestowed our anxious consideration on the facts at hand, we are of the opinion that there is some merit in the submission of learned counsel for the appellant that while dealing with an appeal under Section 130 of the Act, the High Court should have examined each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon and given its reasons for holding that question is not a substantial question of law. ***It needs to be emphasised that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums.*** *In State of Orissa Vs. Dhaniram Luhar2 this Court, while reiterating that reason is the heart beat of every conclusion and without the same, it becomes lifeless, observed thus :*

"8.....Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;....."

(Emphasis supplied by me)

14. In the case of **CCT Vs. Shukla & Bros. (2010) 4 SCC 785** (paras 20, 24 to 27) Hon'ble Supreme Court held as under:

"20. A Bench of Bombay High Court in the case of M/s. Pipe Arts India (P) Ltd. V. Gangadhar Nathuji Golamare (2008)6 Mah LJ 280, wherein the Bench was concerned with an appeal against an order, where prayer for an interim relief was rejected without stating any reasons in a writ petition challenging the order of the Labour Court noticed, that legality, propriety and correctness of the order was challenged on the ground that no reason was recorded by the learned Single Judge while rejecting the prayer and this has seriously prejudiced the interest of justice. After a detailed discussion on the subject, the Court held: (Mah LJ pp.283-87, paras 8,10 & 12-22)

"8. The Supreme Court and different High Courts have taken the view ***that it is always desirable to record reasons in support of the Government actions whether administrative or quasi-judicial. Even if the statutory rules do not impose an obligation upon the authorities still***

it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. *These concepts would require that any order, particularly, the order which can be subject-matter of judicial review, is reasoned one. Even in the case of Chabungbambohal Singh v. Union of India 1995 Suppl (2) SCC 83, the Court held as under: (SCC pp. 85-86, para 8)*

'8. ...His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated "unfit". As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated "unfit", and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made."

* * *

10. In ***Jawahar Lal Singh v. Naresh Singh (1987) 2 SCC 222,*** *accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons.* ***Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.***

In State of Punjab and Ors. v. Surinder Kumar (1992) 1 SCC 489, while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limine or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

13. In Hindustan Times Ltd. v. Union of India (1998) 2 SCC 242, the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

(emphasis supplied)

14. Consistent with the view expressed by the Supreme Court in the aforereferred cases, in State of U.P. v. Battan and Ors.(2001) 10 SCC 607, the Supreme Court held as under:(SCC p.608, para 4)

'4.The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. ...The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable."

15. Similar view was also taken by the Supreme Court in the case of Raj Kishore Jha v. State of Bihar and Ors. JT 2003 Supp(2) SC 354.

16. In a very recent judgment, the Supreme Court in State of Orissa v. Dhaniram Luhar (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under: (SDC p. 572, para 8)

'8. Even in respect of administrative ***orders Lord Denning, M.R. In Breen v. Amalgamated Engg. Union, (1971)2 QB 175, observed:(QB p.191 C)***

"The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

17. Following this very view, the Supreme Court in another very recent judgment delivered on 22-2-2008, in State of Rajasthan v. Rajendra Prasad Jain, (2008)15 SSC 711 stated that 'reason is the heartbeat of every conclusion, and without the same it becomes lifeless.'

18. ***Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request****. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal*

meaningful. ***It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be****. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law.* ***Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article,*** *"The problem with the Courts: Black-robed Bureaucracy Or Collegiality Under Challenge" 42 Md.L. Rev. 766, 782 (1983),* ***observed as under:-***

'My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not.'

19. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant*. Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenburg, Justice on Appeal 10 (West 1976), observed as under:-*

*'****When reasons are announced and can be weighed, the public can have assurance that the correcting process is working****. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand.* ***An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles****. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.'*

20. The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned

decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

21. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on 13-9-2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said, 'The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and (4) to provide reasons for an appeal Court to consider.'

22. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120 (NIRC), the Court went to the extent of observing that 'Failure to give reasons amounts to denial of justice'. Reasons are really linchpin to administration of justice. They are the link between the mind of the decision-taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher courts but is even of great utility for providing public understanding of law and imposing self- discipline in the Judge as their discretion is controlled by well- established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award.

The Court has to consider such a plea keeping in view the provisions of Section 17-B of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the

contentions alleged to have been raised by respective parties before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals."

24. ***Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law.*** *Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.*

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

26.Our procedural law and the established practice, in fact, imposes unqualified obligation upon the Courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that, the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order 14 Rule 2 read with Order 20 Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

27. ***By practice adopted in all Courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision****. In Alexander Machinery (Dudley) Ltd. v. Crabtree, 1974 ICR 120(NIRC), there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view.* ***There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher court. Absence of reasons thus would lead to frustrate the very object stated hereinabove."***

(Emphasis supplied by me)

15. The appellate authority is under the statutory obligation under Rule 12 of the Rules to consider with due care every fact for and against the delinquent employee and to record its finding in a manner which would clearly indicate as to whether the facts on which the order was passed have been established? Whether the facts so established afford sufficient ground for taking action? and whether penalty is excessive, adequate or inadequate? Absence of the findings to disclose reasons in an appellate order in the manner indicated above renders the order to be indefensible/unsustainable.

16. Reason is the heart beat of every conclusion. In the absence of reasons the order becomes lifeless. Non recording of reasons renders the order to be violative of principles of natural justice. Reasons ensures transparency and fairness in decision making. It enables litigant to know reasons for acceptance or rejection of his prayer. It is statutory requirement of natural justice under Rule 12 of the Rules Reasons are really linchpin to administration of justice. It is link between the mind of the decision taker and the controversy in question. Thus failure to give reasons amounts to denial of justice.

16. Aforenoted observations have been made merely for the purpose that the concerned authorities should properly discharge their function entrusted to them by law.

17. The petitioner has already filed a revision which is pending and as such I do not feel it proper to pass any order at this stage on the merits of the case.

18. **In view of the aforesaid and with the consent of learned counsel for the parties this writ petition is disposed of with the direction to the respondent no.6 to decide the revision of the petitioner strictly in accordance with law by a speaking and reasoned order within two months from the date of production of a certified copy of this order. Considering the peculiar facts of the case as aforenoted and in the interest of justice it is provided that till the Revision is decided no recovery shall be made from the petitioner pursuant to the impugned orders.**

19. Writ petition is disposed of.

(2016) 9 ILRA 1437
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ A No.- 47072 Of 2016

Reoti Singh Meena **...Petitioner**
Versus
Union Of India & Ors. **...Respondents**

Counsel for Petitioner:
Abhyuday Kumar Srivastava

Counsel for Respondents:
C.S.C., A.S.G.I.

FACTS

The petitioner, working as a Postal Assistant in the Department of Posts, challenged a charge sheet dated 6.5.2016 issued to him under Rule 14 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, by filing Original Application No. 1135 of 2016 before the Central Administrative Tribunal, Allahabad. The charge against the petitioner was that the caste (Scheduled Tribe — Meena) certificate dated 20.8.1981, on the basis of which he had obtained appointment, had been cancelled by order dated 25.11.2010 after an enquiry revealed that he was never a resident of village Gahlawata, District Alwar, as represented, but was in fact a permanent resident of village Khushalpur, Tehsil Bilsi, District Budaun — thus charging him with procuring appointment on the basis of false information.

The petitioner sought interim relief before the Tribunal for stay of the disciplinary proceedings pending the charge sheet, which was rejected by the impugned order dated 9.9.2016, with the next date fixed as 27.9.2016. It was pointed out on behalf of the petitioner that he had instituted Civil Suit No. 7 of 2011 before the Civil Judge (Junior Division), Laxmangarh, District Alwar, challenging the cancellation of his caste certificate, and that the Rajasthan High Court, in a writ petition arising from interim injunction proceedings in that suit, had directed the civil suit to be decided within 12 months. On this basis, it was contended that since the validity of the caste certificate cancellation was sub judice, the disciplinary proceedings ought to be stayed, relying on the Supreme Court's decision in M/s Stanzen Toyotetsu India (P) Ltd. v. Girish V & Others.

ISSUES FOR CONSIDERATION

(i) Whether the pendency of a civil suit instituted by the petitioner challenging the cancellation of his caste certificate warranted a stay of the departmental disciplinary proceedings initiated against him on the basis of that cancellation.

(ii) Whether the principles governing stay of disciplinary proceedings pending a criminal trial — to avoid prejudice to the employee's defence — apply with equal force to a pending civil suit instituted by the employee himself.

(iii) Whether the Tribunal was justified in declining interim relief and directing the disciplinary proceedings to continue.

HELD

The Court held that it is well settled that departmental and criminal proceedings can proceed simultaneously, and a stay of disciplinary proceedings pending a criminal trial is warranted only where both are founded on the same set of facts and evidence, such that disclosure of the employee's defence in the departmental proceedings before the prosecution has led its evidence in the criminal trial would cause serious prejudice — and even this bar is not absolute, as unduly delayed criminal proceedings do not justify indefinite stay of the disciplinary proceedings, relying on the principles laid down by the Supreme Court in Divisional Controller, KSRTC v. M.G. Vittal Rao and Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., as considered in Stanzen Toyotetsu India (P) Ltd. v. Girish V & Others.

The Court held that these principles, evolved in the context of criminal prosecutions — which serve a different purpose from disciplinary proceedings and are governed by a different standard of proof — could not be extended to a civil suit, more so one instituted by the petitioner himself, since no comparable risk of prejudicial disclosure of defence arises in such a suit. The Court noted that the interim stay initially granted in the civil suit had been set aside in appeal, that the only direction from the Rajasthan High Court was for expeditious disposal of the suit within 12 months (a period about to expire), and that the petitioner had not placed the plaint or the current status of the suit on record. In these circumstances, the Tribunal was correct in holding that it was not in the interest of justice to stay the disciplinary proceedings pending an uncertain and undisclosed timeline for conclusion of the civil suit.

RESULT

Writ petition disposed of without interfering with the impugned order of the Tribunal declining interim relief. The second respondent was directed to conclude the pending disciplinary proceedings against the petitioner expeditiously, provided the petitioner cooperates in the same.

CASE REFFERED

M/s Stanzen Toyotetsu India P. Ltd. Vs. Girish V & others3 .
Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G. Vittal Rao4 ,
Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd.

(Delivered by Hon'ble Dilip Gupta, J.)
&
Hon'ble Manoj Kumar Gupta, J.)

1. The petitioner, who is working as Postal Assistant in the Department of Posts, challenged the charge sheet dated 6.5.2016 issued to him by the department under Rule 14 of the Central Civil Services (Classification, Control & Appeal) Rules, 19651 by filing Original Application No.1135 of 2016 before the Central Administrative Tribunal, Allahabad2. The main charge against the petitioner was that the caste certificate dated 20 August 1981 issued by Tehsildar, Lakshmangarh, district Alwar, Rajasthan certifying that the petitioner belongs to the scheduled tribe (Meena) had been cancelled by order dated 25 November 2010. The cancellation was effected after holding an enquiry in which it transpired that the petitioner had never been a resident of village Gahlawata, District Alwar as represented by him while obtaining the caste certificate. He was found to be a permanent resident of village Khushalpur, Tehsil Bilsi, District Budaun. He has thus been charged of procuring appointment by furnishing wrong information.

2. Before the Tribunal, the petitioner also made a prayer for grant of interim relief for staying the proceedings in pursuance of the impugned charge sheet. However, by the impugned

order dated 9 September 2016, the prayer for interim relief has been rejected fixing 27 September 2016 as the next date in the main case.

3. It is pointed out by learned counsel for the petitioner that the petitioner has instituted Civil Suit No.7 of 2011 before the Civil Judge (Junior Division) Laxmangarh, district Alwar challenging the orders passed by the authorities cancelling the caste certificate dated 20 August 1981. It is further pointed out that in a writ petition filed by the petitioner before the Rajasthan High Court arising out of proceedings for grant of interim injunction, a direction was issued to the Civil Court to decide the proceedings of the suit within a period of 12 months. It is urged that since the issue relating to the validity of the orders cancelling the caste certificate is res integra and thus, the disciplinary proceedings initiated against the petitioner with the issuance of the impugned charge sheet, deserves to be stayed. In support of the said contention, learned counsel for the petitioner has placed reliance on a decision of the Supreme Court in the case of **M/s Stanzen Toyotetsu India P. Ltd. Vs. Girish V & others3**.

4. On the other hand, learned counsel for the Union of India vehemently opposed the submissions made by learned counsel for the petitioner and submitted that the Tribunal rightly did not grant any interim relief to the petitioner.

5. In the case cited on behalf of the petitioner, the issue before the Supreme Court was whether the disciplinary proceedings initiated by the appellant Company against its employees should remain stayed pending conclusion of criminal case in respect of the same incident. The Supreme Court placed reliance on its earlier decision in **Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G. Vittal Rao4,** wherein the following principles have been laid down:-

"(i) There is no legal bar for both proceedings to go on simultaneously.

(ii) The only valid ground for claiming that the disciplinary proceedings may be stayed would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts and law.

(iii) Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings.

(iv) Departmental Proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common."

6. The Supreme Court also referred to the broad principles laid down in **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd.5**, which are as follows :-

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be

considered in isolation to stay the Departmental proceedings but due regard has to be given to the fact that the depart-mental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honor may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

7. After considering the aforesaid broad principles, the Supreme Court in that particular case was of the opinion that the courts below before whom suit was instituted for restraining the disciplinary authorities from proceeding further with the disciplinary enquiry having exercised their discretion in favour of the employee, it would not be proper to interfere with their discretion. The appeals were disposed of by directing that criminal proceedings be concluded expeditiously. It has further been provided that in case criminal trial is not concluded within one year despite the efforts by the trial court, the disciplinary proceedings shall be resumed and the enquiry concluded.

8. It is now well settled that departmental proceedings and proceedings in a criminal case can proceed simultaneously. The main consideration for deciding whether disciplinary proceedings should be continued or not during the pendency of criminal trial is based on ascertainment of the fact as to whether the defence of the employee in the criminal case is likely to be prejudiced if the departmental proceedings are permitted to continue. If both the proceedings are based on the same set of facts and the evidence, the disclosure of the defence by the delinquent in the disciplinary proceedings, even before the prosecution has led evidence in the criminal case may cause serious prejudice to him. Even there, the bar is not absolute. In case the proceedings of the criminal trial are being unduly delayed, the disciplinary proceedings, if lying stayed, could be resumed and concluded. It is for the reason that the criminal prosecution is launched for alleged violation of a duty that the offender owes to the society whereas the departmental enquiry is aimed at maintaining

discipline and efficiency in service. The difference in the standard of proof and the application of the rules of evidence to one and inapplicability to the other distinguishes the one from the other. Conceptually, these two proceedings operate in different spheres and are intended to serve distinctly different purposes. In the instant case, indisputably, no criminal proceedings are pending against the petitioner. On the other hand, the petitioner has instituted the civil suit in question. The copy of the plaint has not been brought on record and thus, it is not clear as to what relief has been sought in the suit. However, according to learned counsel for the petitioner, the relief claimed in the suit is for cancellation of the order by which caste certificate dated 20 August 1981 has been cancelled. Be that as it may, it is not disputed that in the civil suit though initially a stay order was passed in favour of the petitioner but it was set aside in appeal filed by the defendant to the suit. Even in the writ petition, filed by the petitioner before the High Court of Rajasthan, the only direction issued was for deciding the suit within a period of 12 months. A period of one year is about to expire since the date of issuance of the direction by the High Court. The petitioner has also not disclosed the status of the civil suit. The Tribunal having regard to these facts has rightly observed that it is not certain when the proceedings of the suit would conclude and it would not be in the interest of justice to stay the disciplinary proceedings until the suit is decided.

9. Having regard to the facts noted above, we do not find any illegality in the view taken by the Tribunal which may warrant interference by this Court. As noted above, pendency of the civil suit cannot be equated with criminal proceedings, where in certain cases, disciplinary proceedings are stayed to prevent prejudice being caused to the employee in disclosing his defence before the disciplinary authorities even before the prosecution has led its evidence in the criminal trial. Concededly, no such contingency is likely to occur in a civil suit, that too, instituted by the petitioner himself.

10. At this stage, learned counsel for the petitioner submitted that the disciplinary authority be directed to conclude the disciplinary proceedings expeditiously, to which learned counsel appearing on behalf of respondents no.1 and 2 does not have any objection.

11. Accordingly, without interfering with the impugned order, this writ petition is disposed of with direction to the second respondent to conclude the disciplinary proceedings pending against the petitioner expeditiously provided he cooperates in the same.

12. The petition is, accordingly, disposed of.

(2016) 9 ILRA 1442
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2016
BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 47082 Of 2016

Ashok Kumar Lohia **...Petitioner**
Versus
Union Of India & Ors. **...Respondents**

Counsel for Petitioner:
Sunil Kumar Tripathi

Counsel for Respondents:
C.S.C., A.S.G.I.

FACTS

The petitioner, proprietor of a concern that constructed a residential building known as 'Neelkanth Apartment' at Navapura, Daranagar, Varanasi, challenged an assessment order dated 31.5.2016 passed by the Assessing Officer & Deputy Labour Commissioner, Varanasi, under Rule 7(5) of the Building and Other Construction Workers Welfare Cess Rules, 1998, assessing cess of Rs. 2,92,328/- at 1% of the construction cost, along with the consequential order dated 26.8.2016 rejecting his representation dated 19.8.2016. The petitioner also challenged Notifications dated 20.11.2009 and 15.9.2010, issued by the State of U.P. under Rules 2(f) and 2(g) of the Cess Rules, 1998, appointing various categories of officers — including District Magistrates and, in specified cases, the Regional Additional/Deputy/Assistant Labour Commissioners — as 'Assessing Officer' and 'Cess Collector' for assessment and collection of cess under the Building and Other Construction Workers Welfare Cess Act, 1996.

It was contended on behalf of the petitioner that the entire proceedings were without jurisdiction, since the State Government had no authority to appoint an Assessing Officer or Cess Collector. The respondents contended that the assessment was validly made in exercise of powers under Rule 2(g) of the Cess Rules, 1998, and that a statutory remedy of appeal against the assessment was available under Rule 14, rendering the writ petition premature.

ISSUES FOR CONSIDERATION

(i) Whether the State Government had the authority under the Building and Other Construction Workers Welfare Cess Act, 1996 and the Rules framed thereunder to appoint Assessing Officers and Cess Collectors, including through the Notifications dated 20.11.2009 and 15.9.2010.

(ii) Whether the impugned assessment order dated 31.5.2016 and the order dated 26.8.2016 rejecting the petitioner's representation were without jurisdiction.

(iii) Whether, in view of the availability of a statutory appellate remedy under Rule 14 of the Cess Rules, 1998, the writ petition was maintainable.

HELD

The Court held that the Notifications dated 20.11.2009 and 15.9.2010 were issued in valid exercise of the powers conferred under Rules 2(f) and 2(g) of the Building and Other Construction Workers Welfare Cess Rules, 1998, read with Section 5 of the Cess Act, 1996 and Rule 7 of the Rules, appointing District Magistrates and other specified officers as Assessing Officers and Cess Collectors within their respective jurisdictions for assessment and collection of cess on building and other construction work, including private residential buildings with construction cost of Rs. 10 lakh and above. The contention that the State Government lacked authority to make such appointments was found unsustainable on a plain reading of the statutory scheme.

The Court further noted that the constitutionality of the Cess Act and Rules had already been upheld by the Delhi High Court in Builders Association of India v. Union of India, 2007 SCC OnLine Del 327, and by the Supreme Court in Deewan Chandra Builders and Contractors v. Union of India, (2012) 1 SCC 101, where the levy was held to be a fee and not a tax. Reliance was also placed on A. Prabhakara Reddy & Co. v. State of Madhya Pradesh, (2016) 1 SCC 600, where the Supreme Court held that the Cess Act and the parent BOCW Act are beneficial welfare legislations for construction workers, that the levy of cess is not conditional upon prior registration of workers or crediting of the welfare fund, and that such welfare measures should not be defeated by technical objections to the timing or mode of assessment.

Since the notifications appointing the Assessing Officer and Cess Collector were held valid and the assessment was accordingly not without jurisdiction, and since a statutory remedy of appeal with wide powers was available under Rule 14 of the Cess Rules, 1998, the Court held that the petitioner ought to avail that alternative remedy rather than invoke writ jurisdiction.

RESULT

Writ petition dismissed on the ground of availability of alternative statutory remedy of appeal under Rule 14 of the Building and Other Construction Workers Welfare Cess Rules, 1998.

CASE REFERRED

Builders Association of India Vs. Union of India, 2007 SCC online Delhi 327
Deewan Chandra Builders and Contractors Vs. Union of India, 2012 (1) SCC 101
Prabhakara Reddy & Company Vs. State of Madhya Pradesh & others, 2016 (1) SCC 600

(Delivered by Hon'ble V.K. Shukla, J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Ashok Kumar Lohia is before this Court for following reliefs;

a. a writ, order or direction in the nature of certiorari quashing the impugned orders dated 31.5.2016 and 26.8.2016 passed by the respondent no. 3, Assessing Officer & Deputy Labour Commissioner, Varanasi.

b. a writ, order or direction in the nature of mandamus to respondent no. 3 to afford opportunity of hearing and decide the pending representation dated 19.8.2016.

c. a writ, order or direction in the nature of certiorari quashing the impugned Notification dated 20.11.2009 and 15.9.2010, passed by the respondent no. 2, State of U.P. appointing Assessing Officer and Cess Collector.

d. a writ, order or direction in the nature of mandamus commanding the respondent no. 3 not to enforce the impugned order dated 31.5.2016 and 26.8.2016 passed by the respondent no. 3, Assessing Officer & Deputy Labour Commissioner, Varanasi, against the petitioner and not to resort any coercive measure.

e. issue any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

2. Petitioner claims that he is proprietor of a concern that has constructed a residential building at K. 57/21, Navapura, Daranagar, Varanasi under the caption 'Neelkanth Apartment'. Petitioner has stated that proceedings for assessment of cess under Rule 7 (5) of Building and Other Construction Workers Welfare Cess Rules, 1998 was initiated on 31.5.2016 and assessment to the tune of Rs. 2,92,328/- cess was assessed at the rate of 1% over the construction cost. The relevant extract of the said impugned order is quoted below;

"अतएवं भवन एवं अन्य सन्निर्माण कर्मकार उपकर अधिनियम, 1996 तत्सम्बंधी नियमावली, 1988 के नियम 7 (5) के अन्तर्गत प्रदत्त शक्तियों का प्रयोग करते हुए **एकपक्षीय आधार पर** श्री अशोक कुमार लोहिया सी 33/2 चन्दुआ सट्टी, भारत माता मन्दिर, वाराणसी द्वारा 57/21 डी०ए०बी० रोड, दारानगर, वाराणसी में (काशी गोमती संयुक्त ग्रामीण बैंक के बगल में) कराये गये व्यावसायिक आवासीय नीलकण्ठ अपार्टमेन्ट के निर्माण पर उपरोक्त निर्माण लागत का 01 प्रतिशत रू0 2,92,328/- (रू० दो लाख बानबे हजार तीन सौ अट्ठाईस) मात्र उपकर निर्धारित किया जाता है।

श्री अशोक कुमार लोहिया के0 57/21 डी०ए०बी० रोड दारानगर, वाराणसी (काशी गोमती संयुक्त ग्रामीण बैंक के बगल में) को आदेश दिया जाता है कि दिनांक 16.06.2016 तक उक्त निर्धारित उपकर की राशि **"उ०प्र० भवन एवं अन्य सन्निर्माण कल्याण बोर्ड"** के पक्ष में डिमाण्ड ड्राफ्ट के माध्यम से अधोहस्ताक्षरी के कार्यालय में जमा करें तथा यह भी स्पष्ट करें कि निमार्ण कार्य समाप्त होने की तिथि दिसम्बर, 2013 के एक माह के भीतर कुल निर्माण लागत का 1 प्रतिशत की दर से दर उपकर की धनराशि जमा न करने के लिए क्यों न उन पर अधिनियम की धारा-9, के अन्त्रतगत सेस की धनराशि के बराबर अर्थदण्ड एवं अधिनियम की धारा-8 के अन्तर्गत 2 प्रतिशत प्रतिमाह की दर से ब्याज आरोपित किया जाय।"

3. Petitioner, thereafter, represented the matter and same has been rejected. Petitioner is contending before this Court that the entire proceedings, so undertaken, are unjustifiable and, accordingly, requisite relief be accorded to him.

4. Learned counsel for the petitioner has contended before us that the entire proceedings, so initiated, are totally without jurisdiction and not at all subscribed under law and, as such, this Court should come to rescue and reprieve of the petitioner.

5. Learned Standing Counsel, on the other hand, has contended that rightful assessment has been made by the Assessing Officer and Cess Collector under exercise of power conferred under Rule 2 (g) of Building and Other Construction Workers Welfare Cess Rules, 1998 and against the said assessment there is remedy of appeal provided for, as such, no interference be made by this Court and writ petition is liable to be dismissed.

6. Parliament in the year 1996 enacted following two Acts, whose preamble are given below under the name of the Act;

(i) Building & other Construction Workers (Regulation of Employment & Condition of Service) Act, 1996 (hereinafter referred to as BOCW Act of 1996) (Main Act). The Governor, State of U.P., framed rules in exercise of power u/s 62 read with Section 40, which is known as U.P. Building Construction Workers (Regulation of Employment & Conditions of Service) Rules, 2009. (hereinafter referred to as BOCW Rule of 2009).

Preamble : An Act to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other mattes connected therewith or incidental thereto.

(ii) Building & other Construction Workers Welfare Cess Act, 1996 (hereinafter referred to as BOCW Cess Act, 1996) (Supplementary Act). The Central Government in exercise of power u/s 14 (1) of the Act framed, Building & other Construction Workers Welfare Cess Rules, 1998 (hereinafter referred to as BOCW Cess Rules, 1998).

Preamble : An Act to provide for the levy and collection of a cess on the cost of construction incurred by employers with a view to augmenting the resources of the Building and Other Construction Workers Welfare Boards constituted under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

7. The purpose of BOCW Cess Act, 1996 is to create resources of "Building and Other Construction Workers Welfare Board constituted under the BOCW Act, 1996. Thus BOCW Cess Act, 1996, is complementary to BOCW Act, 1996. Section 2 (d) of BOCW Cess Act of 1996 clarifies that words and expression not defined under this Act but defined under BOCW Cess Act 1996 shall have the meaning respectively assigned to them in that Act.

8. As per Section 1 (4) of the BOCW Act of 1996, the Act applies to every establishments which employs or had employed on any day of preceding 12 months 10 or more workers I any 'Building or other Construction Work'. Section 3 of BOCW Cess Act, 1996 says that cess shall be collected for the purposes of BOCW Act of 1996 at a rate not exceeding 2% but not less than 1% of the cost of construction. Rule 14 of Building & Other Construction Workers Cess Act, 1996 is reproduced below;

"**14. Power to make rules.--(**1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may

provide for all or any of the following matters, namely:--

(a) the manner in which and the time within which the cess shall be collected under sub-section (2) of section 3;

(b) the rate or rates of advance cess leviable under sub-section (4) of section 3;

(c) the particulars of the returns to be furnished, the officer or authority to whom or to which such returns shall be furnished and the manner and time of furnishing such returns under sub-section (1) of section 4;

(d) the powers which may be exercised by the officer or authority under section 7;

(e) the authority which may impose penalty under section 9;

(f) the authority to which an appeal may be filed under sub-section (1) of section 11 and the time within which and the form and manner in which such appeal may be filed;

(g) the fees which shall accompany an appeal under sub-section (2) of section 11; and

(h) any other matter which has to be, or may be, prescribed."

Building & Other Construction Workers Welfare Cess Rules, 1998

"Rule 2 (f) "Cess Collector" means an officer appointed by the State Government for collection of cess under the Act;

Rule 2 (g) "Assessing Officer" means a gazetted officer of a State Government or an officer of a local authority holding an equivalent post to a gazetted officer of the State Government appointed by such State Government for assessment of Cess under the Act;"

9. By means of notification dated 20.11.2009 in exercise of the powers conferred under Sub-rules (f) and (g) of Building and Other Construction Workers Welfare Cess Rules, 1998 and with a view to perform the duties and responsibilities as envisaged under Section 5 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of the rules, the Governor has appointed officers mentioned in Column 2 for their respective jurisdiction mentioned in Column 3 to be 'Assessing Officer' and 'Cess Collector' as mentioned in Columns 4 and 5 of the Schedule mentioned hereinunder for purposes of assessment of Cess and collection thereof, in respect of all Building and Other Construction Work completed or being carried out by Government, Semi Government, Agencies, Corporations, Co-operative Societies, Private Agencies, Companies, Firms or Construction Agencies and also owners of such Private Residential Buildings with total construction cost of Rs. 10 lakhs and above, as envisaged under Building and Other Construction Workers Welfare Cess Act, 1996 (Act 28 of 1996).

SCHEDULE

Sl. No	Designation of Officer	Jurisdiction	Conferred Powers	
			Cess Assessing Officers	Cess Collector
1	2	3	4	5
1	All District Magistrates (Or Chief Development Officers and/or Additional District Magistrate, Finance and Revenue, as authorized by the District Magistrate)	All Building or Other Construction Works, completed or under construction, amenable under the provision of the Cess Act and rules made thereunder, as mentioned above within the limits of territorial jurisdiction in the district.	Assessing Officer	Cess Collector

10. This much fact has also been clarified that all the Assessing Officers and Cess Collectors shall within their respective jurisdiction assess the cess at the rate of 1 per cent of construction cost without any monetary limitations as authorized vide Government of India Notification No. S-61011/9/95/RW, dated October 12, 1996 issued under sub-section (1) of Section 3 of Building and Other Construction Workers Welfare Cess Act, 1996.

11. The Regional Additional/Deputy Labour Commissioners, all Assistant Labour Commissioners posted in such regional offices and Labour Enforcement Officers posted in remaining district shall provide secretarial support and assistance to the District Magistrate in exercise of powers and responsibilities as envisaged hereinabove.

12. This is further, clarified that all Builders/Employers/Building owners/Developers/Promoters shall submit the return on prescribed Proforma 1 within the time as stipulated under Section 4 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of Building and Other Construction Workers Welfare Cess Rules, 1998.

13. Thereafter by means of notification dated 15.9.2010 in exercise of the powers conferred under sub-rules (f) and (g) of the Rule 2 of Building and Other Construction Workers Welfare Cess Rules, 1998, all District Magistrates have been appointed "Assessing Officer" and "Cess Officer" within the area of their local jurisdiction vide Government Notification No. 1412/36-2-2009-251 (SM)/95, dated November 20, 2009 in addition thereto and in exercise of powers under sub-rules (f)

and (g) of Rule to as mentioned therein above and with a view to perform the duties and responsibilities as envisaged under Section 5 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of the Rules, the Governor is pleased to appoint the officers mentioned in Column 2 of the Schedule below, for their respective territorial jurisdiction mentioned in Column 3 as "Assessment Officer" and "Cess Collector" as mentioned in Columns 4 and 5 works respectively in respect of all constructed under their respective control or jurisdiction, undertaken directly or through contractors and also private residential houses with total construction cost of Rs. 10 lakhs and above (in respect of which approval/sanction is in their competence/jurisdiction) under Building and Other Construction Workers Welfare Cess Act, 1996 (Act No. 28 of 1996).

Assessment of Officer and Cess Collector

Sl. No.	Designation of Officer	Jurisdiction	Cess Assessment Officer	Cess Collector
1	Secretary	Development Authority	All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction)below Rs. 10 Lakhs, Cess Assessment Officer	Cess Collector
2	Officer not below the rank of Executive Engineer of the Public Works Department	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
3	Officer not below the rank of Executive Engineer of the	All construction works undertaken either directly or	Cess Assessment Officer	Cess Collector

	Irrigation Department	within their control within the area of their local jurisdiction		
4	Officer not below the rank of Executive Engineer of the U.P. Power Corporation	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
5	Officer not below the rank of Secretary, Mandi Parishad	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
6	Officer not below the rank of Project Manager of U.P. Bridge Corporation	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
7	Officer not below the rank of Executive Engineer of the U.P. Rajkiya Nirman Nigam	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
8	Officer not below the rank of Executive Engineer of the U.P. Rajkiya Nalkoop Nigam	All construction works undertaken either directly or within their control within	Cess Assessment Officer	Cess Collector

		the area of their local jurisdiction		
9	Officer not below the rank of Executive Engineer of the U.P. Jal Nigam	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
10	Officer not below the rank of Executive Engineer of the Samaj Kalyan Nigam	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
11	Officer not below the rank of Executive Engineer of the U.P. Avas and Vikas Parishad	All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)	Cess Assessment Officer	Cess Collector
12	Nagar Ayukt/Addl./Dy. Nagar Ayukt of Nagar Nigam	All construction works undertaken either directly or within their competence in the territorial area of their	Cess Assessment Officer	Cess Collector

		jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)		
13	Executive Engineer of Nagar Palika Parishad/Nagar Panchayat	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector
14	Block Development Officer	All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)	Cess Assessment Officer	Cess Collector
15	Asstt./Dy./Addl. Labour Commissioner	All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction	Cess Assessment Officer	Cess Collector

		(excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)		
16	Zila Basic Shiksha Adhikari	All construction works undertaken either directly or within their control within the area of their local jurisdiction	Cess Assessment Officer	Cess Collector

14. The abovementioned officers have been made fully responsible for assessment and collection of cess under Building and Other Construction Workers Welfare Cess Act, 1996 (Act No. 28 of 1996) and Building and Other Construction Workers Welfare Cess Rules, 1998. The cess, so collected, has to be deposited within 30 days of cess collection in the account of "the U.P. Building and Other Construction Workers Welfare Board."

15. The abovesaid officers, for the purpose of assessment of cess, are obligated to follow the same procedures, guidelines, directions and standards as are already applicable in their respective department with the approval of State Government and, in case, in any department such approved procedure, guidelines, directions and standards are not available, then in that case, recourse has to be taken to such approved procedure, guidelines and directions as are already in practice in similar matters in any other department of Government for the purposes of assessment of cess.

16. The Regional Additional/Deputy Assistant Labour Commissioners of the Department of Labour, who are appointed Assessment Officers and Cess Collectors as hereinabove, in their respective territorial jurisdiction, are obligated to closely monitor the assessment of cess and collection thereof with a view to their effective implementation and shall also, in case for want of clarity, provide clarifications to officers of their Department as and when required.

17. A bare perusal of the notification would go to show that in exercise of the powers conferred under Sub-rules (f) and (g) of Building and Other Construction Workers Welfare Cess Rules, 1998 and with a view to perform the duties and responsibilities as envisaged under Section 5 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of the rules, the Governor has been pleased to appoint officers mentioned in Column 2 for their respective jurisdiction mentioned in Column 3 to be Assessing Officer and Cess Collector as mentioned in Columns 4 and 5 of the schedule mentioned hereinunder for the purposes of assessment of cess and collection thereof, in respect of all

Building and Other Construction Work completed or being carried out by Government, Semi Government, Agencies, Corporations, Co-operative Societies, Private Agencies, Companies, Firms or Construction Agencies and also owners of such Private Residential Buildings with total construction cost of Rs. 10 lakhs and above, as envisaged under Building and Other Construction Workers Welfare Cess Act, 1996. Once in exercise of such an authority Assessing Officer and Cess Collectors have been appointed, then the averments mentioned by the petitioner that there is no authority conferred upon State Government to appoint Assessing Officer or Cess Collectors is unjustifiable. The authority in question under which such arrangements have been made is clearly referable to the provisions quoted, in view of this, the arguments, that have been so advanced, that Assessing Officer has been wrongly nominated by the State Government, cannot be accepted by us.

18. Constitutionality of Cess Act and Rules framed thereunder was subjected to challenge before the Delhi High Court in the case of ***Builders Association of India Vs. Union of India, 2007 SCC online Delhi 327.*** Delhi High Court upheld the validity of said provisions. The matter was taken to Apex Court in the case of ***Deewan Chandra Builders and Contractors Vs. Union of India, 2012 (1) SCC 101***, the Apex Court, in its turn, has dismissed the challenge and has taken the view that the levy is in fact a ***'fee'*** and not a ***'tax'***.

19. Apex Court in the case of ***A. Prabhakara Reddy & Company Vs. State of Madhya Pradesh & others, 2016 (1) SCC 600***, has taken the view that the provisions are beneficial measures for the welfare of the workers and provisions provided thereof should not defeat the rights of workers whose protection is the primary aim. Relevant paragraphs 11, 12, 13 and 14 are extracted below;

"11. The learned counsel highlighted the provisions in the Cess Act and Rules framed thereunder such as Rules 3, 4, 5 & 7 providing for levy of cess; time and manner of collection; transfer of the proceeds of the cess to the Board; and assessment of the cess, to support his contention that there is no basis under the law to support the plea of the appellants that the contracts or work orders finalized before constitution of Board must be made immune from levy of cess on the ground that cost of construction must always be treated as a single entity and therefore incapable of two divisions, one pertaining to pre-Board period and the other relating to after the constitution of the Board. He supported the views of the High Court that there can be no estoppel against statute and hence, even if a contract or work order does not provide for payment of recovery of cess by the contractor or the principal, the statute providing for cess cannot become ineffective. It is also the stand of the respondents that had the cess been a tax, the liability to pay the same would be coterminous with the entire cost, if construction was after coming into force of the Cess Act but since it has been held to be a fee, the respondents have acted reasonably and effected its levy by raising demands only to cover such cost of construction which coincides with and begins from the constitution of the Board.

12. Although the learned Senior Counsel for the appellants had taken us through the entire scheme of the Main Act as well as the Cess Act and also the Rules framed thereunder, but nothing helps the appellants' case and in view of limited issues arising from determination, we do not feel persuaded to go into details of the Cess Act and the Rules unnecessarily. We are of the considered view that after the Cess Act and the Rules came into effect and the Board was constituted, with the

notification specifying the rate of cess to be levied upon the cost of construction incurred by the employer already in place, the respondents were duty bound to collect the cess by raising the demands in respect of the on going construction works if the workers in such construction activities were eligible for benefits under the BOCW Act.

13. The fact that the task of registering the workers and providing them the benefit may take sometime, would not affect the liability to pay the levy as per the Cess Act. Any other interpretation would defeat the rights of the workers whose protection is the principal aim or primary concern and objective of the BOCW Act as well as the Cess Act. The Cess is a fee for service and hence, its calculation, as per settled law is not to be strictly in accordance with quid pro quo rule and does not require any mathematical exactitude. The scheme of the BOCW Act, the Cess Act and the Rules warrant that the lawfully imposable cess should be imposed, collected and put in the statutory welfare fund without delay so that the benefits may flow to the eligible workers at the earliest. The scheme of the BOCW Act or the Cess Act does not warrant that unless all the workers are already registered or the welfare fund is duly credited or the welfare measures are made available, no cess can be levied. In other words the service to the workers is not required to be a condition precedent for the levy of the cess. The rendering of welfare services can reasonably be undertaken only after the cess is levied, collected and credited to the welfare fund.

14. We also find no merit in other submission advanced on behalf of the appellants that there is legal impediment in charging levy on the cost of construction incurred by the employer from a particular period on account of constitution of Board from a particular date or for any other reason. This argument is fallacious. Such beneficial measures for the welfare of workers are applicable even to the construction activity which may have commenced before coming into force of the BOCW Act and the Cess Act, if they are subsequently covered by the provisions of these Acts. There can be no legal obstacle in ignoring the construction cost incurred before the cess became leviable by distinguishing it from the cost of construction incurred later, from a date when the Board is available to render service to the Building and other construction workers. Levy of cess in these facts and circumstances cannot be faulted for any reason. Demand of cess in the given facts cannot amount to retrospective application of the Cess Act. Hence the appeals must fail."

20. Learned counsel for the petitioner has miserably failed to demonstrate that the State Government has got no authority whereas under the scheme of the Act and Rules framed thereunder it is the State that has got full authority to make such arrangement, in view of this, the challenge made on the said score is unsustainable. Once the notification in question is valid and the assessment in question has been made, then against the said assessment in question there is statutory remedy of appeal provided for under Rule 14 of the Building and Other Construction Workers Welfare Cess Rules, 1998 and the appellate forum has all wide powers to decide the appeal in question, in accordance with law.

21. Writ petition is ***dismissed***, accordingly, on the ground of alternative remedy.

(2016) 9 ILRA 1455
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 62792 Of 2009

Vishal Chand **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsels for Petitioner:
B.R. Mishra, Hari Om Ojha, Rakesh Pande

Counsels for Respondents:
C.S.C., Neeraj Tiwari.

Subject Matter
Constitution of India - Articles 14, 16(1) - Doctrine of 'equal pay for equal work' - Two candidates selected pursuant to the same advertisement, same selection process and same post (Lecturer, Biotechnology) placed on different pay - one on consolidated salary and the other in regular pay scale - Whether such differential treatment, unexplained in the counter affidavit, is arbitrary and discriminatory - Whether delay of about three years in filing the writ petition disentitles relief where the disparity constitutes a continuing cause of action - Held, discrimination made out; relief granted prospectively from the date of filing of the writ petition, without retrospective arrears, given the delay.

Facts
Pursuant to a single advertisement issued by the respondent-University for two vacancies of Lecturer (Biotechnology and Environmental Science) in the Institute of Bio-Science and Biotechnology, the petitioner and one Dr. Varsha Gupta were both selected by the Selection Committee for the post of Lecturer (Biotechnology) in the Institute of Bio-Science and Biotechnology (SFS), and both were issued appointment letters on the same date, 03.04.2006. However, the petitioner was appointed on a consolidated salary of Rs. 9,000/- per month, while Dr. Varsha Gupta was appointed in the regular pay scale of Rs. 8,000-13,500/-, all other terms and conditions in both appointment letters being identical. The petitioner contended that this differential treatment, despite identical selection, post and duties, was arbitrary, illegal and violative of Articles 14 and 16(1) of the Constitution. Respondents 2 to 4 filed a counter affidavit stating, in paragraph 17, only that the petitioner was highly qualified and educated, but assigned no reason whatsoever for the distinction in salary between the petitioner and Dr. Varsha Gupta. The University's sole defence was that the writ petition, filed in November 2009 in respect of an appointment made in 2006, after the petitioner had already worked for about three years, was barred by delay/laches.

Issues
1. Whether delay of about three years in approaching the Court disentitles the petitioner to relief, where the salary disparity complained of is a continuing, month-to-month cause of action.

2. Whether payment of consolidated salary to the petitioner, as against regular pay scale to another candidate selected on the same post pursuant to the same advertisement, recruitment process and criteria, without any distinction shown in duties, responsibilities or qualifications, violates the doctrine of 'equal pay for equal work' under Articles 14 and 16 of the Constitution.

Held

On delay, since the disparity in pay scale continued from month to month and constituted a continuing cause of action, delay in approaching the Court could at most disentitle the petitioner to relief for the past period on the ground of laches, but could not defeat prospective relief against ongoing discrimination. On the substantive question, the doctrine of equal pay for equal work, deducible from Articles 14 and 16 read with the Preamble and Article 39(d) of the Constitution, is not an abstract doctrine but one of substance, applicable to cases of unequal pay based on no or irrational classification where persons under the same employer perform identical work, following Randhir Singh Vs. Union of India and Ors., (1982) 1 SCC 618. Parity in pay depends on factors such as source and mode of recruitment, qualifications, nature and value of work, responsibility, reliability and experience, and the equality clause can be invoked only where there is wholesale identity between the two posts, following R.D. Gupta and Ors. Vs. Lt. Governor, Delhi Administration and Ors., (1987) 3 SCC 505; Jaipal and Ors. Vs. State of Haryana and Ors., (1988) 3 SCC 354; Grih Kalyan Kendra Workers' Union Vs. Union of India and Ors., JT 1991 (1) SC 60; State of Orissa and Ors. Vs. Balaram Sahu and Ors., (2003) 1 SCC 250; State Bank of India and Anr. Vs. M.R. Ganesh Babu and Ors., (2002) 4 SCC 556; Deb Narayan Shyam and others Vs. State of West Bengal and others, (2005) 2 SCC 286; State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, 2009 (11) SCALE 619 and (2009) 13 SCC 635; and A.K. Behra Vs. Union of India & Anr., JT 2010 (5) SC 290. On facts, the petitioner and Dr. Varsha Gupta were selected on identical posts (Lecturer, Biotechnology) pursuant to the same advertisement, the same recruitment process and the same selection criteria, with identical terms in their appointment letters save for salary; the University's counter affidavit conceded the petitioner's high qualification and offered no explanation whatsoever for the differential in salary. In such circumstances, denying the petitioner regular pay scale amounted to treating equals as unequals, in violation of Articles 14 and 16, and the University's action in discriminating between the two similarly placed appointees was accordingly held illegal.

Result

Writ petition allowed. Respondents directed to pay the petitioner salary in the regular pay scale (Rs. 8,000-13,500/-) applicable to the post of Lecturer (Biotechnology), with the benefit of regular pay scale and arrears operating prospectively from the date of filing of the writ petition (November 2009); no arrears payable for the period from the date of appointment till the date of filing of the writ petition. For purposes of increment, pay fixation and other consequential benefits, the regular pay scale shall be treated as applicable from the date of the petitioner's original appointment. Petitioner awarded costs of Rs. 25,000/- against Respondent No. 2.

Case Law Referred

Randhir Singh Vs. Union of India and Ors., (1982) 1 SCC 618
R.D. Gupta and Ors. Vs. Lt. Governor, Delhi Administration and Ors., (1987) 3 SCC 505
Jaipal and Ors. Vs. State of Haryana and Ors., (1988) 3 SCC 354
Grih Kalyan Kendra Workers' Union Vs. Union of India and Ors., JT 1991 (1) SC 60
State of Orissa and Ors. Vs. Balaram Sahu and Ors., (2003) 1 SCC 250
State Bank of India and Anr. Vs. M.R. Ganesh Babu and Ors., (2002) 4 SCC 556
Deb Narayan Shyam and others Vs. State of West Bengal and others, (2005) 2 SCC 286
State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, 2009 (11) SCALE 619
State of Madhya Pradesh and Ors. Vs. Ramesh Chandra Bajpai, (2009) 13 SCC 635
A.K. Behra Vs. Union of India & Anr., JT 2010 (5) SC 290.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard learned counsels for parties and perused the record.

2. The grievance of petitioner is that pursuant to same advertisement published by Chhatrapati Sahu Ji Maharaj University, Kanpur Nagar (hereinafter referred to as "University") advertising same nature of posts in the same department, petitioner and another person, namely, Dr. Varsha Gupta, were appointed as Lecturer (Biotechnology). Still respondent-University has discriminated petitioner by appointing on a consolidated salary of Rs. 9000/- per month, while Dr. Varsha Gupta simultaneously has been given salary in regular pay scale of Rs. 8000-13,500/-.

3. An advertisement was published by University (copy whereof is Annexure-2 to writ petition) which advertised two vacancies on the post of Lecturer (Biotechnology and Environmental Science) in Institute of Bio-Science and Biotechnology . Selection Committee selected petitioner and one Dr. Varsha Gupta for the post of Lecturer (Biotechnology) in the Institute of Bio-Science and Biotechnology (SFS). Both were issued appointment letters on the same date, i.e., 03.04.2006 but petitioner's appointment has been made on the post of Lecturer (Biotechnology) on a consolidated salary of Rs. 9000/- while Dr. Varsha Gupta has been appointed as Lecturer (Biotechnology) in regular pay scale of 8000-13,500/-. All other terms and conditions of appointment letters are same as is evident from Annexure-3, copy of appointment letter of petitioner, and, Annexure-5, which is copy of appointment letter of Dr. Varsha Gupta.

4. Grievance of petitioner is that there is no justification for making discrimination in the matter of salary, when both were appointed pursuant to same advertisement on the post of Lecturer (Biotechnology) and this is patently arbitrary, illegal and violative of Articles 14 and 16(1) of the Constitution of India.

5. Respondents 2 to 4 have filed counter affidavit and in para 17 thereof, it is said that petitioner is a highly qualified and educated person and has been appointed on consolidated salary of Rs. 9000/-. With respect to distinction between salary of petitioner and Dr. Varsha Gupta, no reason has been assigned in the entire counter affidavit and respondents have kept conspicuous silence on this aspect.

6. The only objection raised by learned counsel for University is that appointment was made in 2006 and after appointment, petitioner worked for three years. This writ petition has been filed after almost three years, and, therefore, petitioner is not entitled for any relief.

7. However, we find no force in the above objection raised on behalf of respondent-2. Disparity in the matter of pay scale has continued from month to month and provides continuous cause of action. If a petitioner approaches a Court with delay in a case where cause of action is

continuous, he may not be given relief for the past period treating him to be guilty of laches, but if he is being discriminated, Court may grant relief prospectively.

8. In the present matter, it is a clear case of denial of the principle of "equal pay for equal work" inasmuch same posts in the same Department for discharging same duties in the same recruitment have been filled in. While petitioner has been appointed as Lecturer (Biotechnology) on consolidated salary of Rs. 9000/-, another candidate appointed as Lecturer (Biotechnology) has been placed in regular pay scale of Rs. 8000-13,500/-. Neither in respect to the duties nor performance nor responsibilities nor otherwise, any distinction, whatsoever, has been pointed out or pleaded by respondent-University in respect to petitioner vis-a-vis Dr. Varsha Gupta who both have been appointed on the same post, i.e., Lecturer (Biotechnology) after undergoing same process of selection/recruitment and same criteria. Even it is admitted by respondent-University that petitioner is highly qualified and educated person. We find it difficult as to how and why respondent-University in such circumstances can discriminate petitioner vis-a-vis other similarly placed persons in the matter of salary/wages. Principle of equal pay for equal work is well recognized and in the past 30 years and more it has been reiterated time and again by the Courts that if in all other aspects, duties, responsibilities, obligations etc. two persons are similarly placed performing same duties, they cannot be denied equal pay and any otherwise treatment would amount to treating equals as un-equals and shall violate fundamental right of equality enshrined under Article 14 and 16 of Constitution of India.

9. In **Randhir Singh v. Union of India and Ors., (1982) 1 SCC 618,** Apex Court considering principle of equal pay for equal work held that it is not an abstract doctrine but one of substance. Construing Articles 14 and 16 in the light of Preamble and Article 39(d) of the Constitution, Apex Court held that principle of equal pay for equal work is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing different scales of pay do identical work under the same employer.

10. In **R.D. Gupta and Ors. v. Lt. Governor, Delhi Administration and Ors. (1987) 3 SCC 505,** the Apex Court applying principle of equal pay for equal work, in para 20 of the judgment, considered correctness of defence taken by employer justifying non application of said principle, and held -

"the ministerial staff in the NDMC constitute a unified cadre. The recruitment policy for the selection of the ministerial staff is a common one and the recruitment is also done by a common agency. They are governed by a common seniority list. The ministerial posts in the three wings of the BDNC viz, the general wing, the electricity wing and the waterworks wing are interchangeable posts and the postings an made from the common pool according to administrative convenience and exigencies of service and not on the basis of any distinct policy or special qualifications. Therefore, it would be futile to say that merely because a member of the ministerial staff had been given a posting in the electricity wing, either due to force of circumstances or due to voluntary preferment, he stands on a better or higher footing or in a more advantageous position

than his counterparts in the general wing. It is not the cast of the respondents that the ministerial staff in the electricity wing perform more onerous or more exacting duties than the ministerial staff in the general wing. It therefore follows that all sections of the ministerial staff should be treated alike and all of them held entitled to the same scales of pay for the work of equal nature done by them." (para 20)

11. In **Jaipal and Ors. v. State of Haryana and Ors., (1988) 3 SCC 354**, the Apex Court held:

"The doctrine of equal work equal pay would apply on the premise of similar work, but it does not mean that there should be complete identity in all respects. If the two classes of persons do same work under the same employer, with similar responsibility, under similar working conditions the doctrine of 'equal work equal pay would apply and It would not be open to the State to discriminate one class with the other in paying salary. The State is under a constitutional obligation to ensure that equal pay is paid for equal work." (para 6)

12. In **Grih Kalyan Kendra Workers' Union v. Union of India and Ors. JT 1991 (1) SC 60**, it was observed:

"the question of parity in pay scale cannot be determined by applying mathematical formula. It depends upon several factors namely ***nature of work, performance of duties, qualifications, the quality of work performed by them****. It is also permissible to have classification in services based on hierarchy of posts, pay scale, value of work and responsibility and experience. The classification must, however, have a reasonable relation to the object sought to be achieved." (para 7) (emphasis added)*

13. In **State of Orissa and Ors. v. Balaram Sahu and Ors. (2003) 1 SCC 250 : 2003 (1) AWC 273 (SC)**, Court observed as under:

"Though "equal pay for equal work" is considered to be a concomitant of Article 14 as much as "equal pay for unequal work" will also be a negation of that right, equal pay would depend upon not only the nature or the volume of work, tint also on the qualitative difference as regards reliability and responsibility as well and though the functions may be the same, but the responsibilities do make a real and substantial difference." (para 11)

14. In **State Bank of India and Anr. v. M.R. Ganesh Babu and Ors. (2002) 4 SCC 556**, the Court observed in para 16:

"The principle of equal pay for equal work has been considered and applied in may reported decisions of this Court. The principle has been adequately explained and crystallized and sufficiently reiterated in a catena of decisions of this Court. It is well settled that equal pay must depend upon the nature of work done."

15. In **Deb Narayan Shyam and others Vs. State of West Bengal and others, 2005(2) SCC 286**, the Court summarized as to when doctrine of equal pay for equal work would apply in the light of exposition of law laid down in catena of its earlier decisions and said:

"Large number of decisions have been cited before us with regard to the principle of 'equal pay for equal work' by both sides. We need not deal with the said decisions to overburden this judgment. Suffice it to say that the principle is settled that if the two categories of posts perform the same duties and function and carry the same qualification, then there should not be any distinction in pay scale between the two categories of posts similarly situated. But when they are different and perform different duties and qualifications for recruitment being different, then they cannot be said to be equated so as to qualify for equal pay for equal work."

16. In **State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, 2009(11) SCALE 619** the Court said that it is well settled that the doctrine of equal pay for equal work can be invoked only when the employees are similarly situated. Similarity in designation or nature or equation of work is not determinative for equality in the matter of pay scales. The Court has to consider the factors like the source and mode of recruitment/appointment, qualifications, nature of work, the value thereof, responsibility, reliability, experience, confidentiality, functional need, etc. In other words the equality clause can be invoked in the matter of pay scale only when there is a whole sale identity between the two posts.

17. In **State of Madhya Pradesh and Ors. Vs. Ramesh Chandra Bajpai, 2009(13) SCC 635**, the Court said that doctrine of equal pay for equal work can be invoked only when the employees are similarly situated and that similarity of the designation or nature or quantum of work is not determinative of equality in the matter of pay scales and that the Court has to consider several factors and only when there was wholesale identity between the holders of two posts, equality clause can be invoked and not otherwise.

18. In **A.K.Behra Vs. Union of India & Anr., JT 2010 (5) SC 290, the Court, in paras 84 and 85,** said:

"84. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.

85. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive."

19. Looking to the entire dispute in the case in hand from various determining factors enumerated in the above authorities, we find no reason to discriminate petitioner vis-a-vis another

incumbent appointed on the same post, i.e., Lecturer (Biotechnology) pursuant to the same advertisement, same recruitment process, same criteria and same selection etc. particularly when none has been pointed out by respondent-University in the counter affidavit.

20. Ex-facie, therefore, we have no hesitation in holding that respondent-University has acted illegally in discriminating petitioner vis-a-vis another incumbent appointed on the post of Lecturer (Biotechnology) in the matter of pay by providing a consolidated salary of 9000/- per month to petitioner while another counterpart, Dr. Varsha Gupta, has been appointed in regular pay scale of Rs. 8000 to 13,500/-. In our view, both are entitled to be treated alike and should have been given same salary.

21. The writ petition is allowed accordingly. Respondents are directed to pay salary to petitioner in regular pay scale applicable to the post of Lecturer (Biotechnology) but no arrears of salary shall be paid to petitioner from the date of his appointment till the date of filing this writ petition which has been filed in November' 2009. Benefit of salary in regular pay scale of Rs. 8000-13,500/- and arrears shall be made applicable to petitioner from the date of filing of this writ petition. However, for the purpose of increment, pay fixation and other benefits etc. regular pay scale shall be treated to be applicable to petitioner from the date of his appointment.

22. Petitioner shall also be entitled to cost which we quantify to Rs. 25,000/- against respondent-2.

(2016) 9 ILRA 1462
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 64214 Of 2005

Ashok Kumar **...Petitioner**

Versus

Fatehpur Kshetriya Gramin Bank through Chairman & Ors. **...Opposite Parties**

Counsels for Petitioner:
Aditya Kumar Singh, Ashok Khare, S.K. Srivastava, Siddharth Khare

Counsels for Opposite Parties:
Y.K. Sinha, R.B. Sahai, S.C.

Subject Matter
Service Law - Departmental/Disciplinary Enquiry - Regional Rural Banks Act, 1976 - Fatehpur Kshetriya Gramin Bank (Officer and Employee) Service Regulations, 2001, Regulation 40 - Principles of natural justice in domestic enquiry - Repeated ex-parte proceedings by Enquiry Officer despite genuine and verified reasons (arrest/custody, medical illness certified by Bank's own doctor, critical illness of parent) for delinquent's absence - Refusal to supply copies of documents relied upon by the employer despite demand - Denial of request to nominate a Defence Assistant - Closure of oral enquiry without affording opportunity to lead defence evidence - Held, enquiry vitiated in its entirety for violation of principles of natural justice; punishment orders of removal and recovery set aside.

Facts
The petitioner, who joined the respondent Bank (a Regional Rural Bank sponsored by Bank of Baroda) as Clerk/Cashier on 07.09.1981 and was later promoted to Field Officer (redesignated Probationary Officer, Junior Management Grade) in 1989, was placed under suspension on 21.05.2004 while posted at Mavaiganeshpur Branch. An FIR dated 03.07.2004 was lodged against him under Sections 467, 468, 471 and 409 IPC, pursuant to which he was arrested on 23.08.2004 and released on bail on 26.08.2004. A chargesheet dated 22.07.2004 containing eleven charges was served on him, and an Enquiry Officer was appointed under Regulation 40 of the Regulations, 2001. The enquiry proceeded through a series of dates - 18.08.2004 (date-fixing letter served only on the date itself), 26.08.2004 (petitioner in judicial custody/awaiting release on bail), 02.09.2004 and 17.09.2004/23.09.2004 (petitioner medically certified unfit, verified by the Bank's own doctor, Dr. Tejman Singh), 25.09.2004 (petitioner's request for copies of proceedings and time to prepare declined), 01.10.2004 (request to nominate a Defence Assistant and for copies of relied-upon documents declined), and 08.10.2004/12.10.2004 (petitioner unable to attend due to his father's critical illness, and due to late service of the next date's intimation) - on each of which the Enquiry Officer either proceeded ex-parte recording prosecution witnesses' statements or otherwise declined the petitioner's requests, culminating in closure of the oral enquiry on 12.10.2004 without affording the petitioner opportunity to cross-examine witnesses or lead defence evidence. The Enquiry Officer submitted a report dated 04.01.2005 holding Charges 1 to 9 proved.

The Chairman issued a show-cause notice dated 07.01.2005 and, despite the petitioner's hospitalization and request dated 19.01.2005 for further time and personal hearing, passed an order the same day imposing the penalty of removal and recovery of Rs. 57,550/-. The petitioner's departmental appeal was rejected by the Board of Directors in its meeting dated 26.05.2005, communicated on 06.06.2005. The present writ petition sought certiorari quashing both orders, reinstatement, and consequential benefits.

Issue

Whether, in the facts and circumstances of the case, the petitioner was afforded adequate and reasonable opportunity of defence in the disciplinary enquiry, or whether the enquiry was conducted in violation of the principles of natural justice so as to vitiate the resultant orders of punishment.

Held

An order of punishment can be passed only after affording reasonable opportunity of defence to the delinquent employee. Examining the enquiry chronologically, the Court found that on at least three dates (26.08.2004, 02.09.2004 and 23.09.2004) the Enquiry Officer proceeded ex-parte, recording statements of the Bank's witnesses, despite the petitioner's absence being for genuine and undisputed reasons - custody pursuant to arrest, and illness independently verified by the Bank's own medical consultant, Dr. Tejman Singh, acting under the disciplinary authority's own directions. When the petitioner first appeared on 25.09.2004, his innocuous request for copies of earlier proceedings and time to prepare was declined without justification, and a further witness's statement was recorded; on 01.10.2004, his request to nominate a Defence Assistant - a right not disputed by the Bank under the governing Rules - and for copies of documents relied upon by the Bank were both declined without reason. Non-supply of documents relied upon by the employer in support of disciplinary charges, despite demand, vitiates the entire proceedings, following State of U.P. and others Vs. Saroj Kumar Sinha, (2010) 2 SCC 772, which in turn relied on Kashinath Dikshita Vs. Union of India, (1986) 3 SCC 229, Trilok Nath Vs. Union of India, 1967 SLR 759 (SC), and State of Punjab Vs. Bhagat Ram, (1975) 1 SCC 155, for the proposition that a delinquent employee is entitled to all relevant statements, documents and material to enable an effective defence, including cross-examination of witnesses. Subsequently, despite the petitioner's genuine inability to attend on 08.10.2004 (his father's critical illness, duly supported by documents) and 12.10.2004 (late service of the date's intimation), the Enquiry Officer closed the oral enquiry on 12.10.2004 without affording any opportunity to lead defence evidence. The cumulative conduct of the Enquiry Officer - proceeding ex-parte on valid dates of absence, declining a statutorily recognized right to a Defence Assistant, withholding relied-upon documents despite demand, and closing the enquiry without defence opportunity - reflected a lack of impartiality and fairness amounting to 'malice in law', an oral enquiry being a substantive statutory right and not a mere formality, following A. Savariar Vs. The Secretary, Tamil Nadu Public Service Commission and another, 2013 JT (3) SC 170 (relying on Roop Singh Negi Vs. Punjab National Bank, (2009) 2 SCC 570), which held that departmental proceedings are quasi-judicial in character and must observe principles of natural justice, an enquiry vitiated by their breach rendering the resultant punishment bad. The enquiry as a whole was accordingly held to be wholly illegal and arbitrary, denying the petitioner adequate opportunity of defence.

Result

Writ petition allowed. Order of punishment dated 19.01.2005 and appellate order dated 06.06.2005 set aside. Petitioner held entitled to all consequential benefits, together with costs quantified at Rs. 25,000/-.

Case Law Referred

State of U.P. and others Vs. Saroj Kumar Sinha, (2010) 2 SCC 772
Kashinath Dikshita Vs. Union of India, (1986) 3 SCC 229
Trilok Nath Vs. Union of India, 1967 SLR 759 (SC)
State of Punjab Vs. Bhagat Ram, (1975) 1 SCC 155

Savariar Vs. The Secretary, Tamil Nadu Public Service Commission and another, 2013 JT (3) SC 170
Roop Singh Negi Vs. Punjab National Bank, (2009) 2 SCC 570.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Prateek Chandra, Advocate, holding brief of Sri Ashok Khare, learned Senior Counsel, appearing on behalf of petitioner and Sri Y.K. Sinha, counsel for respondent Bank.

2. Aggrieved by order dated 19.01.2005 read with corrigendum dated 16.03.2005, passed by Chairman/Disciplinary Authority, Fatehpur Khestriya Gramin Bank, Fatehpur (hereinafter referred to as "Bank") imposing punishment of removal and recovery of Rs. 57,550/- from petitioner, as also appellate order dated 06.06.2005 communicating decision of appellate authority i.e. Board of Directors taken in its meeting dated 26.05.2005, this writ petition has been filed by petitioner Ashok Kumar who has lost his employment as also become liable for recovery of Rs. 57,550/- under the impugned orders.

3. A prayer has been made for issue of a writ of certiorari for quashing aforesaid orders and to grant all consequential benefits, reinstatement with continuity in service and other benefits.

4. Brief facts necessary to understand the dispute giving rise to present writ petition may be stated hereinafter;

5. Bank is a Regional Rural Bank governed by the provisions of Regional Rural Bank's Act 1976 (hereinafter referred to as "Act 1976") and sponsored by Bank of Baroda. Petitioner was appointed as Clerk/Cashier and joined Bank on 07.09.1981. He was promoted as Field Officer on 18.05.1989. The post of Field Officer was redesignated as Probationary Officer in Junior Management Grade. While working at Mavaiganeshpur Branch of Bank, petitioner was placed under suspension vide order dated 21.05.2004 passed by Chairman of the Bank. A First Information Report (hereinafter referred to as "FIR") dated 03.07.2004 was also lodged at Police Station Hussainganj, District Fatehpur under Sections 467, 468, 471 and 409 Indian Penal Code being Case Crime no. 41 of 2004. Petitioner was served with a chargesheet dated 22.07.2004 containing eleven charges. Pursuant to FIR dated 03.07.2004, petitioner was arrested on 23.08.2004 and enlarged on bail by Sessions Judge, Fatehpur, vide order dated 26.08.2004. In the meantime disciplinary authority i.e. Chairman of Bank appointed one Chandra Prakash Gadi, Manager as Enquiry Officer under Regulation 40 of Fatehpur Kshetriya Gramin Bank (Officer and Employee) Service Regulations 2001 (hereinafter referred to as "Regulations 2001") to enquire into the charges levelled against petitioner vide chargesheet dated 27.07.2004 and submit report to disciplinary authority.

6. Enquiry Officer vide letter dated 17.08.2004 fixed 18.08.2004 as the date for preliminary hearing in the Head Office of Bank at Fatehpur and required petitioner to attend the proceedings. This letter was served upon petitioner on 18.08.2004. Oral hearing was to commence at 10.30 a.m. on the same day hence petitioner could not attend enquiry proceedings. This fact was communicated by petitioner to Enquiry Officer. The next date fixed by Enquiry Officer was 26.08.2004 but there was no occasion for petitioner to attend proceedings on the said date since he was in jail having been arrested by police on 23.08.2004 and bail was granted on 26.08.2004. The factum that petitioner was in jail on 26.08.2004 was also in the knowledge of Enquiry Officer, yet instead of adjourning the matter, Enquiry Officer proceeded further. Presenting Officer submitted copies of documents relied by Bank in respect of charges and also submitted list of witnesses proposed to be examined by Bank. Enquiry Officer fixed next date as 02.09.2004. After release from jail, on bail, petitioner fell ill on 01.09.2004. Along with medical certificate issued by a Physician administering treatment to him, an application seeking adjournment was submitted by petitioner to Enquiry Officer. Disciplinary authority through letter dated 04.09.2004 directed petitioner to get his illness verified by Bank's doctor, Tejman Singh, G.T. Road, Fatehpur and obtain a certificate regarding illness from him and submit to Bank by 07.09.2004. In compliance with such direction of disciplinary authority, petitioner appeared before Dr. Tejman Singh who, vide certificate dated 06.09.2004, confirmed petitioner's illness and agreed with earlier medical certificate, advising rest for fifteen days i.e. 01.09.2004 to 15.09.2004. However, Enquiry Officer discarded aforesaid facts and proceeded with oral enquiry by recording statements of Smt. Shyamwati, Dhyan Singh, Ram Bhawan Singh, Dhanraj Singh, Shiv Saran Singh and Ramesh Chand Rahi on 02.09.2004 resulting in denial of opportunity of cross examination of such witnesses by petitioner.

7. Enquiry Officer then fixed 09.09.2004 as next date for hearing but in view of medical certificate granted by Dr. Tejman Singh, under the directions of disciplinary authority, adjourned proceedings to 17.09.2004. Since petitioner did not recover he was further advised for rest and some further treatment was administered vide medical certificate dated 15.09.2004. Again disciplinary authority vide letter dated 17.09.2004 required petitioner to get himself medically examined by Dr. Tejman Singh and in compliance thereof Dr. Tejman Singh examined petitioner and certified his continuity of illness, giving following certificate:-

"This is to certify that I have examined Sri Ashok Kumar s/o Sri Ram Saran Singh, r/o Hariharganj, Fatehpur. I find him fit to resume his duty w.e.f. Tomorrow 25.09.2004"

8. In the meantime Enquiry Officer adjourned proceedings on 17.09.2004 and fixed 23.09.2004. Due to illness as verified by Dr. Tejman Singh, petitioner could not attend proceedings on 23.09.2004 but ignoring this, Enquiry Officer proceeded to record statement of Bank's witness Sri Shiv Shanker, Branch Manager and then fixed 25.09.2004, as the next date. On 25.09.2004 after getting fit, petitioner appeared before Enquiry Officer and requested to supply copy of earlier proceedings and give time to prepare the matter. Enquiry Officer neither supplied copies of earlier proceedings nor granted any time and instead proceeded further by recording statement of Dharampal, Bank's witness.

9. The next date fixed was 01.10.2004 when petitioner appeared and requested Enquiry Officer to allow him to nominate Defence Assistant and also prayed for supply of copies of documents relied by Bank in support of charges. Enquiry Officer did not accept either of the request of petitioner and fixed 08.10.2004 as the next date for enquiry.

10. On 07.10.2004 petitioner requested Enquiry Officer to defer proceedings fixed on 08.10.2004 since petitioner's father Ram Saran Singh was seriously ill. Application was duly supported by several documents demonstrating critical condition of petitioner's father. This request was rejected by Enquiry Officer vide order dated 07.10.2004 which was served upon petitioner on 08.10.2004 at 10.00 a.m. Petitioner could not attend enquiry on 08.10.2004 and Enquiry Officer fixed next date as 12.10.2004. This information was given to petitioner by a registered letter, served upon him at 2.30 p.m. on 12.10.2004. Due to late communication, he had no occasion to participate in the proceedings on 12.10.2004. This fact was communicated to Enquiry Officer vide letter dated 13.10.2004.

11. On 12.10.2004, Enquiry Officer proceeded to close oral hearing and granted time to Presenting Officer to submit written brief by 22.10.2004. When petitioner received information about Enquiry Officer's closure of oral enquiry on 12.10.2004, he made representation dated 20.10.2004, requesting Enquiry Officer to grant opportunity to cross examine Bank's witnesses and thereafter give opportunity to produce defence witnesses. Enquiry Officer did not accept the request and instead, served a copy of written brief submitted by Presenting Officer along with covering letter dated 23.10.2004 and directed petitioner to submit reply on or before 09.11.2004. In compliance thereto petitioner submitted his written brief on 09.11.2004.

12. Enquiry Officer submitted report dated 04.01.2005 holding charges 1 to 9 proved. Thereupon Chairman of Bank proposed penalty of 'Removal' and 'Recovery' and required petitioner to show cause vide letter dated 07.01.2005. Petitioner in the meantime fell ill and was hospitalized, hence could not submit reply on 18.01.2005. A representation dated 19.01.2005 was submitted by petitioner requesting disciplinary authority to give further time for personal hearing but Chairman proceeded to pass order in the meantime on 19.01.2005 imposing penalty of 'Removal' and 'Recovery' of Rs. 57,550/-. Thereagainst petitioner preferred appeal which has been rejected by Board of Directors in its meeting dated 26.05.2005, communicated by Chairman's letter dated 06.06.2005.

13. Sri Prateek Chandra, learned counsel for petitioner submitted that the above facts make it very clear that there was no honest and bonafide attempt on the part of Enquiry Officer to give effective and adequate opportunity of defence to petitioner. Enquiry Officer proceeded with enquiry on various dates in absence of petitioner though for valid reasons, petitioner was not present on such dates. Hence impugned orders are wholly illegal being in utter violation of principles of natural justice. Petitioner has been denied right to earn livelihood and serious stringent punishment of 'Removal' had been imposed without conducting an enquiry consistent with principles of natural justice.

14. Respondent Bank has filed counter affidavit in which basic facts are not disputed. It is however said repeatedly that petitioner himself did not avail opportunity granted by Enquiry Officer as well as Bank by fixing various dates for oral enquiry, hence has to blame himself and cannot make any complaint that order of punishment had been passed without affording opportunity of hearing to him.

15. We have heard learned counsel for parties and perused the record.

16. It goes without saying and is also admitted by parties that under Rules, an order of punishment could have been passed only after affording reasonable opportunity of defence to delinquent employee. Now the only question up for consideration is, "whether in the facts and circumstances of this case, can it be said that petitioner was afforded adequate opportunity of defence or hearing or here is a case where opportunity was afforded repeatedly but petitioner failed to avail the same and hence cannot make any complaint."

17. We may examine this aspect on summarizing the facts relating to various dates fixed by Enquiry Officer for oral hearing and proceedings which took place on those dates as also the reasons of absence or presence of petitioner, etc.

18. We shall examine various dates and proceedings chronologically; 18.08.2004 first date was fixed for preliminary hearing, but letter dated 17.08.2004, fixing 18.08.2004 was served on 18.08.2004, hence there was no occasion for petitioner to attend enquiry proceedings before Enquiry Officer which commenced at 10.30. p.m. on 18.08.2004. We do not find any justification to issue letter on 17.08.2004 fixing very next day i.e. 18.08.2004 without ensuring communication of date in time. Then next date fixed is 26.08.2004. Petitioner in the meantime was arrested by police on 23.08.2004 and Sessions Judge, Fatehpur, passed order on 26.08.2004 itself releasing petitioner on bail. After passing of bail order, it had to be communicated to jail concerned and thereafter petitioner could have been released. Hence there was no occasion or possibility of attending enquiry proceedings on 26.08.2004 before Enquiry Officer. This factum of arrest was well within knowledge of Enquiry Officer, and is a fact which is not disputed by Bank. Still we find it surprising that Enquiry Officer treated petitioner's absence deliberate and proceeded with oral enquiry, by permitting Presenting Officer to submit documents relied by Bank in support of charges and also list of witnesses proposed to be examined by Bank. Enquiry Officer did not care to supply all these documents and list of witnesses to petitioner so that petitioner may come well prepared on the next date.

19. On the contrary Enquiry Officer, after exparte proceedings on 26.08.2004, fixed next date as 02.09.2004. Petitioner fell ill on 01.09.2004 and his illness was duly certified by medical certificate issued by Physician with whom petitioner was under treatment and this illness was duly verified by Bank's doctor Tejman Singh who examined petitioner under the orders of disciplinary authority and issued certificate to this effect on 07.09.2004. Enquiry Officer in total disregard of all these facts, proceeded to record statements of several witnesses in support of charges on 02.09.2004 and here again entire proceedings were exparte. Bank's medical consultant doctor Tejman Singh verified petitioner's illness and advised rest upto 15.09.2004. Enquiry Officer fixed 17.09.2004, on which date also petitioner could not attend proceedings due to his continued illness. This continued illness was also

verified by Bank's consultant Dr. Tejman Singh in his certificate dated 24.09.2004. Dr. Tejman Singh, Bank's medical consultant examined petitioner under the orders of disciplinary authority, therefore on 17.09.2004 absence of petitioner was neither deliberate nor for reasons within his control but it was on account of genuine reason of illness. Enquiry Officer totally unmindful of all these facts proceeded on 23.09.2004 to record statements of Bank's witnesses Shiv Shanker, Branch Manager and this was again exparte and illegal.

20. Petitioner could attend enquiry proceedings for first time on 21.09.2004, by which time on three dates, exparte proceedings were held by Enquiry Officer i.e. on 26.08.2004, 02.09.2004 and 23.09.2004. On these three dates, as we have already held, absence of petitioner was for just, valid and genuine reasons, still Enquiry Officer proceeded exparte which was patently illegal and resulted in denial of adequate opportunity of defence to petitioner.

21. On 25.09.2004 when petitioner appeared before Enquiry Officer for the first time, he requested to supply copies of earlier proceedings and to give time to prepare the matter. This was a very innocuous and genuine prayer and we find no just and valid reason for Enquiry Officer in not accepting the same. Strangely Enquiry Officer had something other in his mind and neither he supplied copies of earlier proceedings nor granted time to petitioner to prepare the matter and instead proceeded further to record statement of Bank's another witness namely Dharampal. For all practical purposes, we have no hesitation in holding that even this proceeding is virtually exparte or in any case in utter violation of principles of natural justice, denying adequate and effective opportunity of defence to petitioner.

22. The next date fixed by Enquiry Officer is 01.10.2004 on which date petitioner requested Enquiry Officer to permit him to nominate a Defence Assistant and also to supply copies of documents relied by Bank in support of charges. Learned counsel for Bank, did not dispute that under the Rules governing disciplinary proceedings, a delinquent employee, if so desires, has a right to nominate Defence Assistant to represent him in oral enquiry. At the earliest opportunity available to petitioner, he made this request and there was no justification for declining the aforesaid request but Enquiry Officer did so. He also did not supply copies of documents relied by Bank in support of charges and no reason was given as to why those copies were not to be supplied to petitioner though it was incumbent upon employer as also Enquiry Officer to supply copies of documents relied upon in support of charges by employer and this is mandatory.

23. In some cases where the documents relied by employer, in support of case, if very bulky and there is some difficulty in supply of such documents the delinquent employee is allowed inspection of all the documents and ought to have those documents whenever oral proceedings are held but this is not the reason for which Enquiry Officer denied copies of relied upon documents. We fail to understand as to why Enquiry Officer did not supply copies of relied upon documents to petitioner and in our view, here again the Enquiry Officer denied adequate opportunity of defence to petitioner.

24. In **State of U.P. and others Vs Saroj Kumar Sinha, (2010) 2 SCC 772**, it was held that non supply of documents relied by department in support of charges vitiate the entire proceedings. Court

referred to and relied earlier decision in **Kashinath Dikshita Vs Union of India, (1986) 3 SCC 229**, and said:

"When a government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defence, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible."

25. Court also observed:

"It is difficult to comprehend why disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding specific request made by appellant in this behalf. The defence of employer that no prejudice would be caused cannot be accepted for the reason that delinquent employee is entitled to have an access to the documents and statements throughout the course of the inquiry. He would have needed these documents and statements in order to cross-examine the witnesses who are produced in the inquiry to establish the charges against him."

26. Again following earlier decision in **Trilok Nath Vs Union of India 1967 SLR 759 (SC)**, Court said in **State of U.P. and others Vs Saroj Kumar Sinha (supra)**:

"Non-disclosure of documents having a potential to cause prejudice to a government servant in the enquiry proceedings would clearly be denial of a reasonable opportunity to submit a plausible and effective rebuttal to the charges being enquired into against the government servant."

27. Referring to another judgment in **State of Punjab Vs Bhagat Ram (1975) 1 SCC 155,** Court in State of **U.P. and others Vs Saroj Kumar Sinha (supra)**, said:

"The proposition of law that a government employee facing a department enquiry is entitled to all the relevant statement, documents and other materials to enable him to have a reasonable opportunity to defend himself in the department enquiry against the charges is too well established to need any further reiteration."

28. Hence, non-supply of relied on documents to petitioner, that too despite demand, vitiates the entire proceedings.

29. The next date fixed is 08.10.2004, which petitioner could not attend due to critical condition of his father and communicated this reason by sending letter on 07.10.2016, duly supported with medical documents showing critical condition of petitioner's father but here again Enquiry Officer proceeded to ignore petitioner's request but adjourned proceedings to 12.10.2004. Communication of the said date was made to petitioner by registered letter which was served on 2.30 p.m. on 12.08.2004, as a result whereof petitioner obviously could not attend enquiry proceedings. On this very date without

looking into reason for petitioner's absence, Enquiry Officer closed oral enquiry and allowed time to Presenting Officer to submit written brief. In our view, if Bank's evidence concluded on 12.10.2004 even then it was incumbent upon Enquiry Officer to adjourn proceedings to another date to give opportunity of defence evidence to petitioner but that was not done.

30. In the entirety of facts and circumstances, we have no manner of doubt in holding that here is a case where petitioner has been denied adequate opportunity of defence and enquiry has been conducted in a wholly illegal and arbitrary manner. In fact we express our adverse inference about conduct of Enquiry Officer for the manner in which he has proceeded. It appears that he was adamant and there appears to be some unknown reason on his part to proceed with enquiry ignoring petitioner's absence for valid reasons. This kind of attempt on the part of Inquiry Officer shows his lack of impartiality, and, unfairness and can be termed "Malice in law". An oral enquiry is not a mere formality but substantive statutory right of an employee and cannot be denied to him unless for just and valid reasons.

31. In **A. Savariar Vs The Secretary, Tamil Nadu Public Service Commission and another, 2013 JT (3) SC 170**, Court relying on **Roop Singh Negi v. Punjab National Bank (2009) 2 SCC 570**, said that departmental proceeding is a quasi-judicial proceeding. Enquiry Officer performs a quasi-judicial function. Enquiry Officer has a duty to arrive at a finding upon taking into consideration materials brought on record by the parties after giving due opportunity to the delinquent employee. Opportunity of oral hearing is not a mere formality but a matter of substance. Court also held that an oral enquiry must be held observing principles of natural justice. It is necessary and mandatory. The requirement of reasonable opportunity cannot be characterized as a paper formality inquiry but has to be held in accordance with principles of natural justice. If the enquiry is vitiated being in violation of principles of natural justice, the order of punishment would be bad.

32. In the light of the aforesaid exposition of law and facts and circumstances of this case as discussed above, we find that not only oral enquiry was held on various dates by Enquiry Officer exparte in a wholly illegal and arbitrary manner but it has also caused denial of adequate opportunity to petitioner by failing to supply relied upon documents in support of charges, despite demand by petitioner and also failed to give time to petitioner to prepare the matter, knowing well that on certain dates, absence of petitioner was for just, valid and genuine reasons, duly verified by relevant material by petitioner before disciplinary authority as well as Enquiry Officer which facts could not be disputed before us also.

33. In view of above discussion, impugned orders of punishment cannot be sustained, since petitioner has been punished in an illegal and arbitrary manner and for the entire laxity and illegality in enquiry, none else but respondent Bank and its official are to be blamed. In our view petitioner is entitled for all consequential benefits.

34. Writ petition is allowed. Impugned order of punishment dated 19.01.2005 as well as appellate order dated 06.06.2005 are hereby set aside. Petitioner shall be entitled to all consequential benefits and also cost which we quantify to Rs. 25,000/-.

(2016) 9 ILRA 1471
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 67067 Of 2005

Prem Narain Khanna **...Petitioner**

Versus

Central Bank Of India Thru' A.G.M. & Ors. **...Respondents**

Counsel for Petitioner:
Pulak Ganguly, R.K. Agarwal

Counsel for Respondents:
S. Tewari, K.R. Singh Jadaun.

Subject Matter
Service Law - Departmental Enquiry - Bank employee - Dismissal from service for misappropriation/embezzlement of Bank funds and creation of fictitious loan accounts - Whether ex-parte conclusion of oral enquiry vitiated the proceedings where the delinquent employee himself failed, without adequate reason, to participate and refused to cross-examine witnesses - Whether punishment of dismissal was excessive, disproportionate or shocking to conscience - Held, no denial of natural justice where delinquent employee's own conduct caused the ex-parte proceeding; dismissal for breach of trust and lack of integrity by a Bank official holding a position of trust is neither excessive nor disproportionate; writ petition dismissed.

Facts
The petitioner, who joined the respondent Bank as Assistant Cashier in 1964 and rose to the post of Deputy Manager/Branch Manager, was placed under suspension on 26.04.1996 following two FIRs dated 11.07.1996 and 12.07.1996 alleging criminal misappropriation and embezzlement of Bank funds (Sections 409, 420, 467 IPC). A chargesheet dated 27.11.1996 containing six charges was served on him on 28.11.1996. After successive changes in Enquiry Officer (S.P. Singh, then B.S. Pandey, and finally T.N. Sharma, who concluded the oral hearing on 11.08.1998), the enquiry proceeded through disputed dates: the petitioner and his Defence Assistant failed to attend on 25.07.1998 without prior intimation; on 28.07.1998 the petitioner appeared belatedly and sought adjournment citing his Defence Assistant's absence, whereupon the Enquiry Officer granted a final adjournment to 30.07.1998 with a caution against further delay and liberty to engage a locally available Defence Assistant; on 30.07.1998, despite the petitioner's continued plea of inability to contact his Defence Assistant, the Enquiry Officer required him to cross-examine the Bank's witnesses, which the petitioner refused to do, following which he left the proceedings midway. The Enquiry Officer's report dated 14.08.1998 held all six charges proved; the disciplinary authority concurred, and after considering the petitioner's reply, imposed the penalty of dismissal by order dated 21.11.1998. The petitioner's first appeal was rejected on 05.02.2000, but this order was set aside as non-speaking in Writ Petition No. 1657 of 2000 by judgment dated 06.05.2004, with a direction to the appellate authority to reconsider specific grounds; the

appellate authority, on reconsideration, again rejected the appeal on 05.08.2004. The petitioner challenged both the punishment order and the appellate order in the present writ petition, contending denial of opportunity to cross-examine witnesses and disproportionate punishment; the Bank contended that the petitioner's own conduct in avoiding participation and refusing to cross-examine witnesses precluded any such grievance, and that the seriousness of the proved charges justified dismissal.

Issues

1. Whether the petitioner was denied adequate opportunity of defence, vitiating the order of punishment, where the oral enquiry proceeded and concluded in circumstances of the petitioner's own non-participation and refusal to cross-examine witnesses.
2. Whether the punishment of dismissal imposed upon the petitioner was excessive, unjust, or disproportionate to the charges found proved, so as to warrant interference under Articles 14 and 16 of the Constitution of India.

Held

On the first issue, the record showed that the petitioner and his Defence Assistant failed, without valid reason or prior intimation, to attend the enquiry on 25.07.1998; despite the Enquiry Officer's accommodation by a further adjournment with an express caution and liberty to change the Defence Assistant, the petitioner persisted in citing his Defence Assistant's unavailability, ultimately refused to cross-examine the Bank's witnesses when called upon to do so, and left the proceedings in the midst on 30.07.1998. A delinquent employee who has himself failed to participate in the enquiry cannot be permitted to complain of denial of adequate opportunity of hearing, following Union of India and others Vs. B.K. Srivastava, AIR 1998 SC 300. The Enquiry Officer was accordingly justified in proceeding notwithstanding the petitioner's conduct, and no violation of natural justice was made out. On the second issue, since the delinquent held the position of Branch Manager/Deputy Manager and the charges found proved involved lack of integrity and honesty, breach of trust, and creation of fictitious loan accounts causing monetary loss to the Bank, the Court held that judicial review of quantum of punishment is confined to cases where the punishment shocks the conscience of the Court or is wholly irrational/perverse, relying on Ranjit Thakur Vs. Union of India and others, (1987) 4 SCC 611, as explained in Union of India Vs. R.K. Sharma, (2001) 9 SCC 492, and reiterated in Union of India and others Vs. Bodupalli Gopalaswami, (2011) 13 SCC 553, and Prem Nath Bali Vs. Registrar, High Court of Delhi and others, AIR 2016 SC 101 (further followed in Commissioner of Police and others Vs. Sat Narayan Kaushik, AIR 2016 SC 1464). Where an employee holds a position of trust involving handling of public money or acting in a fiduciary capacity, the highest degree of integrity is an inbuilt requirement, and misconduct in such cases must be dealt with strictly, following Regional Manager, U.P.S.R.T.C., Etawah and others Vs. Hotilal and another, (2003) 3 SCC 605 (followed in West Bengal State Electricity Board and Ors. Vs. Hari Bhakta Ghosh, 2015 (1) SCT 73 SC), and Union of India and others Vs. Diler Singh. It is the loss of confidence in the employee, not the quantum of money misappropriated, that is the primary relevant factor for assessing proportionality of punishment for financial misconduct, following Divisional Controller, N.E.K.R.T.C. Vs. H. Amaresh, 2006 SCC 187, and Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2005) 3 SCC 254, with the gravity of corruption-related misconduct not to be judged by the amount involved, following Niranjan Hemchandra Sashittal and another Vs. State of Maharashtra, (2013) 4 SCC 642, and Rajasthan State TPT Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693, which held that no punishment other than dismissal is appropriate in cases of proven corruption. On facts, given the seriousness of the proved charges of dishonesty, breach of trust, and causing loss to a Bank of which the petitioner was custodian of public money, the punishment of dismissal was held to be neither excessive, unjust, nor arbitrary.

Result

Writ petition dismissed as devoid of merit.

Case Law Referred

Union of India and others Vs. B.K. Srivastava, AIR 1998 SC 300
Bank of India and others Vs. T. Jogram, 2007 (7) SCC 236
Regional Manager, U.P.S.R.T.C., Etawah and others Vs. Hotilal and another, (2003) 3 SCC 605
West Bengal State Electricity Board and Ors. Vs. Hari Bhakta Ghosh, 2015 (1) SCT 73 SC
Ranjit Thakur Vs. Union of India and others, (1987) 4 SCC 611
Union of India Vs. R.K. Sharma, (2001) 9 SCC 492
Union of India and others Vs. Bodupalli Gopalaswami, (2011) 13 SCC 553
Prem Nath Bali Vs. Registrar, High Court of Delhi and others, AIR 2016 SC 101
Commissioner of Police and others Vs. Sat Narayan Kaushik, AIR 2016 SC 1464
Union of India and others Vs. Diler Singh, MANU/SC/0719/2016
Divisional Controller, N.E.K.R.T.C. Vs. H. Amaresh, 2006 SCC 187
Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2005) 3 SCC 254
Niranjan Hemchandra Sashittal and another Vs. State of Maharashtra, (2013) 4 SCC 642
Rajasthan State TPT Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693.

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(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Pulak Ganguly, learned counsel for petitioner and Sri K.R. Singh Jadaun, counsel for respondent Bank.

2. This writ petition under Article 226 of Constitution of India is directed against punishment of dismissal imposed upon petitioner vide order dated 21.11.1998 and appellate order dated 14.08.2004 whereby petitioner's appeal has been dismissed.

3. Petitioner, Prem Narain Khanna, who held office of Deputy Manager in Central Bank of India (hereinafter referred to as "Bank") has been found guilty of serious charges, constituting misconduct hence punishment with penalty of dismissal from service was imposed vide order dated 21.11.1998 and his appeal has been rejected by Zonal Manager of Bank, vide order dated 05.08.2004, hence this writ petition under Article 226 of Constitution of India challenging both the aforesaid orders.

4. Petitioner joined Bank in 1964 on the post of Assistant Cashier and thereafter got due promotions from time to time. He was placed under suspension on 26.04.1996. Two First Information Reports dated 11.07.1996 and 12.07.1996 were lodged against him being Case no. 90 of 1996 under Sections 409, 420, 467 I.P.C. at Police Station Bisharatganj, Bareilly and Case Crime no. 412 of 1996 under Sections 409, 420 I.P.C. Police Station Qila, District Bareilly alleging criminal misappropriation and embezzlement of Bank's funds.

5. Since charges also constitute major misconduct in the discharge of official duty, disciplinary proceedings were also initiated against petitioner. Chargesheet dated 27.11.1996 was served upon him containing six charges.

6. Disciplinary authority appointed one Sri S.P. Singh as Enquiry Officer and after his transfer one B.S. Pandey, Senior Manager was appointed Enquiry Officer vide order dated 01.09.1997. He held proceedings on certain dates whereafter T.N. Sharma was appointed Enquiry Officer vide order dated 01.04.1998. He concluded oral hearing on 11.08.1998 and submitted enquiry report dated 14.08.1998 holding charges proved. Disciplinary authority agreed with the enquiry report, furnished copy thereof to petitioner and permitted him to submit representation. After considering petitioner's reply, the disciplinary authority passed order of punishment of dismissal on 21.11.1998.

7. Petitioner thereafter filed appeal vide memo of appeal dated 01.01.1999 which has been rejected by appellate authority vide order dated 05.02.2000. This order was challenged in Writ Petition no. 1657 of 2000 and this Court held that appellate order is non speaking. Thus it was set aside vide judgment dated 06.05.2004 and Court directed appellate authority to consider grounds taken by petitioner in paras 6 to 12 in memo of appeal and thereafter decide appeal. Pursuant thereto, impugned appellate order has been passed rejecting appeal on 05.08.2004.

8. Assailing impugned punishment and appellate orders, learned counsel for petitioner contended that oral enquiry was conducted exparte and petitioner was not given opportunity to cross examine witnesses hence entire proceedings are in utter violation of principles of natural justice.

9. Learned counsel appearing on behalf of Bank, on the contrary, submitted that despite repeated opportunity, petitioner himself did not avail opportunity of oral hearing, hence Enquiry Officer had no option but to proceed exparte. In these circumstances, petitioner cannot be heard to complain that he was not given adequate opportunity.

10. The punishment has also been challenged on the ground that it is excessive, unjust and does not commensurate to the charges found proved against petitioner, hence arbitrary and in violation of Article 14 and 16 of Constitution of India.

11. In reply to this conduct, learned counsel for Bank submitted that allegations of misappropriation and embezzlement of Bank's fund, due to collusion of petitioner, are such serious charges that if proved, guilty person cannot be allowed to continue in the service of Bank since Bank deals with public money and no person in service can be allowed in service who plundered with public money.

12. Two questions which we need to adjudicate in this writ petition are: (i) whether petitioner was denied adequate opportunity of defence vitiating order of punishment and (ii) whether punishment imposed upon petitioner is just, adequate and commensurate with the charges proved or arbitrary and illegal.

13. Six charges were leveled against petitioner vide chargesheet dated 27.11.1996 issued by Regional Manager, Bareilly in the capacity of disciplinary authority. It was served upon petitioner on 28.11.1996. Initially, one S.P. Singh was appointed as Enquiry Officer vide order dated 26.05.1997 but he was transferred and, therefore, Sri B.S. Pandey, Senior Manager, Bareilly Branch was appointed as Enquiry Officer vide order dated 01.09.1997. Later on Sri T.N. Sharma, Senior Manager, Regional Office, Agra was appointed as Enquiry Officer vide order dated 01.04.1998 who continued oral enquiry from the stage left by Sri B.S. Pandey. It appears that in oral enquiry which was conducted before 25.07.1998, petitioner along with Defence Assistant participated but he did not attend enquiry held on 25.07.1998. Petitioner did not inform about his absence on 25.07.1998 but later on he told that his Defence Assistant was not ready to attend proceedings on that date, having some other engagement, hence petitioner also did not participate in oral enquiry on 25.07.1998. Proceedings next continued on 28.07.1998 when also in the morning session petitioner did not appear before Enquiry Officer but came to attend oral enquiry at 1.30 p.m. Though he attended enquiry but requested for adjournment on the ground that his Defence Assistant is not present and therefore, he will not examine management witness MW-2 and requested for adjournment of enquiry. Enquiry Officer did not appreciate the manner in which Defence Assistant dealt with proceedings particularly since he did not care to inform Enquiry Officer about his absence. Still proceedings were adjourned upto 30.07.1998 with direction to petitioner to participate in the proceedings properly, and if Defence Assistant is not careful enough to attend regular proceedings, he may change and engage a Defence Assistant working at Bareilly itself. Enquiry Officer also informed petitioner that enquiry would not to be adjourned further.

14. Then petitioner informed Enquiry Officer that he will not change his Defence Assistant and on 30.07.1998 when oral hearing resumed, petitioner was present but informed Enquiry Officer that he could not contact his Defence Assistant. Enquiry Officer, however found that a letter dated 27.07.1998 sent by Defence Assistant to Regional Manager, Bareilly complaining against Enquiry Officer and requested intervention in oral proceedings. Petitioner again sought adjournment but it was not accepted by Enquiry Officer and it required petitioner to cross examine management witnesses to which petitioner refused. Hence enquiry continued. Subsequently petitioner left oral enquiry in the midst.

15. In these facts and circumstances, we do not find that petitioner can be permitted to raise objection that he was denied adequate opportunity of defence and enquiry was conducted exparte. Petitioner had no licence to keep enquiry proceedings adjourned at his own whims and caprice. When enquiry was fixed on 25.07.1998 there was no justification for the petitioner or his Defence Assistant not to attend enquiry on that date particularly without even taking care to inform Enquiry Officer about absence. No valid reason has been shown to abstain from inquiry on 25.07.1998.

16. So far as opportunity of cross examination of witnesses is concerned, minutes and proceedings of oral enquiry placed on record along with counter affidavit shows that petitioner was asked to cross examine management witnesses but he refused and in the midst left enquiry

on 30.07.1998. Enquiry Officer in the circumstances, was justified in continuing to proceed with oral enquiry.

17. We also find that Enquiry Officer found that all the six charges were proved which have been concurred by disciplinary authority and thereupon punishment of dismissal had been imposed.

18. In **Union of India and others Vs B.K. Srivastava, AIR 1998 SC 300**, it was held that a delinquent employee if has himself failed to participate in enquiry, cannot be allowed to raise objection that he was denied adequate opportunity of hearing.

19. In the circumstances, we are not inclined to accept the contention that petitioner was denied adequate opportunity of defence. Therefore, first question is answered against petitioner.

20. Then comes the second question, whether punishment imposed upon petitioner is excessive, unjust and does not commensurate with the charges proved against him.

21. Petitioner was Branch Manager in a Bank. The charges levelled against him which have been found proved are lack of integrity, honesty, devotion to duty, causing serious breach of trust, besides monetary loss to Bank. It is alleged that petitioner caused fictitious loan accounts drawing fund from Bank, as a result whereof, Bank suffered losses.

22. Dealing with the case of a Bank employee, in **Bank of India and others Vs T. Jogram, 2007 (7) SCC 236,** Court held;

"in absence of any material to show that there was procedural irregularity/illegality in conducting enquiry and there is no case of violation of principles of natural justice or malafide in a matter of punishment of Bank employee, Court shall not exercise power of judicial review in the matter of punishment."

(emphasis added)

23. Again in **Regional Manager, U.P.S.R.T.C., Etawah and others Vs Hotilal and another, 2003 (3) SCC 605**, Court said;

"If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transaction or acts in a fiduciary capacity, highest degree of integrity and trust-worthiness is must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of learned Single Judge upholding order of dismissal."

(emphasis added)

24. The above view has been followed in **West Bengal State Electricity Board and Ors. Vs Hari Bhakta Ghosh, 2015 (1) SCT 73 SC**.

25. Interference with punishment, imposed by disciplinary authority after considering gravity of charge, is not a routine matter but limited to the case where punishment is such so as to shock the conscience and only then Court may interfere and not otherwise.

26. In **Ranjit Thakur Vs Union of India and others, (1987) 4 SCC 611**, Court held;

"judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the competent authority. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. If one can say that punishment imposed is wholly irrational and perverse it is a recognised ground of judicial review."

(emphasis added)

27. This judgment was explained in **Union of India Vs R.K. Sharma, 2001 (9) SCC 492,** and Court said;

"in Ranjit Thakur, the charge was ridiculous, the punishment was harsh and disproportionate and it was on such gross facts that this Court had held that the punishment was so strikingly disproportionate that it called for interference; and the said observations in Ranjit Thakur are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the punishment to be disproportionate. It was held that only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and merely on compassionate grounds, courts should not interfere."

(emphasis added)

28. Both the aforesaid judgments have been noticed and reiterated in **Union of India and others Vs Bodupalli Gopalaswami, (2011) 13 SCC 553**.

29. In **Prem Nath Bali Vs Registrar, High Court of Delhi and others, AIR 2016 SC 101**, question arose, 'whether punishment of compulsory retirement was excessive, unjust and does not commensurate with the charge proved against delinquent employee. Court said;

"once the charges leveled against the delinquent employee are proved then it is for the appointing authority to decide as to what punishment should be imposed on the delinquent employee as per the Rules. The appointing authority, keeping in view the nature and gravity of the charges, findings of the inquiry officer, entire service record of the delinquent employee and all relevant factors relating to the delinquent, exercised its discretion and then imposed the punishment as provided in the Rules.

Once such discretion is exercised by the appointing authority in inflicting the punishment (whether minor or major) then the Courts are slow to interfere in the quantum of punishment and only in rare and appropriate case substitutes the punishment.

Such power is exercised when the Court finds that the delinquent employee is able to prove that the punishment inflicted on him is wholly unreasonable, arbitrary and disproportionate to the gravity of the proved charges thereby shocking the conscious of the Court or when it is found to be in contravention of the Rules."

(emphasis added)

30. The above observations are reiterated in **Commissioner of Police and others Vs Sat Narayan Kaushik, AIR 2016 SC 1464**. In the matter of punishment it is always relevant, to consider the position, delinquent employee was holding, what was nature of his duties, degree of trust, integrity etc. maintained by such person and other relevant factors.

31. In the matter of a member of disciplined force, who left campus without prior permission, proceeded to the market, consumed liquor and quarrelled with the civilians, it was held that punishment of dismissal cannot be said to be disproportionate or excessive. In **Union of India and others Vs Diler Singh, MANU/SC/0719/2016**, Court held,

"when a member of the disciplined force deviates to such an extent from the discipline and behaves in an untoward manner which is not conceived of, it was difficult to hold that the punishment of dismissal as was imposed was disproportionate and shocking to the judicial conscience."

32. In **Divisional Controller, N.E.K.R.T.C. Vs. H. Amaresh, 2006 SCC 187**, dealing with the question of quantum of punishment, Court held,

"mis-appropriation of the funds by the delinquent employee was only Rs. 360.95 but it is not question of quantum of money misappropriated by delinquent employee but it is a question of loss of confidence and the basic aptitude of lack of integrity on the part of such person. Court said "This Court in a catena of judgments held that the loss of confidence as the primary factor and not the amount of money mis-appropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of mis-appropriating a Corporation's funds, there is nothing wrong in the

Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."

(emphasis added)

33. In **Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2005) 3 SCC 254**, the amount found to be in possession of unaccounted money was only Rs. 93/-, but dealing with the question of quantum of punishment, Court said;

"..... question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment, on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a person is found guilty of misappropriating corporation's fund, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal."

(emphasis added)

34. In **Niranjan Hemchandra Sashittal and another Vs State of Maharashtra, (2013) 4 SCC 642**, Court in para 25 of judgment said;

"In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small and in certain cases, it is extremely high. The gravity of the offence in such a case, is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenet of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law....."

(emphasis added)

35. In **Rajasthan State TPT Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693,** Court said;

" in cases involving corruption-there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant."

(emphasis added)

36. We do not propose to multiply the authorities on this aspect and suffice it to mention that dishonesty, lack of integrity on the part of an official of Bank going to the extent of helping a scrupulous person to the extent that it may cause loss to Bank, of which, the official is custodian and holding position in trust, is a very serious matter. It is the aptitude of a person who leans towards dishonesty and corruption or bad conduct, that needs be punished. The circumstances or quantum of loss or amount of misappropriation or other things cannot be considered as a justification for such misconduct on the part of official concerned, so as to justify a lenient view on the issue of punishment.

37. A Bank official holds a position where public money is kept in trust and he is custodian thereof. If he causes any loss to public money on account of any lack of good conduct on his part such person must be dealt with iron hands and there is no question of leniency or sympathy. In fact any indulgence in such matter will make even Court a party to such dishonest action, which has to be avoided, prevented and is totally uncalled for, since a Court cannot be a party to a misdeed of a person. On the contrary, once a person had indulged in misconduct, lack of integrity or honesty etc., adequate preventive punishment which may be a lesson to others also, is need of the day.

38. In the present case, looking to seriousness of charges which have been proved against petitioner, we have no hesitation in holding that the same, neither can be said to be excessive, nor unjust, nor otherwise arbitrary, justifying any interference. Hence second question is also answered against petitioner. No other point has been argued.

39. Writ petition lacks merit and is accordingly dismissed.

(2016) 9 ILRA 1481
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Company Petition No.- 38 Of 2015

M/s Sharda Fuels India Ltd. ...Petitioner

Versus

Registrar of Companies U.P. & Uttarakhand & Anr. ...Respondents

Counsel for Petitioner:
Anshul Kumar Singhal, Chandan Agarwal

Counsel for Respondents:
A.S.G.I., Sanjay Kumar

HEADNOTES:
The impugned order dated **11.05.2010** striking off the company's name is **set aside**.
Gazette publication held **invalid and incomplete**.
The name of the petitioner company is **restored to the Register of Companies**.
Company Petition Allowed.

PROCEDURE:
STRIKING OFF COMPANY NAME UNDER SECTION 560, COMPANIES ACT, 1956
The procedure prescribed under **Section 560** is **mandatory** and must be strictly complied with before striking off the name of a company.
The statutory sequence includes:
Sending **first letter** to inquire whether the company is functional.
If no reply within one month → **second letter within 14 days**.
If still no reply → **publication in Official Gazette expressing intention to strike off**.
Allowing **three months from date of Gazette publication**.
Passing final order and **publishing dissolution notice in Gazette**.
Any deviation from the above procedure renders the action **illegal and void**.

ISSUES:
Whether the Registrar of Companies complied with the **mandatory procedure under Section 560** of the Companies Act, 1956?
Whether non-compliance of statutory requirements vitiates the order of striking off the company's name?
Whether publication in the Gazette without proper contents satisfies statutory requirement?

FINDINGS / RATIO DECIDENDI:
Delay in Second Notice:
The second notice was not issued within the prescribed period of 14 days → **violation of Section 560(2)**.
Defective Gazette Publication:
Publicaion did not express intention to strike off → **non-compliance of Section 560(3)**.

No Proof of Registered Post:
Mandatory service of notice not proved → **procedural illegality**.
Premature Final Order:
Final order passed before expiry of **three months from Gazette publication → illegal exercise of power**.
Absence of Satisfaction:
No material showing Registrar formed opinion that company was defunct → **lack of jurisdictional foundation**.

LEGAL PRINCIPLES:
Compliance with statutory procedure under Section 560 is **not directory but mandatory**.
Natural justice and procedural safeguards must be strictly followed before dissolution of a company.
Gazette publication must contain **clear intention and statutory recital**, not merely listing names.
Time limits prescribed under statute are **substantive safeguards**, not procedural formalities.

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

1. Heard Sri Anshul Kumar Singhal, learned counsel for the petitioner and perused the pleadings exchanged between the parties.

2. The name of the petitioner company was ordered to be struck off vide notification dated 11.05.2010 issued by the Registrar of the Companies U.P. and Uttarakhand in exercise of powers under Section 560 (5) of the Companies Act, 1956 (hereinafter referred as the 'Act') and the same is said to have been published in the gazette for the period 22nd May, 2010 to 28th May, 2010.

3. The above action of the Registrar of the Companies has been impugned by the petitioner by filing this petition under Section 560 (6) of the Act.

4. The Registrar of the Companies filed a counter affidavit and this Court vide order dated 02.02.2016 permitted him to bring on record the details of the entire procedure followed by him sequence wise for striking the name of the petitioner company along with the supporting documents.

5. In pursuance to the above order the Registrar of the Companies has filed supplementary affidavit.

6. The submission of learned counsel for the petitioner is that the procedure laid down under Section 560 of the Act was not followed by the Registrar of the Companies in passing the impugned order and directing for striking of the name of the petitioner company. He submits that the second letter was not sent within time; there is no publication of any notice in the gazette, the notice of the publication in the gazette was not sent to the petitioner company by registered post; and that the final order was also not published in the official gazette as contemplated by Section 560 (5) of the Act.

7. Section 560 of the Act prescribe that the Registrar of the Companies is empowered to strike the name of any company from the register of the companies provided he has reasonable cause to believe that the company is not carrying on business or is in operation. However, before passing any such order so as the inquire whether the company is carrying on business or not he is required to send to the company concerned a letter by post inquiring whether the company is functional or not.

8. If the Registrar does not receive any reply to the aforesaid letter within one month, he is required to send a second letter by post within fourteen days after the expiry of one month, informing the company that if no answer is received within a month a notice shall be published in the gazette with the view to strike off the name of the company.

9. Even then if no reply is received to the second letter within one month, he shall cause a notice to be published in the official gazette expressing intention to strike off the name of the company from the register of the company at the expiration of three months unless cause is shown to the contrary. It is thereafter on the expiry of time mentioned in the gazette if no cause to the contrary is shown, the Registrar may strike off the name of the company and publish a notice thereof in gazette, whereupon the company shall stand dissolved.

10. The above procedure is mandatory before passing an order for striking the name of the company and to make publication in the official gazette that the company stand dissolved.

11. In the instant case, the Registrar of the Companies as per his own showing had sent the first letter by post to the company on 15.10.2009. Therefore, the second letter by registered post was to be sent by him within fourteen days on the expiry of one month thereof i.e. up to 30th November, 2009, but the Registrar of the Companies issued the second letter by Registered/Speed post on 18.12.2009 much after the expiry of stipulated period of fourteen days from the expiry of one month of the first letter. Thus, committing breach of Section 560 (2) of the Act in sending the second letter.

12. After the second letter was sent by registered post, the Registrar of the Companies is said to have published a notice in the official gazette for the period 24th April, 2010 to 30th April, 2010 with the view to strike off name of the petitioner company but no such notice has been brought on record to show the contents of the notice published in the gazette. In fact a perusal of annexure-5 to the supplementary affidavit reveals that no notice as contemplated by Section 560 (3) of the Act was published in the gazette except the names of the proposed companies including that of the petitioner company which were to be struck off. Such a notification without expressing any intention to strike off the name of the company is no publication as mandated under the provisions of Section 560 (3) of the Act.

13. The notice intimating that the name of the company shall be struck off and it will stand dissolved on the expiry of three months required to be sent by registered post was sent on 11.02.2010, but there is nothing on record to indicate that it was sent by registered post. Not even

an averment to this effect has been made in the affidavit that it was sent by registered post. Thus, again breach of Section 560 (3) occurred on part of the Registrar of the Companies.

14. The Registrar of the Companies finally vide notification dated 11.05.2010 passed an order that the name of the company has been struck off and that it has been dissolved. This order/notification required to be published in the official gazette in accordance with the provisions of Section 560 (5) of the Act. According to the Registrar of the Companies it has been published in the gazette on 22nd May to 28th May, 2010, but again the said gazette only contains the name of the company but no recital to the effect that the name of the company has been struck off and it has been dissolved . Thus, the said publication is incomplete and is not in accordance with law.

15. Apart from the above, the first publication was made in the gazette dated 24th April 2010 to 30th April, 2010. The registered post notice thereof was issued on 11.02.2010. The publication in the official gazette and the notice by registered post allows three months time before taking a final decision to strike off the name of the company. However, the final order to struck off the name of the company was passed on 11.05.2010 even before the period of three months had expired from the publication of the gazette by taking three months period from the date of the notice. The date of the notice is not relevant and material when a notice to that effect was also to be published in the gazette. In that case the date of publication of the notice in the gazette would be taken to be the date of notice for the purposes of allowing three months period for striking off the name of the company. The Registrar of the Companies thus, manifestly erred in passing the order dated 11.5.2010 even before the period of three months had expired from the notice contemplated under Section 560 (3) of the Act. Moreover, it may not be out of context to state that none of the notice issued by the Registrar of the Companies mentioned that he has reason to believe that the company is not carrying on business or is not in operation or that in the absence of reply given by the company he is satisfied that the company is non-functional. In such circumstances, not only there is violation of procedure prescribed for striking off the name of the company from the register of the company but there appears to be no reason on part of the Registrar of the Companies to believe that the company is defunct.

16. In view of the aforesaid facts and circumstances, the impugned order dated 11.05.2010 and publication of the name of the petitioner company in the gazette of 22nd May 2010 to 28th May, 2010 are set aside and the name of the company is directed to be restored to its original place in the register of the Companies maintained by the Registrar of the Companies U.P. and Uttarakhand.

17. The company petition stands allowed.

(2016) 9 ILRA 1485
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 41 Of 2015

Mohammad Iqbal & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ashok Kumar, Praveen Kumar, Trapti Gupta

Counsel for the Respondents:
C.S.C., C.B. Tripathi

HEADNOTES:
The Court held that under the statutory provisions, Commercial Tax Authorities are empowered to seize goods but **have no authority to seize or detain the vehicle**. Detention of the petitioner's truck for more than two months by respondent no.3 without jurisdiction and without authority of law was held **illegal, arbitrary and an abuse of statutory power**, resulting in undue harassment and financial loss to the petitioner.
The Court observed that public officials are accountable for misuse of statutory powers and harassment of citizens, and such arbitrary exercise of authority violates the rule of law. Relying upon settled principles laid down in judicial precedents relating to abuse of public power, the Court held that compensation can be awarded for illegal acts of State authorities.
Accordingly, the writ petition was disposed of with **exemplary cost of Rs. 2,00,000/-**, payable initially by the State with liberty to recover the same from the concerned erring officer responsible for illegal detention of the vehicle. The State was further directed to initiate
The Court held that under the statutory provisions, Commercial Tax Authorities are empowered to seize goods but **have no authority to seize or detain the vehicle**. Detention of the petitioner's truck for more than two months by respondent no.3 without jurisdiction and without authority of law was held **illegal, arbitrary and an abuse of statutory power**, resulting in undue harassment and financial loss to the petitioner.
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Accordingly, the writ petition was disposed of with **exemplary cost of Rs. 2,00,000/-**, payable initially by the State with liberty to recover the same from the concerned erring officer responsible for illegal detention of the vehicle. The State was further directed to initiate **disciplinary proceedings** against the concerned officer and submit compliance report within the stipulated time.

Proceeding:

Writ Petition under Article 226 of the Constitution of India (Writ Tax) challenging illegal detention of vehicle by Commercial Tax Authorities and seeking compensation for arbitrary and unauthorized exercise of power by public officials.

Issue:
Whether Commercial Tax Authorities have jurisdiction under the relevant Tax Statute to seize or detain a vehicle while intercepting goods in transit, and whether unauthorized detention of vehicle by a public servant entitles the petitioner to compensatory costs and disciplinary action against the erring officer.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Ashok Kumar, learned counsel for petitioners and Sri C.B. Tripathi, learned Standing Counsel for respondents.

2. Grievance of petitioner is that respondent-3 intercepted petitioner's vehicle, i.e., Truck No. RG-01 GB-5544 carrying certain goods at National Highway-24 and asked petitioner-2 to hand over all documents relating to goods. The documents available with petitioner-2 were handed over to which respondent-3 alleged that there are certain discrepancies and therefore seized the goods along with vehicle on 03.10.2014 despite request of Driver to unload the goods and release vehicle. However, without any power or authority of seizure of vehicle and without seizing the vehicle with due process of law, respondent-3 illegally detained vehicle for more than 25 days and thereafter lodged report bearing Case Crime No. 1755 dated 31.10.2014 under Section 420, 120B, 467, 468, 470, 471 and 472 I.P.C. at Police Indirapuram but vehicle in question was not handed over to Police but remained under custody of respondent-3. It is only when all these facts were brought to the notice of this Court and this Court passed following order on 22.1.2015, vehicle in question was released:

"Sri C.B. Tripathi, the learned Special Counsel for the State has received instructions indicating that the vehicle has been detained on the instructions of the Investigating Officer pursuant to the lodging of an FIR and on that ground, the vehicle has not been released in favour of the petitioner.

The learned Special Counsel further submitted that appropriate orders may be passed by the Court for release of the vehicle forthwith. The learned Special Counsel further stated that a short time may be given to file a counter affidavit to bring all these facts on record.

The law is settled, namely, that the commercial tax authorities cannot detain and seize the vehicle under the Act. Such detention of the vehicle for over 3 and a 1/2 months is prima facie without any sanction of law. We further find that the police authorities has not been seized the truck under any provision of the criminal law pursuant to the lodging of an FIR against the petitioner. In that event, the commercial tax authorities had no justification to detain the truck in question.

Consequently, we are of the opinion that heavy cost/compensation is to be awarded to the petitioner, which will be recovered from the erring officials of the commercial tax department.

For this limited purpose the respondents may file a counter affidavit within a week.

List on 29th January, 2015.

In the meanwhile, we direct that the Vehicle No.RJ01 GB 5544 detained by the Assistant Commissioner, Commercial Tax, Mobile Squad Unit No.2-respondent no.3 shall be released forthwith.

Certified copy of this order shall be made available to the learned counsel for the petitioner on payment of usual charges today itself.

3. Today, learned counsel appearing for respondents could not dispute that under the Statute, Tax authorities can seize goods but there is no power for seizure of vehicle. He also could not explain as to how respondent-3 could detain vehicle from 03.10.2014 to 31.10.2014, when for the first time, first information report was lodged and even thereafter when Police did not take custody of vehicle why the vehicle remain to be detained by respondent-3.

4. Petitioner claimed that vehicle has been financed by Bank and petitioner has been incurring continuous liability but on account of wholly illegal, unauthorized and arbitrary action on the part of respondent-3, said vehicle remained detained with respondent-3 for almost three months causing huge loss to petitioner. It could not ply for all this period only because of the high handedness of respondent-3.

5. Since it is not in dispute that respondent-3 had no authority to seize vehicle in question, we are satisfied that detention of vehicle on 03.10.2014 by respondent 3 and thereafter was wholly illegal, unauthorized and without jurisdiction. This has caused avoidable loss to petitioner only for illegal act of respondent-3.

6. Respondent-3 being a Public Servant and holder of a civil post exercising certain authority under Tax statute, is supposed to act strictly in accordance with law and not to act arbitrarily, to satisfy his own ego or harass a common man. A Government official holding a high position is under a duty and obligation to ensure that a citizen and a common man is actually served by him since he is representing a welfare State instead of causing harassment in one or the other way. Nobody holding howsoever high Office can treat law on to himself so as to act in any manner which is irrational, unreasonable and even unconstitutional. It is really surprising as to how respondent-3, when lacked any authority to seize and detain vehicle in question, continued to do so. When this Court made certain observations, respondent-3 immediately released vehicle which shows that there was no justification or valid cause for such detention. Thus unauthorized act on the part of respondent-3 is illegal, besides socially and morally obnoxious, for the reason that it has

resulted in causing huge burden upon petitioner- owner of vehicle not only to continue to incur liability of interest etc. on the loan it has taken for purchase of vehicle, but also to suffer loss of income which petitioner could have earned while plying the vehicle during this period and for this loss if anyone is responsible, he is only respondent-3.

7. The respondents being "State" under Article 12 of the Constitution of India, its officers are public functionaries. In our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large. Respondents have support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting, mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which gives feeling of helplessness to a common man. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither political backing nor financial strength to match inaction in public oriented departments, gets frustrated and it erodes credibility in the system. This is unfortunate that matters which require immediate attention are allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of Court to take effective steps and rise to occasion otherwise confidence of common man is likely to be shaken. It is the responsibility of Court, in such matters, to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful action/inaction or illegal exercise of power on the part of public functionaries.

8. In our system, Constitution is supreme, but the real power vests in the people of India. Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man.

9. Echoing harassment, a common man suffers, and most of times silently, having no capacity to counter or protest, Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307,** referring to observations **of Lord Hailsham in Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027 and Lord Devlin in Rooks Vs. Barnard and others 1964 AC 1129**, said as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he

acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

10. Said observations have been reiterated and followed in a subsequent judgment in **Ghaziabad Development Authority Vs. Balbir Singh JT 2004 (5) SC 17**.

11. In a democratic system governed by rule of law, Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has and never would be a silent spectator but always react to bring authorities within rule book or to make them accountable.

12. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530,** court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

13. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558**, Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

14. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** Court has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not meant to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

15. In the present case also, we find, when a vehicle like a Truck of petitioner is stopped by an Officer of Government, whether in Tax department of elsewhere, without any authority on the spot, the person present on the site finds it difficult, how to protect its rights. The dilemma and helplessness of petitioner is writ large. It has suffered illegal detention of vehicle by respondent-3 for more than two months. Thereafter finding no other way, invoked extraordinary equitable

jurisdiction of this Court. If these activities are not taken seriously and ignored, may encourage others to perpetuate such activities of illegal detention and would give them an opportunity to negotiate with sufferer(s) to either part away some illegal consideration for release of vehicle else continue to suffer. The attitude and action on the part of respondent-3 in detention of vehicle is nothing but a blatant example of dishonest and corrupt act on the part of a Government servant. The public authorities like respondent-3 find various ways in depriving common man of his simple right of speech, movement, business, profession etc. and time and again create obstruction knowing it well that an option of litigation, in the present scenario, is a much more costly, time consuming and difficult process which will deter sufferer from availing such option of knocking doors of justice and instead doers of wrong would be successful in negotiating terms in an illegal manner with sufferer. We can not be oblivious of these practices and activities and illegal deprivation on the part of officials having authority and in the garb of such authority harassing public by illegal demonstration of such authority.

16. Looking into entire facts and circumstances, we are satisfied that here is a case where petitioner deserves to be compensated by respondent-3 with an exemplary cost which is compensatory as also an illustration of preventative measure against recurrence of such activities on the part of respondents.

17. We, therefore dispose of this writ petition with cost of Rs. 2 lacs which shall be paid at the first instance by respondent-1 since respondent-3 is the official and agent of respondent-1, but it shall have liberty to recover such amount from authority concerned who is responsible for such illegal action of detention of petitioner's vehicle on 03.10.2014 and onwards.

18. Besides, we also direct respondent-1 to look into the matter and take appropriate disciplinary action against concerned Officer who had indulged in such an illegal activity and pass appropriate order by completing disciplinary proceeding within a period of three months.

19. A compliance report shall be submitted by respondent-1 within four months through an affidavit of respondent-1.

(2016) 9 ILRA 1491
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.09.2016

BEFORE

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

Special Appeal No.- 378 Of 2016

Shri Adarsh Sanskrit Vidyalaya & Ors. **...Appellants**

Versus

C/M Shri Adarsh Sanskrit Vidyalaya, Ambedkar Nagar & Ors. **...Respondents**

Counsels for Appellants:
Laltaprasad Misra, Pawan Kumar Pandey, Sharad Pathak

Counsels for Respondents:
C.S.C., Manish Kumar, Pt. S. Chandra

HEADNOTES:
Societies Registration Act, 1860 – Section 4-B, Section 25 – Dispute of Committee of Management – Validity of Electoral College – Forgery of membership list – Scope of writ jurisdiction – Duty of Deputy Registrar – Effect of non-consideration of vital issue – Certiorari – Fresh election – Held, Deputy Registrar must decide validity of entire membership list when dispute raised – Failure to adjudicate electoral college vitiates election process – Writ maintainable where decision making process is perverse or incomplete.

PROCEDURE:
Dispute arose regarding management of **Shri Adarsh Sanskrit Vidyalaya**, a society registered under the **Societies Registration Act, 1860**.
Allegations were made that **Hriday Narayan Mishra** manipulated records in the office of Deputy Registrar by inserting forged documents and fabricated membership lists showing himself as Manager and altering the composition of the General Body.
Order dated **13.7.2010** of Deputy Registrar recognizing Hriday Narayan Mishra as Manager was challenged in **Writ Petition No. 5043 (MS) of 2010**. The learned Single Judge vide judgment dated **13.3.2013** directed fresh consideration of dispute particularly regarding the date of birth and membership of Hriday Narayan Mishra and ordered that management of Society be supervised by the Principal of Government Inter College, Ambedkar Nagar.
On reconsideration, Deputy Registrar by order dated **6.8.2013** held membership of Hriday Narayan Mishra invalid on the ground that he was minor at the time of alleged induction, yet accepted list of 24 members allegedly prepared by him and directed fresh elections which were held on **1.9.2013**.
Respondent challenged orders dated **6.8.2013**, **23.8.2013**, and consequential elections dated **1.9.2013** in **Writ Petition No. 6484 (MS) of 2013**, which was allowed by learned Single Judge holding that Deputy Registrar failed to adjudicate dispute relating to validity of entire electoral college.
Aggrieved, appellants filed present Special Appeal.

ISSUE:

Whether writ petition challenging order of Deputy Registrar relating to membership dispute and elections of society is maintainable when disputed questions of fact are involved.
Whether Deputy Registrar was justified in restricting enquiry only to membership of Hriday Narayan Mishra and not adjudicating validity of entire General Body membership list forming electoral college.
Whether elections held on basis of disputed electoral college without determination of valid membership are sustainable in law.
Whether dispute ought to have been relegated to civil suit or Prescribed Authority under Section 25 of Societies Registration Act.

CITATION:
Special Appeal No. 378 of 2016, decided on 14.9.2016 (All HC)
Relied on principle governing scope of judicial review where decision making process is vitiated due to non-consideration of relevant material.

ACTS:
Societies Registration Act, 1860
Section 4-B – Power of Registrar to examine validity of membership list
Section 25 – Reference of dispute relating to election of office bearers
Constitution of India
Article 226 – Power of High Court to issue writ of certiorari

HELD:
Validity of electoral college is foundational issue in dispute relating to elections of society.
Deputy Registrar having held that membership of Hriday Narayan Mishra was invalid being minor, was under obligation to examine entire membership list forming electoral college.
Failure to decide dispute regarding membership of General Body constituted serious flaw in decision making process.
Elections held on basis of disputed and unverified electoral college cannot be sustained.
Writ petition maintainable where authority fails to consider material issues or acts in arbitrary manner.
Deputy Registrar possesses power under Section 4-B of the Act to determine validity of membership and ought to have exercised the same.
Learned Single Judge rightly quashed order dated 6.8.2013 and consequential elections dated 1.9.2013 and directed reconsideration of membership dispute.
Management of society to continue under supervision of Principal, Government Inter College as earlier directed.
Finding declaring membership of Hriday Narayan Mishra invalid attained finality and shall not be reopened.

CONCLUSION:
Special Appeal dismissed.
Impugned judgment of learned Single Judge upheld.
Deputy Registrar directed to reconsider validity of membership of General Body after affording opportunity of hearing to parties.
Management of Society to continue under supervision of Principal, Government Inter College, Ambedkar Nagar till dispute is finally decided.

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

1. This appeal has been filed in the name and on behalf of the Committee of Management Shri Adarsh Sanskrit Vidyalaya which is a Society registered under the Societies Registration Act, 1860 through its alleged Manager Shri Sarju Prasad Dubey. It questions the judgment of the learned Single Judge dated 5.7.2016 whereby the petition filed by the respondent Nos.1 and 2 herein has been allowed, and the order of the Deputy Registrar, Faizabad dated 6.8.2013 giving directions to hold fresh elections and the consequential orders finalizing the election schedule and membership dated 23.8.2013 as well as the elections held on 1.9.2013 has been quashed.

2. The Society has been allowed to be managed in the meantime under the supervision of the Principal of a Government Inter College as was directed earlier by a learned Single Judge vide judgment dated 13.3.2013 in Writ Petition No.5043 (MS) of 2010.

3. The Deputy Registrar has been further directed to re-consider the entire matter particularly the objections raised by the respondent Nos.1 and 2 with regard to the allegations of forgery, concoction and fabrication of documents resulting in the passing of the previous orders of the Deputy Registrar.

4. The Society has established a Sanskrit School and was being managed by a Committee of Management. The said Committee that had been previously elected and was in power had held elections on 10.8.2005 on the strength whereof renewal was sought and the Society was renewed under the 1860 Act on 19.3.2008 for a period of five years w.e.f. 10.10.2005.

5. According to the contesting respondents, a letter was dispatched on 12.2.2007 to the Deputy Registrar informing him about the aforesaid elections dated 10.8.2005 and alongwith the letter the proceedings dated 10.8.2005 were also sent containing the name of all 26 members of the General Body which did not include the name of either one Hriday Narayan Mishra or the appellant Sarju Prasad Dubey.

6. The dispute began thereafter when Hriday Narayan Mishra, who according to the respondent Nos.1 and 2 was a rank trespasser, operated hand in gloves with one Maan Singh hatching a conspiracy in the office of the Deputy Registrar, and manipulated the status of all genuine documents by replacing them and changing them with documents bearing forged signatures of the respondent No.2, including altering of the entire membership of the General Body as also the list of office bearers that had been filed before the Deputy Registrar, Firms, Societies and Chits. According to the respondent Nos.1 and 2, this was again attempted by Sri Hriday Narayan Mishra through some forged documents dated 9.9.2009 and a forged letter allegedly signed by the appellant informing of the holding of fresh elections held on 10.8.2009 that was allegedly confirmed on 6.9.2009. This document for the first time indicated Mr. Man Singh as the President and the appellant/Sarju Prasad Dubey as the Vice-President and Sri Hriday Narayan Mishra as the Manager. It also reflected the respondent No.2 as a Member of the Committee of Management and according to the respondents, the signatures of the respondent No.2 were forged on the said letter. This letter finds place as Annexure - 9 to the original record of the writ petition.

7. On discovering this development, the respondent No.2, who claims himself to be the then Manager filed a complaint and also requested for supply of all the documents that were forged and fabricated and inserted into the file including the list of members of the general body vide representation dated 26.10.2009. Since Sri Hriday Narayan Mishra had been shown to be the Manager and against whom the complaint had been filed, he also submitted a reply giving a list of Members of the General Body 25 in number claiming that they are all Life Members of the Society and they had deposited the fee. This was countered by a detailed reply by the respondent No.2 on 29.1.2010. A copy of the same is Annexure - 12 to the record of the writ petition and it categorically states that documents at pages 370 to 385 be all cancelled as they are fake and manipulated. At the same time, it was also alleged that the entire membership of the General Body as reflected by Hriday Narayan Mishra was fake and a particular grievance was raised about Hriday Narayan Mishra that his membership that was being claimed w.e.f. 12.7.1976 was fake, inasmuch as his date of birth as shown in his records is 6.7.1967. It was therefore alleged that if the date of birth of Hriday Narayan Mishra was 6.7.1967, then he was a minor as on the date of the alleged acquisition of membership on 12.7.1976 being only 9 years old and this established his forgery and fake identify to somehow or the other to enter into the Society. It was also alleged by the contesting respondents that under the Right to Information Act, the Membership List was provided to the respondent No.2 for the years 1982 till 1986 which nowhere mentioned the name of either Man Singh or Hriday Narayan Mishra or any of their associates. A copy of the list has been filed as Annexure - 13 to the writ petition which also does not find the name of the appellant Sri Sarju Prasad Dubey. The forgery by introducing fake lists of office bearers and members of the general body subsequently and removing the original ones reflected otherwise and these fake lists had never seen the light of the day before the dispute arose. It is this forgery and fabrication that was complained of by the respondents.

8. On the strength of his alleged fake elections dated 10.8.2009 as Manager/Hriday Narayan Mishra succeeded in getting the signatures attested from the District Inspector of Schools on 12.3.2010 but that was stayed by the Joint Director on 12.3.2010 itself.

9. The contesting respondents thereafter made complaints before the Registrar and Deputy Registrar respectively on 17.5.2010 and 24.5.2010 alleging that these manipulations and fake documents were inserted with the connivance of the officials of the Registrar, particularly one Shekhar Babu (Office Staff) who with great difficulty disclosed the contents of the order sheet after avoiding to the best of his ability. Alongwith the said letters, the respondent No.2 also submitted the Membership Lists of 1989, 1990, 1993 and of the year 2000 stating therein that these documents were available on the record of the file at particular pages to demonstrate that Hriday Narayan Mishra and his associates were never members and they have tried to usurp the Society by inserting a Membership List and list of office bearers which are fake. Not only this, other documents pertaining to the institution were also forged by endorsing the fake signatures of Ram Nath Mishra/respondent No.2.

10. Despite this entire material being placed on record, the objections filed by the respondent No.2 were rejected and vide order dated 13.7.2010, the Deputy Registrar acknowledged

the documents and membership of Hriday Narayan Mishra and held him to be the validly elected Manager. The said order of the Deputy Registrar dated 13.7.2010 was challenged in the High Court before the learned Single Judge in Writ Petition No.5043 (MS) of 2010 that was enclosed with the counter affidavit filed on behalf of the Deputy Registrar in the petition giving rise to this appeal which is on record.

11. There was a previous dispute of the Society that had commenced in 1993 but the same would not be relevant for the purpose of the present controversy except for the fact that the dispute of elections was decided by the Prescribed Authority, Jalalpur, Faizabad vide his order dated 18.6.1999 recognizing Sri Ram Nath Mishra and his Committee as the valid committee subject to any challenge being raised in this regard. The fact however remains that Ram Nath Mishra was throughout contesting the claims as against his Committee of Management, and with this new dispute also raised all the aforesaid pleas against Hriday Narayan Mishra and his associates before the Deputy Registrar/ who on 13.7.2010 held that Hriday Narayan Mishra was a valid member since 1976 and had been elected as a Manager on 12.8.2008. These elections were also according to the Deputy Registrar recognized by the District Inspector of Schools in respect of the institution.

12. The aforesaid order dated 13.7.2010 was challenged by Ram Nath Mishra/respondent No.2 by filing Writ Petition No.5043 (MS) of 2010 as noted above where one of the principal grounds of challenge was the continuance of Sri Hriday Narayan Mishra as Manager and recognized by the District Inspector of School being invalid on the very fundamental issue of his date of birth as referred to here-in-above and additionally, the manipulations made in the records of the Deputy Registrar's office by inserting papers and files of fake lists that had been detailed in the representations on record and mentioned here-in-above. The said writ petition was contested by Sri Hriday Narayan Mishra and after contest, the learned Single Judge of this Court vide judgment dated 13.3.2013 came to the conclusion that the Deputy Registrar has adopted an incorrect course of appreciating the evidence on the issue relating to the date of birth of Hriday Narayan Mishra and accordingly directed a High Level Enquiry to be conducted by the Secretary of the Secondary Education with regard to the correct date of birth of Hriday Narayan Mishra. The Deputy Registrar was directed to proceed to decide the issue afresh after addressing to the submissions of the parties concerned and a direction was given to examine the matter again after receiving the report from the Secretary, Secondary Education about the date of birth as claimed by Sri Hriday Narayan Mishra.

13. In the meantime, the Society was directed to be managed by the Principal of the Government Inter College, Ambedkar Nagar. Thus, under the orders of the Court, the management of the Society stood superseded with the directions of deciding the matter in the light of the observations made in the judgment dated 13.3.2013 where a serious doubt had been expressed by the Court itself about the date of birth of Hriday Narayan Mishra who was claiming himself to be the Manager as against the respondent No.2/Ram Nath Mishra. The said judgment is Annexure - 18 to the writ petition.

14. When the matter returned back before the Deputy Registrar as per the aforesaid judgment of this Court, the Deputy Registrar was informed by the Secretary of the U.P. Board of

Secondary Education vide letter dated 1.5.2013 that Sri Hriday Narayan Mishra, S/o Durga Prasad Mishra had appeared in the High School Examinations of 1975 who passed the High School in 3rd division with a roll number and his date of birth as reflected therein was 6.5.1960 and not 6.5.1958 as alleged by Hriday Narayan Mishra nor 6.7.1967. Thus, it was established that Hriday Narayan Mishra had filed a fake document and had depicted a wrong date of birth, i.e., 6.5.1958 before the Deputy Registrar.

15. On receiving this information, the Deputy Registrar proceeded to again re-hear the matter and Hriday Narayan Mishra also contested the same by filing his application on 15.7.2013. The respondent No.2 also filed his objections, written submissions and letters alleging the manipulations in the entire Membership List of the General Body and the office bearers once again and also levelling allegations against the manipulations that were made in the file with the connivance of the officials of the office of the Deputy Registrar. Allegations were also made against the Deputy Registrar about mala fides and his personal conduct before the Registrar and the District Magistrate by the respondent No.2 stating that there was total non-cooperation by the officials and that the entire office of the Deputy Registrar, Faizabad was bent upon to help Hriday Narayan Mishra. The applications and the written submissions filed by the respondent No.2 indicate a clear allegation being made about the issue of the forgery and fake documents being replaced and inserted in the file including the membership of the General Body and the list of office bearers.

16. The Deputy Registrar while reconsidering the matter recorded a clear finding that the date of birth of Sri Hriday Narayan Mishra, if taken to be 6.5.1960, as correct, then on 12.7.1976 he was a minor and therefore his membership was declared to be a nullity under the order dated 6.8.2013.

17. The Deputy Registrar however abruptly closed the matter by declaring that the list of 25 members as submitted by Sri Hriday Narayan Mishra would be treated to be valid for holding of fresh elections except his name and therefore, the General Body List of 24 members excluding Hriday Narayan Mishra was accepted by the Deputy Registrar which also formed the basis of the directions issued on 23.8.2013 to hold fresh elections. This list included Man Singh as also Sarju Prasad Dubey, the appellant who were throughout being contested by the respondent No.2 as being fake members for various reasons as indicated in their objections and representations. The list of 24 members was entirely contrary to what that was relied upon by the respondent No.2.

18. The respondent No.2 had clearly asserted that the lists which had been received by him under the Right to Information Act from the office of the Deputy Registrar for certain periods as referred to here-in-above nowhere indicated the names of either Hriday Narayan Mishra or Sarju Prasad Dubey and their associates who find place in the list approved by the Deputy Registrar. The respondent No.2 throughout disputed his signatures that had been forged by Hriday Narayan Mishra to manipulate the documents and inserting them in the file of the office of the Deputy Registrar.

19. The Deputy Registrar nowhere addressed himself to this issue of the electoral college which went to the root of the matter, namely, the persons entitled to participate in the elections. The constitution of the electoral college would obviously have a material bearing directly on the holding of the elections and if the same has a fake foundation then any election held on the strength of such a list without adjudicating the controversy of the said membership would be an erroneous exercise of holding of elections as contemplated under Section 25 of the Societies Registration Act, 1860.

20. The respondent No.2 aggrieved by this order filed Writ Petition No.5518 (MS) of 2013. After the said writ petition was filed, the respondent No.2 also came to know about the directions issued by the Deputy Registrar on 23.8.2013 to hold the elections on the basis of the disputed list of membership which was held on 1.9.2013 in which the appellant Sarju Prasad Dubey claimed himself to have been elected as Manager. Consequently, the said writ petition was got dismissed as withdrawn vide judgment dated 4.9.2013 with liberty to file a fresh writ petition if there is a fresh cause of action.

21. The fresh writ petition No. 6484 (MS) of 2013 was filed challenging the order dated 6.8.2013, the consequential order dated 23.8.2013 and the elections held on 1.9.2013, which has given rise to the present appeal. The learned Single Judge while addressing himself to all the issues raised as well as the preliminary objections raised by the appellant therein came to the conclusion that the writ petition filed by the respondent No.1 was entertainable and maintainable. Secondly, the Deputy Registrar had completely misdirected himself in not proceeding to touch the issue of membership which was the bone of contention as the disputed membership lists had been depicted by none else than Hriday Narayan Mishra whose own membership had been found to be invalid. The learned Single Judge came to the conclusion that the correctness of the electoral rolls, namely, the list of entire 25 members as depicted by the appellants through Hriday Narayan Mishra had to be examined, and having not done so and having limited the enquiry only to the membership of Hriday Narayan Mishra, was an erroneous approach which was not the intention of the learned Single Judge while disposing of Writ Petition No.5043 (MS) of 2010 on 13.3.2013. Accordingly, the order dated 6.8.2013 and the consequential actions were quashed and the status of management as was existing on 13.3.2013 as directed by the learned Single Judge through the Principal of the Government Inter College, Ambedkar Nagar was maintained.

22. Assailing the aforesaid judgment, Dr. L.P. Mishra alongwith Pt. S. Chandra for the appellants contend that the Deputy Registrar was perfectly justified in confining himself only to the issue of membership of Hriday Narayan Mishra as directed by the learned Single Judge in the judgment dated 13.3.2013 and there was no scope for him to travel beyond the same and decide the issue of the entire membership of the General Body. They contend that if the respondent No.1 was aggrieved by any such membership dispute then he ought to have filed a Civil Suit. Even otherwise the said respondent had no authority to maintain a writ petition in the name of the Committee of Management of the Society alleging himself to be the Manager which did not exist. Dr. Mishra submits, by bringing on record the membership list of 1977-78 that was filed alongwith the counter affidavit of the appellant as Annexure No.11, that the said list is also countersigned by the respondent No.2 and being a valid list the same also contains the name of the appellant-Sarju Prasad Dubey as well as Hriday Narayan Mishra and the respondent No.2 himself. This list also contains the name of Man Singh.

23. He also submits that once the elections have been held on 1.9.2013, it is a fait accompli and the dispute of the election can now only be raised before the Prescribed Authority under Section 25 of the Societies Registration Act, 1860 and cannot be a subject matter of writ petition which aspect has been overlooked by the learned Single Judge. He therefore asserts that this question of fact also could not have been entertained in the writ jurisdiction and therefore, the interference by the learned Single Judge was uncalled for. He submits that the legal position is settled through several decisions on the aforesaid issues and therefore, the same should be invoked and the judgment of the learned Single Judge deserves to be set aside.

24. Countering the said submissions, Sri Manish Kumar, learned Counsel for the respondent Nos.1 and 2 submits that the preliminary objection of maintaining the writ petition has been correctly dealt with by the learned Single Judge holding that it was the answering respondents tho were contesting the claim throughout and the respondent No.2 was the Manager when the lis arose and even continues to have a grievance as on date as all the orders have been passed on the dispute raised by the answering respondent No.2. Thus, to say that the respondent No.2 did not have any locus to maintain the petition and there was a wrong description of parties does not hold water.

25. He submits that any judgment or precedent that is sought to be relied upon by the learned counsel for the appellants will not come to their aid in view of the peculiar facts of this case where two orders were passed by the Deputy Registrar on the merits of the claim and both the writ petitions were filed by the answering respondent No.2. He further submits that no such plea was either entertained or accepted when the first writ petition was decided on 13.3.2013 which judgment was never assailed either by Sri Hriday Narayan Mishra or the faction to which the appellant also belongs. He then submits that fraud is writ large and has vitiated the entire proceedings before the Deputy Registrar. The Deputy Registrar committed a manifest error by avoiding to decide the issue of membership of the general body. He further submits that this error in procedure of the decision making process is clearly amenable to judicial review by this Court as it amounts to a perversity and which did not require any facts to be established. This is a clear case of non-consideration of a vital issue in it's entirety. It is undisputed that the Deputy Registrar has not decided the dispute of the electoral college and has confined himself only to the issue of the membership of Hriday Narayan Mishra. This flaw in the decision making process therefore deserved to be corrected by a writ of certiorari and to that extent, the writ petition was very much maintainable. He therefore contends that the Court itself was not deciding the issue of membership but was rather proceeding to decide the manner in which the decision has been rendered which was obviously not in accordance with law. It is thus urged by Sri Manish Kumar that the learned Single Judge was fully justified in quashing the order and remitting the matter back to the Deputy Registrar to decide the issue raised with regard to the correctness of the electoral college and the rolls maintained in the office of the Deputy Registrar as projected by the faction of the appellant and the answering respondents.

26. This having not been done the very foundation of the elections held on 1.9.2013 falls through as it directly and materially affects the elections. He contends that judicial notice can be taken of this flaw in the decision making process and therefore the answering respondent does not deserve to be relegated to avail the remedy of a Suit for this purpose. The failure to discharge his obligation renders the order of the

Deputy Registrar to be invalid for which the issuance of a writ was necessary and accordingly, no error has been committed by the learned Single Judge while allowing the writ petition.

27. He has further submitted that on the merits of the claim, the answering respondents reiterate that they had raised all these issues about the membership and it was not only confined to the fakeness of the documents from pages 370-385 of the file of the Deputy Registrar as urged on behalf of the appellants. He has invited the attention of the Court to various paragraphs of the objections that were again taken after the judgment dated 13.3.2013 reasserting the issue of fake membership of the entire General Body.

28. The learned Standing Counsel has also invited the attention of the Court to the counter affidavit of the Deputy Registrar that was filed on behalf of the respondent-State.

29. Respondent No.7/Man Singh is of the same faction of the appellant Sarju Prasad Dubey as he has been shown to be the President of the Committee said to have been elected of which the appellant No.3 claims to be the Manager. It may be mentioned that Man Singh has also sought impleadment for being heard before the Deputy Registrar to which objections were filed by the respondent No.2.

30. Thus, all parties are represented and we have heard learned Counsel for the parties at length and perused the entire records.

31. The first issue is about the maintenance of the writ petition on behalf of the respondent Nos. 1 and 2. It may be put on record that the tenure of the Committee of Management is stated to be five years. The respondent No.2 claimed himself to be the Manager of the Committee when the dispute arose. The fact that the dispute arose in 2010 after the alleged elections of 2008 therefore cannot be ignored. It is the pendency of this tenure of five years between 2008-2013 that the dispute was decided twice by the Deputy Registrar one on 13.7.2010 and the next on 6.8.2013. The respondent Nos.1 and 2 therefore had a right to depict themselves for raising a challenge to the orders passed by the Deputy Registrar which had proceeded to recognize the faction of Hriday Narayan Mishra in 2010 and then his successor Sri Sarju Prasad Dubey on 6.8.2013. In this background, the respondent No.2 was an aggrieved person and he had a right to challenge the orders of the Deputy Registrar before whom he had been contesting his right to manage the affairs of the Society throughout. In this background, the learned Single Judge was perfectly justified in rejecting the preliminary objections that had been raised before him and we do not find any reason to differ from the said view. Thus, the argument of locus standi and incorrect description of parties is rejected as raised on behalf of the appellants.

32. The next issue is with regard to the status of the order dated 13.7.2010 which was under challenge in Writ Petition No.5043 (MS) of 2010. The appellants contend that the said order of the Deputy Registrar had not been quashed and the only observation that was made was about the membership of Hriday Narayan Mishra. Thus, the decision of the learned Single Judge dated 13.3.2013 which has become final, and was not assailed by any of the parties should be read so as to confine the decision by the Deputy Registrar only in respect of Hriday Narayan Mishra. We are unable to accept the aforesaid proposition for the reasons already recorded by the learned Single Judge in the impugned judgment and also for the reason that the genesis of the dispute arose from the alleged fake claim of Hriday Narayan Mishra who was

representing the management and had been recognized as such alongwith his membership by the Deputy Registrar under the order dated 13.7.2010. From the representations and objections that had been previously filed before the Deputy Registrar by Ram Nath Mishra when the decision was rendered on 13.7.2010, we find that the entire issue of membership of the General Body had been raised in the objections filed. The order of the Deputy Registrar dated 13.7.2010 was not accepted by this Court under the judgment dated 13.3.2013 mainly on the ground of the issue of the membership of Hriday Narayan Mishra. However, while deciding the matter, the learned Single Judge did not recognize the elections of Hriday Narayan Mishra and his alleged committee, and rather superseded the Committee by handing over the control and the affairs of the Society to the Principal of the Government Inter College, Ambedkar Nagar . A further direction was given to the Deputy Registrar that he would accordingly examine the issue of elections afresh. This is clearly stated in the judgment and is extracted herein ***"and accordingly shall examine the issue of election afresh"***. The intention and observations were therefore clearly directed not only to decide the issue of membership of Hriday Narayan Mishra but of the entire election set up by him based on the disputed electoral college that had been recognized by the Deputy Registrar on 13.7.2010. The main point that impelled the learned Judge was definitely the issue of the date of birth of Hriday Narayan Mishra. The only inference which can be drawn from a reading of the entire judgment is that the Deputy Registrar was required to go into the entire issue as his order dated 13.7.2010 had not been approved. Thus, the contention on behalf of the appellants that the said judgment is final and the issue of the membership of the General Body cannot be reopened is thus liable to be rejected, inasmuch as the issue of the membership of the General Body was directly involved with the issue of elections set up by Hriday Narayan Mishra. Any other conclusion would be contrary to the intention of the judgment dated 13.3.2013. The issue of membership of the General Body had to be determined which was the bone of contention including the membership of Hriday Narayan Mishra. We therefore hold that the issue of membership had to be decided and was very much open for determination before the Deputy Registrar including the status of the elections as depicted by Hriday Narayan Mishra.

33. We are further fortified in our view on account of the subsequent order of the Deputy Registrar dated 6.8.2013 which is the subject matter of challenge in this controversy. The Deputy Registrar ultimately found the membership of Hriday Narayan Mishra to be invalid as he was a minor. Not only his election therefore automatically fell through and he could not be recognized as Manager. This order of the Deputy Registrar dated 6.8.2013 has not been questioned by Hriday Narayan Mishra. It is thus clear that the issue of Hriday Narayan Mishra has become a fait accompli and therefore, the elections setup by him were found to be invalid. The question is if the very creator of the electoral college was found to be not a valid member of the Society, was it not the obligation of the Deputy Registrar to have entered into the aforesaid issue? To our mind, this was incumbent upon the Deputy Registrar to have entered into the objections with regard to the membership of the entire electoral college but the Deputy Registrar abruptly without any decision or finding, approved all the 24 members who had allegedly participated in the elections held on 1.9.2013.

34. On the issue of the power of the Deputy Registrar to decide membership, Dr. L. P. Mishra, learned counsel for the appellants could not dispute the legal position that such a power is available to the Deputy Registrar under Section 4-B of the Societies Registration Act, 1860 as applicable in the State of U.P. In our opinion also, the Deputy Registrar has failed to exercise his authority in this regard on the most

important issue which ought to have been gone into for holding of any fresh elections. Further, the fact that the previous elections setup by Hriday Narayan Mishra would not be recognized and fresh elections deserve to be held was accepted by the faction of Hriday Narayan Mishra including the appellant who was shown to be a member of the General Body as depicted by Hriday Narayan Mishra. The appellant also did not question the authority of the Deputy Registrar to hold fresh elections.

35. In such a situation, if the Deputy Registrar was to hold fresh elections, and if objections had been filed against the membership again before him before holding of the elections on 1.9.2013, then the Deputy Registrar was under an obligation to have decided the issue of membership. It is apparent from the objections raised by the respondent No.2 at every stage that he had been contesting the very electoral college of 24 members of the Deputy Registrar indicating it to be the fake list which was not adjudicated upon considering the objections of the respondent No.2 in the order dated 6.8.2013. In our opinion, this was a blatant flaw in the order of the Deputy Registrar who under a wrong impression or otherwise a deliberate wrong procedure adopted by him, did not choose to decide the issue of the dispute of membership and the electoral college entitled to participate in the elections. The decision making process was therefore clearly vitiated and the Deputy Registrar failed to decide an issue that went to the root of the matter. Accordingly, the learned Single Judge did not commit any error in exercising a writ of Certiorari and issuing a direction to decide the matter again. We therefore fully endorse the view taken by the learned Single Judge on this count as well.

36. We for all the reasons recorded here-in-above decline to interfere with the impugned judgment with a direction to the Deputy Registrar to decide the issue of the membership of the General Body keeping in view the objections raised by the respondent No.2 from time to time and after giving an opportunity of hearing to both the parties.

37. Since the Principal, Government Inter College, Ambedkar Nagar had continued to manage the affairs of the Society after 13.3.2013 under the directions of the learned Single Judge and which was not challenged, we do not find any reason to interfere with the aforesaid direction as well under the impugned judgment.

38. We however clarify that the Deputy Registrar shall decide the issue of membership in the light of the observations made by the learned Single Judge and what has been stated above, but since the parties are not at variance on the issue of membership of Hriday Narayan Mishra being rightly annulled, quashing of the order dated 6.8.2013 would not amount to reviving the issue of the decision of the membership of Hriday Narayan Mishra which would be treated to have become final between the parties to this appeal.

39. The Special Appeal stands ***disposed off*** accordingly.

(2016) 9 ILRA 1502
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Revision No.- 533 Of 2003

Ram Chander & Ors. **...Revisionists**
Versus
State Of U.P. **...Opposite Party**

Counsel for Revisionists:
S.C. Srivastava, Ramakar Shuka

Counsel for Opposite Party:
Govt. Advocate

Procedure:
Revision against concurrent findings of conviction under Sections **323/34 and 452 IPC** passed by the Trial Court and affirmed in Criminal Appeal. The revision was filed challenging the **severity of sentence** and **non-consideration of benefit under the Probation of Offenders Act, 1958**.

Issue:
Whether the High Court, in revisional jurisdiction, can interfere with concurrent findings of fact and conviction?
Whether failure of courts below to consider **Sections 3 & 4 of the Probation of Offenders Act, 1958** vitiates the sentence?
Whether the accused are entitled to benefit of probation considering lapse of time and nature of offence?

Headnotes:
Revisional jurisdiction is **limited** and does not permit **re-appreciation of evidence** unless there is manifest illegality, perversity, or miscarriage of justice.
Concurrent findings of fact recorded by courts below **cannot be interfered with** in absence of glaring defects.
However, **non-consideration of the Probation of Offenders Act** by the trial and appellate courts amounts to **legal error**, especially when such benefit is applicable.
Courts are under a **statutory obligation** (Section 361 Cr.P.C.) to record reasons if benefit of probation is denied.
Considering that the incident was of **1984** and long lapse of time had occurred, the case was found fit for extending benefit of probation.

Case Law Discussed:
State of Kerala vs. Putthumana Illath Jathavedan Namboodiri, AIR 1999 SC 981
Jagannath Chaudhary vs. Ramayan Singh, AIR 2002 SC 2229
Munni Devi vs. State of Rajasthan, AIR 2002 SC 107
State of Karnataka vs. Appa Balu Ingale, AIR 1993 SC 1126

Citation:
Criminal Revision No. 533 of 2003, decided on 16.09.2016, Allahabad High Court

Conclusion:
Conviction upheld.
Sentence modified.
Accused granted benefit under **Section 4 of the Probation of Offenders Act, 1958**.
Directed to furnish bonds of ₹25,000/- with condition of good behaviour for one year.
Revision **partly allowed**.

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

1. This revision has been preferred against the judgment and order dated 18.10.2003 passed by the Additional District & Sessions Judge/Special Judge, E.C. Act Court, Court Room No.9, Sultanpur, passed in Criminal Appeal No. 22 of 1999 (Ram Chander and Others Vs. State of U.P.), arising out of Criminal Case No.1451 of 1985, under Sections 323/34, 452 I.P.C., Police Station-Kotwali Nagar, District-Sultanpur, by which the learned lower court convicted the accused and sentenced them to undergo two years rigorous imprisonment and 500/- fine to each appellant under Section 452 I.P.C. and three months rigorous imprisonment and 200/- fine to each appellant under Section 323/34 I.P.C. with default stipulation was confined.

2. Filtering out unnecessary details, prosecution case is that on 14.10.1984 at about 3.30 p.m. day time, the revisionist Ram Chander, Dashrath, Guddu and Pappu were abusing the family members of the informant, when the informant asked them not to do so, the revisionist entered into the house of the informant with iron rod (Gahdala) and started beating him. Informant had received several injuries on different parts of body. The witnesses saw the incident and save the informant and his brother. Hence, the FIR was lodged, investigation was entrusted which turned into the chargesheet.

3. The prosecution examined six witnesses PW-1 is the informant (Ram Surat Mishra), who proved the written report as Exhibit K-1, PW-2 Ram Shankar Mishra, eye witness he is also said to be injured witness, PW-3 (Badri Nath) and PW-4 (Ram Sukh Mishra) are also said to be a eye witnesses, PW-5 (Geeta Pandey) is a head constable, who scribe a chik report, which was proved by the witnesses as Kxhibit-2, PW-6 Dr. R.K. Gupta, who examined to injured and proved the medical report as Exhibit K.6 and 7.

4. After the prosecution witness was closed, the statements of the accused persons were recorded under Section 313 Cr.P.C who denied the incident and stated that they had been falsely implicated due to enmity.

5. The learned trial court after perusal of the evidence on record convicted the accused.

6. Feeling aggrieved against the judgment of the lower court, the appellant filed an appeal bearing no. 22 of 1999, which was dismissed. Hence, the present revision was preferred.

7. I have heard learned counsel for the revisionist, learned A.G.A for the State and perused the record.

8. Learned counsel for the revisionist has submitted that the punishment imposed on the revisionist is too hard and severe and the revision is liable to be allowed.

9. It is settled principle of law that the revisional jurisdiction is not as wide as the appellate jurisdiction and under the revisional jurisdiction, the High Court is required to exercise its powers where there is material irregularity or manifest error of law or procedure, or there is misconception or misreading of evidence or where the court below has failed to exercise jurisdiction vested in it or has exercised the jurisdiction wrongly and perversely or where the facts admitted or proved do not discloses any offence.

10. As a broad proposition, the interference of revisional court may be justified in cases (i) where the decision is grossly erroneous (ii) where there is no compliance with the provision of law (iii) where the finding of fact affecting the decision is not based on evidence on record (iv) where the material evidence of parties has not been considered (v) where the court below has misread or mis-appreciated the evidence on record (vi) where the judicial discretion has been exercised arbitrarily or perversely.

11. In exercise of revisional jurisdiction the court may not exercise jurisdiction to reassess the evidence and reappraisal of evidence is not permissible within the revisional jurisdiction. Hon'ble the Apex Court in A.I.R. 1999 Supreme Court 981 in the case of ***State of Kerela Vs. Putthumana Illath Jathavedan Namboodiri*** has held:-

"the High Court while hearing revision does not work as an appellate court and will not re-appreciate the evidence, unless some glaring mistake is pointed out to show that injustice has been done".

12. In A.I.R. 2002 Supreme Court 2229 in the case of ***Jagannath Chaudhary Vs. Ramayan Singh,*** Hon'ble Apex Court has held:-

"revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error on point of law resulting in miscarriage of justice".

Similarly In A.I.R. 2002 Supreme Court 107 in the case of ***Munni Devi Vs. State of Rajasthan and others*** *it was held by Hon'ble Apex Court has held:-*

"while exercising the revisional power the High Court has no authority to re-appreciate the evidence in the manner as the trial court and appellate courts are required to do".

13. In another case A.I.R. 1993 Supreme Court 1126 in the case of ***State of Karnataka Vs. Appa Balu Ingale and others*** it has been held by the Hon'ble Apex Court that:-

" generally speaking, concurrent findings of fact arrived at by two courts below are not to be interfered with by the High Court in absence of any special circumstances or unless there is any perversity."

14. Considering the limited scope of revisional jurisdiction it is apparent that the evidence recorded by trial court and reappreciated by the appellate court is not required to be reappreciated again on the point raised by the learned counsel for the revisionist. The appellate court has given findings after detailed discussions and has found no substance in the arguments of accused-appellant. The findings of facts recorded by two courts below may not be interfered with in this revision.

15. The arguments advanced by the learned counsel for the revisionist are that there was no ground for conviction of the accused persons and if at all the courts below had grounds to convict the accused person, no reasons were given by the courts below for not granting probation to the present revisionist, which is erroneous in law and is not liable to be sustained.

16. Learned counsel for the revisionist has further argued that the effect of Sections 3 and 4 of the Probation of Offenders Act, 1958, in the background of what is stated in Section 360 of the Code of Criminal Procedure, 1973, has not been kept in view. Thus, the residual question is applicability of Sections 3 and 4 of the Probation of Offenders Act, 1958 and Section 360 of the Code of Criminal Procedure.

17. Where the provisions of Probation of Offenders Act are applicable, the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, who gave birth to the Probation of Offenders Act and the Code Criminal of Procedure wanted to obviate. Yet the legislature in its wisdom has obliged the Court under Section 361 of the Code of Criminal Procedure to apply one of the other beneficial provisions; be it 360 of the Code of Criminal Procedure or the provisions of the Probation of Offenders Act. It is only by providing special reasons that their applicability can be withheld by the Court. The comparative elevation of the provisions of the Probation of Offenders Act are further noticed in sub section (10) of Section 360 of the Code of Criminal Procedure which makes it clear that nothing in the said Section shall affect the provisions of the Probation of Offenders Act. Those provisions have a paramountacy of their own in the respective areas where they are applicable.

18. Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of 7 years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the Probation of Offenders Act is much wider. It applies to any person found guilty of having committed an offence not punishable with

death or imprisonment for life. Section 360 of the Code does not provide for any rule for Probation Officers in assisting the courts in relation to supervision and other matters while Probation of Offenders Act does make such a provision. While Section 12 of the Probation of Offenders Act states that the persons found guilty of an offence and dealt with under Section 3 or 4 of the Probation of Offenders Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the Probation of Offenders Act as applicable at the same time in a given area cannot be gathered from the provision of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force. The provisions of Section 360 of the Code are wholly inapplicable.

19. Enforcement of Probation Act in some particular area excludes the applicability of the provisions of Section 360, 361 of the Code in that area. Section 3 of the Probation of Offenders Act reads as follows:-

"3. Power of court to release certain offenders after admonition.- When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

Explanation.- For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4."

20. Thus, this was the bounden duty of the learned trial and also the appellate court to consider why they did not proceed to grant the benefit of Probation of Offenders Act. Section 4 of the Probation of Offenders Act reads as follows:

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not

exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2)Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

21. Protection of society and stamping out criminal proclivity must be the object of law, which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice should meet the challenges confronting the society. Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. As justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong.

22. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence.

23. The occurrence relates to the year 1984 and the present revision is pending since year 2003. I find no illegality, irregularity or impropriety in the conviction. But, before concluding a discussion on the point why the benefit of Section 3 and 4 of the Probation of Offenders Act or Section 360 was given to the accused, has to be looked into.

24. The learned trial judge did not even bother to discuss why it was a case in which the aforesaid benefit could not be extended to the accused persons. As far as the Judgment of the appellate court is concerned, but the appellate court also adopted an inhuman attitude and did not assign any reason for not granting benefit of Probation of Offenders Act.

25. Thus, as already said, I hold that the occurrence relates to the year 1984 and this revision is pending since 2003, I find no illegality, irregularity or impropriety in the impugned Judgments and I feel that the conviction should be maintained but the sentence should be modified.

26. The revision is partly allowed with the following modification.

27. The conviction of the revisionist is upheld.

28. Instead of sending the revisionist to jail, the revisionist shall get the benefit of Section 4 of the Probation of Offenders Act. Therefore, instead of sentencing them to undergo two years rigorous imprisonment along with fine of Rs. 500/- each under Section 452 I.P.C., and three months rigorous imprisonment along with fine of Rs. 200/- each under Section 323/34 I.P.C. and in default of payment of fine three months additional imprisonment, they shall file two bonds to the tune of Rs.25,000/- coupled with personal bonds to the effect that they shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions, he will subject himself to undergo sentence before the Magistrate as per Rules. The bonds aforesaid be filed by the accused persons within two months from the date of the Judgment.

29. Let a certified copy of this order be sent to the court concerned for compliance.

(2016) 9 ILRA 1509
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Special Appeal No.- 894 Of 2011

Ashok Kumar Sen **...Appellant**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Shikha Singh

Counsel for the Respondents:
C.S.C., K.K. Roy, Vivek Mishra

HEADNOTES:
Although provisions of **Order I C.P.C.** do not strictly apply to writ proceedings, the **principles underlying impleadment of necessary parties** are applicable by necessary implication.
Under **Order I Rule 9 C.P.C.**, a suit shall not fail due to mis-joinder or non-joinder of parties, but the **proviso makes an exception in case of non-joinder of necessary parties**.
The scheme of **Order I Rule 10(2) C.P.C.** indicates that the Court has power at any stage to direct addition of parties necessary for complete and effective adjudication.
A writ petition should **ordinarily not be dismissed at the threshold** for non-impleadment of necessary parties unless the petitioner fails to comply with directions of the Court to implead such parties.
Dismissal of a writ petition on the ground of **non-impleadment of necessary parties does not operate as res judicata**, since the rights of such parties were never adjudicated on merits.
In absence of any statutory bar similar to **Order IX Rule 9 C.P.C.**, a **second writ petition is maintainable** after removing the defect of non-impleadment of necessary parties.
Once the writ petition is dismissed for non-impleadment of necessary parties, **other observations on merits lose significance**.
The proper remedy available to the petitioner is to **file a fresh writ petition** after impleading necessary parties, which shall be decided independently on merits.

PROCEDURE:
The present **intra-court Special Appeal** was filed against the judgment of the learned Single Judge dated **11.04.2011**, whereby the writ petition challenging appointments made pursuant to an advertisement issued by the **District Panchayat, Kaushambi** was dismissed on the grounds of:
Non-impleadment of necessary parties (selected candidates were not made respondents), and
Non-filing of appointment letters of the selected candidates.
The Division Bench examined the legal effect of **non-impleadment of necessary parties** in writ proceedings and the applicability of principles contained in **Order I Rule 9 and Order I Rule 10(2) C.P.C.**

ISSUE:

Whether a writ petition can be dismissed solely on the ground of **non-impleadment of necessary parties**.
Whether principles of **Order I Rule 9 and Rule 10(2) C.P.C.** are applicable in writ proceedings.
Whether dismissal of a writ petition for **non-impleadment of necessary parties** operates as **res judicata**.
Whether a **second writ petition** is maintainable after curing the defect of non-impleadment of necessary parties.
Whether other findings recorded by the learned Single Judge survive once the writ petition is dismissed on the ground of non-impleadment.

SECTIONS:
Code of Civil Procedure, 1908
Order I Rule 9 – Mis-joinder and non-joinder of parties
Order I Rule 10(2) – Power of Court to add or strike out parties
Order IX Rule 9 – Bar of fresh suit after dismissal in default

CONCLUSION:
The Special Appeal was **disposed of** with liberty to the appellant to file a **fresh writ petition** after curing the defect of non-impleadment of necessary parties.
It was held that dismissal of a writ petition for non-impleadment **does not bar a subsequent petition**, nor does it operate as **res judicata**, as no adjudication on merits has taken place.

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Om Prakash Pandey, Advocate, holding brief of Sri Rajesh Kumar, appearing for the petitioner and Ms. Smriti Kartikaya, learned counsel appearing for the respondent.

2. This intra code appeal is directed against the judgement and order of the learned Single Judge dated 11.04.2011. The order reads as follows:-

"The petitioner is aggrieved by the appointment made pursuant to the advertisement issued by the office of the District Panchayat, Kaushambi.

The petitioner has not placed on record the appointment orders and nor he has impleaded the appointed persons as respondents. No relief, therefore, can be granted to the petitioner.

The writ petition is, accordingly, dismissed."

3. From the aforesaid it is clear that the writ petition has been dismissed on two grounds (a) non impleadment of necessary parties (b) non filing of the appointment order of the persons who have been appointed.

4. In our opinion, once it is found that the writ petition suffered from non impleadment of necessary parties then the writ petition should have been dismissed on that ground alone and all other observations are not required to be made.

5. We shall, therefore, address our self to the first issue with regard to the dismissal of the writ petition on the ground of non impleadment of necessary parties. The provisions of Order-1 do not apply to writ proceedings, but principle in general of this provision are made applicable, as guidelines for the writ Court.

6. The legal principles applicable in the matter of impleadment of necessary parties in writ petition has to be regulated by the provisions of Civil Procedure Code by necessary implication, as there is no other statutory provision regulating the impleadment of parties in a writ petition. At least no other provision in the matter to implead of parties has been brought to the notice of the Court.

7. The joining of parties to the suit is regulated by Order-1 C.P.C. The provisions of Order-1 Rule-1 and Order-1 Rule-3 deal with the persons who may join as plaintiff and with those who may be impleaded as defendant respectively.

8. For our purposes what is relevant is Order-1 Rule-9 of C.P.C. which reads as follows:-

*"9. **Mis-joinder and non-joinder**.- No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:*

Provided that nothing in this rule shall apply to non-joinder of a necessary party."

9. It will be seen that main provision of Order 1 Rule 9 specifically declares that no suit shall be defeated by the reasons of the non joinder or mis-joinder of parties and the Court may in every suit deal with the controversy so far as the rights and interest of the parties actually before it. But the proviso to the said Rules 9, provides that nothing in the said Rule shall apply to non joinder of necessary parties. Meaning thereby that the Court may not proceed with suit where a necessary party has not been impleaded. At this stage we may also refer to Order 1, Rule-10 Sub Clause-2 of C.P.C., which reads as follows:-

*"**10. (2) Court may strike out or add parties**.-The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."*

10. From a simple reading of the same it is clear that the Court may at any stage of the proceeding either upon or without the application of the either parties and on such terms, as may appear to the Court, to be just, order that name of any party improperly joinded whether as plaintiff or defendant be deleted and the name of any persons, who ought to have been joined whether as plaintiff or defendant or it is necessary to enable the Court effectively and completely adjudicate the questions involved in the suit be added. Order 1 does not contemplate any consequences of non-impleadment of a necessary party.

11. In our opinion from the scheme of Order-1 it is apparent that not only the plaintiff is under an obligation to implead all necessary parties, the Court is also required to exercise its discretion and to ensure that all parties for effective and complete adjudication of the issues raised are made party to the suit. Therefore, the intention of the legislature is that normally no suit is to be dismissed for non impleadment of necessary parties unless and until the Courts direct the plaintiff to implead a person, as a party to the suit and the plaintiff refuses to comply with the orders and in that circumstances alone the Court will be left with no alternative but to dismiss the suit for non compliance of its order for impleadment of necessary party.

12. From the provisions of Rule-10 Sub Rule 2, it is further clear that impleadment of a party to the suit can be directed at any stage of the proceeding which further supports the conclusion of this Court that dismissal of a suit for non impleadment of a necessary party should be in a case, where the plaintiffs fails to comply with the directions of the Court refuses to implead the necessary party and not otherwise.

13. Another aspect of the matter which does need consideration by us is as to whether on a suit being dismissed for non impleasment of necessary party can a second suit be filed after removing the defect or not.

14. We find that the principles of res-judicata will not apply when a suit is dismissed for non implement of necessary party, in as much as no issue has been tried between the parties by the court concerned as the other person was not a party to the proceeding, even if any finding are returned by the court concerned. Therefore, such an order will not operate as res-judicata. Even otherwise, suits is to be dismissed for non impleadment of necessary party without adjudicating upon any rights, qua that party as claimed in the suit, i.e. the person, who is a necessary party and has not been implicated.

15. We also take not of the fact that where the legislature wanted that no second suit be maintain even when the earlier suit has been dismissed. It has specifically provided, so reference be had to Order-9 Rule 13, wherein it has been disclosed that when a suit is dismissed in default then no second suit for the same relief would be maintainable. Order-9 Rule 9 of C.P.C. reads as follows:-

*"**9. Decree against plaintiff by default bars fresh suit.-** (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in*

respect of the same cause of action, But he may apply for an Order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an Order setting aside c the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No Order shall be made under this rule unless notice of the application has been served on the opposite party."

No similar provision has been made under Order-1 of C.P.C.

16. In view of the aforesaid, we are of the considered opinion that a second suit for same cause would be maintainable after removing the defect of non impleadment of necessary parties, where the first suit has been dismissed by the Court for non impleadment of necessary party.

17. This is, however, without prejudice the rights of the plaintiff to challenge the order of the Court on the ground that a particular party is not a necessary party and therefore, dismissed of the suit on that ground is unjustified.

18. So far as the other finding returned by the learned Single Judge on the issue of non filing of the appointment letter of the selected candidates is concerned. It is submitted before us that the petitioner, who is a third party, to the contract of appointment acess to the appointment letter which has been issued by the department in favour of the selected candidates. Even otherwise, it is stated that copy of one such letter was brought on record by the petitioner, which has not been taken note of.

19. Be that it may, since the first writ petition has been dismissed amongst other on the ground of non impleadment of necessary parties by the petitioner, all other observations loose significance. Therefore, we **disposed of** the present Special Appeal by providing that the proper remedy available to the petitioner to file a second writ petition by removing the defect of non impleadment of necessary party. The said writ petition is to be considered on its own merit irrespective of the order passed in the first writ petition.

20. Accordingly the Special Appeal is **disposed of**.

21. All the issues may be raised in the second writ petition, as were raised in the first writ petition.

(2016) 9 ILRA 1514
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 1101 Of 1983

Shree Pal & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsels for the Appellants:
Sri Viresh Mishra, Senior Advocate assisted by Sri Sandeep Kumar Dubey

Counsels for the Respondent:
Sri A.N. Mulla, A.G.A.

HEADNOTES:

High Court held that:
Evidence showed existence of **two separate groups** of accused persons.
Role of appellants **Shree Pal and Girraj** was confined only to raising mud barrier across drainage.
Allegation regarding assault by shovel was **improvement over earlier statements** and not supported by FIR or statement under Section 161 Cr.P.C.
Fatal gunshot was fired by co-accused **Sheoraj Singh**, and no evidence proved that appellants shared common object to commit murder or attempt to murder.
Essential ingredients of **Section 149 IPC** were not established.
Trial court failed to properly appreciate distinction in role of appellants.
Accordingly, conviction of appellants under **Sections 147, 307/149 and 324/149 IPC** was held **erroneous and perverse**, and appellants were **acquitted by giving benefit of doubt**.
Appellants were on bail; their bail bonds were cancelled and sureties discharged, subject to compliance of **Section 437A Cr.P.C.**

Procedure:

Appeal against judgment and order dated **02.05.1983** passed by the **Vth Additional Sessions Judge, Aligarh** in **Sessions Trial No. 415 of 1980**, arising out of **Case Crime No. 6 of 1980**, Police Station **Akrabad**, District **Aligarh**, whereby the appellants were convicted under **Sections 147, 302/149, 307/149 and 324/149 IPC** and sentenced to various terms of imprisonment.
During pendency of appeal, two appellants **Rukum Pal and Bhudeo** died and appeal abated against them.
Co-accused **Sheoraj Singh** was declared juvenile by trial court and released on probation. Appeal survived only in respect of **Shree Pal and Girraj**.
The High Court allowed the appeal and set aside conviction giving benefit of doubt.

Issue:
Whether appellants **Shree Pal and Girraj**, who were alleged to have raised a mud barrier (clay bund) obstructing drainage water, could be held liable for offences under **Sections 147, 307/149 and 324/149 IPC**, when the fatal gunshot causing death of Ramdevi was fired by co-accused **Sheoraj Singh**, and whether common object under **Section 149 IPC** was proved beyond reasonable doubt.

Citation:
Indian Penal Code, 1860 — Sections **147, 149, 302, 307, 324 IPC** —
Common object — unlawful assembly — vicarious liability — overt act — benefit of doubt — improvement in testimony — omission in statement under Section 161 Cr.P.C. — acquittal.
Principle reiterated that **mere presence or prior dispute is insufficient to attract constructive liability under Section 149 IPC unless common object is proved beyond reasonable doubt.**

(Delivered by Hon'ble Bala Krishna Narayana, J.)
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. The arguments of this appeal concluded on 14.09.2016. Following order was passed by us on that date:

"Heard Shri Viresh Mishra, Senior Advocate assisted by Shri Sandeep Kumar Dubey, learned counsel appearing on behalf of the appellants and Shri A.N. Mulla, learned AGA for the State.

We will give reasons later but we make the operative order now.

The appeal is allowed. The impugned judgment and order dated 2.5.1983 passed by the Vth Additional Sessions Judge, Aligarh in Sessions Trial No. 415 of 1980, arising out of Case Crime No. 6 of 1980; State Vs. Shree Pal and others, convicting the appellants, Shree Pal and Girraj under Sections-147, 307/149 and 324/149 I.P.C. and sentencing them to one year's R. I. on the first count, seven years' R. I. on the second count and two years' R. I. on the third count respectively is hereby set aside. The appellants Shree Pal and Girraj are acquitted of all the charges framed against them. Since the appellants are on bail, their bail bonds are cancelled and their sureties discharged.

There shall be no order as to cost."

Here are the reasons:-

2. The instant Criminal Appeal was initially preferred by five accused persons but was maintainable at the instance of first four appellants Shree Pal, Girraj, Rukum Pal and Bhudeo while Sheoraj Singh- appellant no.5 was declared juvenile by the trial court and accordingly he was not sent to jail but appropriate orders were passed for maintaining good behaviour for three years,

under the supervision of concerned Information/ Probation Officer, Aligarh, therefore, the present appeal is confined only in respect of aforesaid four appellants.

3. Appropriate to mention that during the course of appeal the other two accused persons- namely, Rukum Pal and Bhudeo expired, therefore, their appeal stood abated against them vide order of this Court dated 27.7.2016. Now we are left with merit of only two appellants Shree Pal and Girraj.

4. This Criminal Appeal is directed against the judgment and order of conviction dated 2.5.1983 passed by court of Additional Sessions Judge Vth, Aligarh in Sessions Trial No.415 of 1980, under Sections 302, 307, 147, 148, 149 IPC, Police Station- Akrabad, District Aligarh arising out of Case Crime no. 6 of 1980, State Vs. Shree Pal and others, whereby Rukum Pal and Bhudeo have been sentenced to one year R.I. each under Section 147 IPC, sentenced to life imprisonment under Section 302/149 IPC, sentenced to 7 years R.I. each under Section 307/149 IPC and sentenced to 2 years R.I. each under Section 324/149 IPC. Similarly, appellants Girraj and Shree Pal have been sentenced to one year R.I. each under Section 147 IPC, sentenced to 7 years R.I. each under Section 307/149 IPC and two years R.I. each under Section 324/149 IPC. The aforesaid sentences to run concurrently.

5. Heard Sri Viresh Mishra, learned Senior Advocate assisted by Sri Sandeep Kumar Dubey, learned counsel appearing on behalf of the appellants and Sri A.N. Mulla, learned AGA for the State.

6. Prosecution story as unfolded by first information report- Exhibit Ka-1- lodged by Bhagwan Singh son of Uttam Singh, R/o Village- Kishanpur, Police Station- Akrabad, District Aligarh, on 12.1.1980 at 10.15 A.M. against five accused persons including the present appellants- Shree Pal and Girraj with allegations that informant's brother Roop Singh has been using tap water for about twenty years whose water flows down the drainage in the street outside his house. This water also flows in front of room of Rukam Pal Singh son of Jodh Singh, which lies to the western side of the street. In the morning of 12.1.1980 around 6.30-7.00 A.M. Shree Pal son of Bhudeo Singh and Girraj son of Anek Singh, raised clay barrier and stopped flow of water (from drainage of Roop Singh), whereupon Ramdevi wife of Roop Singh, Malkhan, Pooran Singh son of Bhagwan Singh and Roop Singh son of Uttam Singh arrived on the spot and asked them not to raise clay barrier, whereupon they (accused) started abusing them. As soon as, the informant side tried to remove the clay barrier, when Rukam Pal son of Jodh Singh, Bhudev Singh son of Khyaliram exhorted 'maaro salo ko', whereupon Sheoraj Singh son of Rookam Pal Singh fired 3-4 times from SBBL gun. First shot hit Ramdevi wife of Roop Singh. She died on the spot and pellet injury was also caused to Malkhan and Poorn Singh son of Bhagwan Singh. In the meanwhile, various persons including Sheoraj Singh son of Ranchur Singh and other villagers also arrived on the spot and saw the incident. Dead body of Ramdevi was lying on the spot while injured Malkhan Singh and Pooran Singh have been brought by bullock-cart to the police station. Report be lodged and action be taken. Contents of this written report were taken in the concerned check FIR at Crime No. 6 of 1980,

under Sections 147, 148, 149, 302, 307 IPC, Police Station- Akranbad, District Aligarh on 12.1.1980 at 10.15 A.M. Check FIR is Exhibit ka-4.

7. On the basis of aforesaid entries in Check FIR, a case was registered against the accused persons at Serial No.17 in the General Diary dated 12.1.1980 at aforesaid crime number under aforesaid Sections of IPC at aforesaid police station. The relevant G.D. Entry is Exhibit Ka-5. Investigation of the case ensued and Sri Brajwasi Lal P.W.7 took over the investigation. He prepared site plan of the place of occurrence and also recorded statement of various persons, prepared inquest report of deceased Ramdevi and took clay roll, simple and blood stained from the spot- Exhibit Ka-8. Besides, he also took blood stained cloths of Malkhan Singh and Pooran Singh and prepared memo of the same Exhibit Ka-10.

8. It is reflected from record that inquest of deceased Ramdevi was held on 12.1.1980 and it was completed around 3 P.M. Inquest witnesses were appointed by the Investigating Officer and in the opinion of the inquest witnesses, it was thus decided to send the dead body for postmortem examination for ascertaining the real cause of death. Inquest report is Exhibit Ka-7. Thereafter relevant papers were prepared for sending the dead body for postmortem examination. Postmortem examination of deceased Ramdevi was conducted at mortuary, Aligarh on 13.1.1980 at 3.45 P.M. by Dr. A.K. Sharma P.W.10, who found the following ante-motem injuries:-

9. ***Ante-mortem Injuries***

(1) Forty gun-shot wounds of entry front of left shoulder, outer surface of left upper arm and outer surface of upper part of left forearm on an area of 18" x 5" size of wound 1/10" x 1/10" skin deep five shot recovered in skin of arm.

(2) Multiple Gun-shot wound of entry (20) in an area of 10"x5 " front of upper part of chest size. 1/10" x 1/10" x cavity deep.

10. Cause of death was reported to be due to shock and haemorrhage as a result of ante-mortem injuries. Postmortem examination report is Exhibit Ka-14.

11. Record further reflects that two injured Pooran Singh and Malkhan Singh were medically examined at PHC, Akrabad on 12.1.1980 at 10.40 A.M. and 11.10 A.M., respectively by Dr. Pradeep Kumar P.W.8. On the person of injured Pooran Singh, the following injuries were noted:-

(1) one lacerated wound on the forehead just above root of nose 1 cm x .5 cm x muscle deep. (2 cm above root and nose)

(2) Lacerated wound one left side of face just near to left nostril .5 cm x .5 cm. Blackening seen around the wound.

(3) Three gunshot wounds on the right side shoulder in the front. Each wound measuring .7 cm x .7 cm bleeding, blackening seen around the wounds. The distance in between the each wound 10 cm.

(4) A lacerated wound on the dorsal surface of middle of middle finger of left hand horizontally obliqe 2.5 cm x .5 cm.

Conclusion:- Injury no.1 caused by hard and blunt object. Injury no.2 and 3 caused by firearm and injury no.4 caused by hard and blunt object. Injury no.s 1 and 4 were stated to be simple in nature and injury nos. 2 and 3 kept under observation and advised X-ray and patient referred to M.S. Hospital for expert opinion and treatment. Duration was stated to be fresh.

12. On the person of injured Malkhan Singh, the following injuries were noted:-

(1) Multiple gunshot wounds all over the forehead and left side of temporal region about twelve in number. Each wound measuring .3 cm x .3 cm- Blackening present around the wounds.

(2) Echymosis with swelling on right eye covering upper and lower lid 5 cm x 4 cm. colour- blusih.

(3) Echymosis with swelling on lower lid of left eye 4.5 cm x 2.5 cm. Colour-blue. G.C.- low, Pulse-150 per minute. Patient referred to M.S. Hospital, Aligarh for expert opiinion and treatment. Duration fresh.

Conclusion- Injury no.1 caused by firearm and injury nos. 2 and 3 may be caused by firearm by hard blunt object. Advised X-ray of both orbital region. All the three injuries kept under observation for determination of nature of injury and advised X-rays and patient referred to M.S. Hospital, Aligarh for expert opinion and treatment.

Both the injury reports are Exhibit Ka-2 and Ka-3, respectively.

13. The investigating Officer (Brajwasi Lal- P.W.7) also took various other steps and thereafter the investigation was taken over by another Investigating Officer namely Shyamveer Singh- P.W.9, on 15.1.1980. He, besides, taking statement of various witnesses, has also filed charge-sheet, vide Exhibit Ka-11.

14. Thereafter, this case was committed to the court of Sessions, from where, it was made over for trial and disposal to the aforesaid court of Additional Sessions Judge Vth, Aligarh, who heard the appellants on the point of charge and prima facie ground was found existing for framing charges under Sections 147, 302/149, 307/149, 324/149 IPC. Sheoraj (juvenile) was separately charged under Sections 148, 302, 307 and 324 IPC. The charges were read over and explained to the accused, who abjured charges and opted for trial.

15. Thereafter, the prosecution was asked to adduce its testimony, whereupon the prosecution examined as many as ten witnesses on its behalf. Brief sketch of the same is being made herein below:

Bhagwan Singh P.W.1 is the first informant and the eyewitness of the incident. He has lodged written report Exhibit Ka-1.

Pooran P.W.2 is injured eye-witness and has described about the incident. He is son of P.W.1 Bhagwan Singh.

Malkhan Singh P.W.3 is also injured eye-witness. He has also testified on the same line as Pooran P.W.2.

Shyodan P.W.4 is also eyewitness of the incident and has narrated the incident in his testimony.

Constable Sri Krishna P.W.5 is the formal witness and has conveyed over, the dead body of Ramdevi, to the hospital and has proved the process.

Dr. S.B. Sharma P.W.6 is the formal witness, who examined injured Pooran Singh and Malkhan Singh at PHC Akarabad on 12.1.1980 at 10.40 A.M. and 11.10 A.M., respectively and noted injuries found on their persons and has proved these injury reports as Exhibits Ka-2 and Ka-3, respectively.

Sri Brajwasti Lal P.W.7, the Investigating Officer has conducted investigation of this case at initial stages and has proved several prosecution papers, Check FIR, Exhibit Ka-4., the relevant GD entry for registering case against accused as Exhibit ka-5. He also made site plan of the occurrence and has proved it as Exhibit ka-6. He also processed inquest of deceased Ramdevi and proved it as Exhibit Ka-7. Simple and blood stained soil was collected from the spot and memo of the same was prepared as Exhibit Ka-8. He also took into possession blood stained clothes of both the injured Malkhan and Pooran, prepared memo of the same as Exhibit Ka-10. This witness has stated in his examination-in-chief in the last paragraph of page-68 of the paper book that investigation was subsequently taken over by the Investigating officer Shyamveer Singh, S.O. (P.W.9) and he had filed charge-sheet against the accused persons and he has identified his signature on the charge-sheet and has proved the same as Exhibit Ka-11.

Dr. Pradeep Kumar P.W.8 has operated on injured Pooran (injured P.W.2) and has proved that he extricated two pellets from his right shoulder after administering anesthesia on him. He has proved his process and the relevant bed-head ticket containing such description as Exhibit Ka-12 and Ka-13, respectively.

Shyamveer Singh P.W.9 is the subsequent Investigating Officer who took over the investigation on 15.1.1980, recorded statement of various witnesses and prepared charge-sheet already exhibited as Exhibit ka-11.

Dr. A.K. Sharma P.W.10 has conducted autopsy on the cadaver of deceased Ramdevi wife of Roop Singh at mortuary, Aligarh on 13.1.1980 around 3.45 P.M. This witness has proved the postmortem Exhibit ka-14.

16. Thereafter, the evidence for the prosecution was closed and the statement of the accused persons recorded under Section 313 Cr.P.C. wherein they claimed their implication without any basis and on account of enmity.

17. The defence produced Suresh Chandra Agrawal D.W.1, Bhagwan Das D.W.2 and Chaub Singh D.W.3. The testimony of all these defence witnesses is irrelevant for the purposes of this appeal for the reason that all these defence witnesses have deposed on point of date of birth of another co-accused Sheoraj Singh, who has already been declared juvenile (by the trial court) and was released on probation for maintaining good conduct for three years period while the trial court delivered its judgment in the concerned Sessions Trial no. 415 of 1980, on 2.5.1983.

18. The learned trial court after hearing the parties on merit and after considering the record returned with aforesaid verdict of conviction and and sentence dated 2.5.1983. Consequently, this appeal.

19. Learned counsel for the appellants initially invited our attention to fact that in this case initially the appeal was filed by all the five appellants but appellant no.5 Sheoraj Singh was declared juvenile by the trial court and obviously he has already suffered the entire sentence (Probation for good conduct for three years) and no appeal was preferred by the State against him. However, during the course of pendency of this appeal the other two accused persons- namely, Rukum Pal and Bhudeo, expired, therefore, their appeal abated vide order of this Court dated 27.7.2016. Therefore, the present appeal is basically confined to two co-accused- namely, Shree Pal and Girraj, i.e. appellant no.1 and appellant no.2, respectively.

20. It has been claimed on behalf of both the appellants that role of Shree Pal and Girraj, the two appellants, is distinguishable in its entirety from the role of the other co-accused persons, and role of present two appellants and rest of the other appellants cannot be clubbed together. Prosecution version alleges, certains particular overt act of raising clay barrier in the street across drainage of Roop Singh because the water flowing from the tap of Roop Singh's house flowed out through the drainage in the street in front of house of both the appellants. Thereafter, allegation proceeds on describing another part of incident, which occurred subsequently to vituperation. The latter part of incident followed after intervention of the informant's side with the present appellants. The other three accused persons Rukum Pal, Bhudeo and Sheoraj Singh formed another group and had no prior or on the spot, nexus with the present appellants and objective of both the set of accused was quite different. They (Rukum Pal, Bhudeo and Sheoraj) conjointly fired on the first

informant side, which resulted into death of Ramdevi. The prosecution witnesses of fact, in order to falsely, involve the present two appellants deliberately, improved their version describing the incident narrowly and assigned role of causing assault by shovel to appellant Shree Pal, which description of incident stands exposed by fact that no such statement was ever recorded under Section 161 Cr.P.C. or was described in the first information report, itself then what to say, about the assault, being caused by Shree Pal, on the spot to Roop Singh. There is no whisper of any shovel being possessed by the two appellants in the first information report itself. Viewing from that angle it is crystal clear that the present two appellants- Shree Pal and Girraj did not commit any offence at all. They only safeguarded their interest by raising clay barrier so that water from drainage of Roop Singh may not flow on the street in front of their house and that act cannot be said to have been committed within any criminal intent. Therefore, the act and the role of both the appellants do not fall within the periphery of any criminal liability. The two appellants apart from above over act did not do anything more and their objective was complete.

21. Per contra, learned AGA has retorted to the above submissions by claiming that the act imputed against the present appellants, was the base, on which, the entire episode stands. The base of the story was laid down by none other than the present two appellants. These two appellants not only raised the mud/soil barrier by placing earth across the drainage of Roop Singh, but also, they insisted that no one should remove this barrier and, in the meanwhile, altercation ensued in the presence of all the offenders, who were present on the spot. The offenders first made unlawful assembly and their object was one and the same that the water from Roop Singh's house should not flow out in the street in front of houses of all the accused persons. This specific act has not only been alleged in the first information report, but also testified by the prosecution witnesses of fact before the trial court and the testimony on point of specific role being played by the appellants has been specifically attributed by the prosecution witnesses. It has emerged in the testimony of prosecution witnesses that during the course of incident one of the present appellants, Shree Pal caused blow/assault with shovel on Roop Singh. All this act when taken as a whole, is sufficient to fasten joint liability contemplated under Section 149 Cr.P.C. Minor inconsistencies, if any, appearing in the statement of the prosecution witnesses by itself, are not sufficient to throw away the entire prosecution case. Latches committed by the Investigating Officer cannot be fatal. The case of the prosecution has been proved beyond reasonable doubt.

22. We have also considered the respective submissions of both the sides.

23. At the very outset, upon perusal of contents of first information report, we come across facts that some drainage was opened from the house of Roop Singh, wherefrom, water from inside the house, used to flow out in the street towards the houses of accused persons and on the day of occurrence, around 6.30/7.00 A.M. Shree Pal and Girraj- present two appellants came in front of Roop Singh's house and raised clay barrier across his drainage, whereupon Ramdevi, wife of Roop Singh, Malkhan Singh, Pooran Singh son of Bhagwan Singh, Roop Singh son of Uttam Singh asked them to refrain from doing so, whereupon the accused persons started abusing. As soon as, the informant's side tried to remove clay barrier, in the meanwhile, Rookam Pal son of Jodh Singh, Bhudev Singh son of Khyaliram exhorted Sheoraj Singh son of Rookam pal Singh to open fire on

the spot, whereupon Sheoraj Singh fired three to four times and the alleged first fire hit Ramdevi wife of Roop Singh as a result of which she fell down and died. Some Pellets also hit Malkhan and Pooran Singh son of Bhagwan Singh. In the meanwhile, Jagpal Singh, Shivraj Singh son of Ranchour Singh, Prasadi Lal of the village arrived on the spot and saw the incident. The first informant Bhagwan Singh while leaving the spot, left behind the dead body of Ramdevi on the spot and went to the police station along with Malkhan Singh and Pooran Singh, in bullock-cart and then report was lodged around 10.15 A.M.

24. After considering the entire allegations made against the present appellants, prosecution case and the claim of present appellants, the moot point that crops up for adjudication of this appeal, relates to fact whether, the prosecution has been able to prove beyond reasonable doubt, the charges against the appellants or whether, the participation of the appellants in the crime was doubtful ?

25. In the backdrop of aforesaid factual aspects of this case, we have to scrutinize and make a comparative analogy of circumstances vis-a-vis facts and evidence on record in order to arrive at just and proper decision in the case.

26. We have scanned carefully, the testimony of prosecution witnesses of fact- Bhagwan Singh P.W.1, Pooran P.W.2, Malkhan P.W.3, Shydan P.W.4 and testimony of formal prosecution witnesses and particularly statement of prosecution witnesses of fact recorded under Section 161 Cr.P.C. by the Investigating Officer Brajwasi Lal P.W.7. It emerges out from construction of testimony of aforesaid four prosecution witnesses of fact that incident occurred on 12.1.1980 around 6.30/7.00 A.M. Shree Pal and Girraj raised clay-bund across drainage in front of house of Roop Singh due to which flow of water from drainage was stopped. At this, informant's brother Roop Singh, his wife Ramdevi and informant's son Malkhan and Pooran including the informant also, went to them and asked them to desist from doing so, whereupon some altercation took place and in the meanwhile, Bhudeo, Rukum Pal Singh and Sheoraj Singh also arrived on the spot and Rukum Pal son of Jodh Singh, Bhudev Singh son of Khyaliram exhorted 'maaro salo ko', whereupon, Sheoraj Singh son of Rukum Pal Singh took out the SBBL gun and fired by it, which fire hit Ramdevi. She fell down and died on the spot. Second fire hit Pooran Singh. He also fell down and third fire hit Malkhan Singh. He also fell down. Fourth fire hit on the wall. Informant and his brother, somehow, managed to save their lives. It has been specifically stated by all the prosecution witnesses of fact that Shree Pal and Girraj were raising clay-bund with their shovel when altercation took place and Shree Pal gave blow with shovel to Roop Singh on his hand, which caused him injury.

27. Testimony as a whole and record reveals that postmortem report of Ramdevi Exhibit ka-14 specifies ante-mortem injuries in shape of a number of pellets hitting her body on shoulder, leg, arm and chest and the opinion of the doctor these injuries could have been caused by use of gun-fire and both the ante-mortem injuries may possibly be caused by gunshot. Obviously, the cause of death is due to shock and haemorrhage. It is obvious that the shot was fired by Sheoraj due to which Ramdevi died on the spot. In so far as, use of shovel for causing assault to Roop Singh is

concerned, we, on scrutinizing statements of all the prosecution witnesses recorded under Section 161 Cr.P.C. discover that use of shovel for causing assault by shovel was never recorded by the Investigating Officer. When, the prosecution witnesses were confronted on such omissions, in their statements under Section 161 Cr.P.C., they could not assigned any sanguine reason for the same. In this view of the matter, it trickles out that the prosecution version, on point of use of shovel at the time of raising clay barrier on the spot, cannot be believed to be the exact position, but the prosecution witnesses are found to be improving gradually on this aspect in order to actively involve the two appellants in overt criminal act.

28. Further, the testimony on record of prosecution witnesses of fact itself suggests that it so happened that informant's side was aggrieved by the soil barrier raised on the spot in-front of house (of Roop Singh) and when initially the informant's side asked the two accused Shree Pal and Girraj, to removed the same, they abused the informant side and in the meanwhile, the three other co-accused persons, namely, Rukum Pal, Bhudeo, and Sheoraj Singh arrived at the spot and Rukum Pal exhorted Sheoraj to assault informant's side, whereupon, Sheoraj brought SBBL gun from inside room and fired on informant's side, thus causing death of Ramdevi and injuring the other two persons, namely, Pooran Singh and Malkhan Singh. Perusal of their injury reports, Exhibit Kha-2 and Ka-3, respectively, verifies fact that injuries could have been caused by gunshot. Therefore, it is obvious that the two persons sustained pellets injuries on their person because of the incident and in consequence of firing done by Sheoraj. Legal premise crops up as to whether, the act of all the accused persons, can be cumulatively construed as a single work with common object and all the accused persons were sharing common object on the spot. Here, we notice that the appellants Shree Pal and Girraj initially raised the clay barrier and thereafter some abuse was extended by them on informant's side and in the meanwhile, another neighbour Rukum Pal Singh, Bhudeo and Sheoraj Singh also arrived at the spot and when only they with their own action caused incident of firing which caused death of one lady, besides, causing injuries on the persons of Pooran Singh and Malkhan Singh, the two sons of the informant.

29. Before we indulge in deliberation on that aspect, it would be appropriate to have a look on Section 149 IPC, which prescribes for acts done by an unlawful assembly in prosecution of the common object of that assembly, which runs as under:

"149. Every member of unlawful assembly guilty of offence commit-ted in prosecution of common object-If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

30. Here, testimony on record, shows that initially only the appellants Shree Pal and Girraj alone were present and the other three accused persons reached on the spot when abuses were extended by the appellants for informant's side. Here ,in this case, it is obvious that there are two sets of accused persons. One set includes Shree Pal, Girraj and the another set includes Rukum Pal, Bhudeo and Sheoraj Singh.

31. Obviously, both the groups are neighbours and resident of the same vicinity and their houses are adjoining to and infront of Roop Singh's house. It can be easily understood, under circumstances of this case, that all the five people had grievance against flow of water, which flowed down in the street from tap of Roop Singh (informant's brother). The point is that initially there were only two persons present on the spot and their object was completed the moment when they raised the mud barrier and thereafter they did no overt act, except exchanging abuses, there is no whisper, either in the first information report or in the statement recorded by the Investigating Officer of the prosecution witnesses that Shree Pal and Girraj did anything more than that. Possibility of use of shovel as a weapon of assault, as discussed above, cannot be accepted in view of absence of any statement recorded by the Investigating Officer to that effect under Section 161 Cr.P.C.

32. Further, it has been stated by the prosecution witnesses that Shree Pal caused assault by shovel on Roop Singh from blunt side, which caused injury on his arm but no medical examination was done nor any such report brought on record. To form an unlawful assembly, it is one of the essential ingredients that the persons forming unlawful assembly as defined under Section 149 IPC, must have common object and all the members present in the assembly, must know and have reason to believe the likelihood of the act committed by any member of the unlawful assembly that this sort of act may be committed. In legal parlance, it can be conveniently construed on the basis of testimony of prosecution witnesses that two sets of accused persons- one in group of two persons and other in group of three persons- though appeared on the spot but they never shared the common object of either causing death or injury on the informant's side. In this case the act of the second set of three accused person had its own isolated object to given vent to their grievance in their own style and and when the occasion comes for that. The act of appellants Shree Pal and Girraj was as per factual testimony on record confined only to raising of mud barrier and beyond that their act seized to exit. It travelled further only to the level of vituperation extended by them on informant side. The other three accused persons, Rukum Pal, Bhudeo and Sheoraj Singh took advantage of this vulnerable situation and finding it opportune moment all the three aforesaid co-accused, with a view, to give concrete shape to their hidden design, committed the crime. The two accused persons Shree Pal and Girraj, neither expected nor knew about any such design. Consequently, the act of the three other co-accused persons Rukum Pal, Bhudeo and Sheoraj Singh cannot fasten any vicarious liability on the appellants Shree Pal and Girraj.

33. On perusal of testimony of the Investigating Officer Brajwasi Lal P.W.7, unfolds entire things and circumstances and exposes to the hilt that on the aspect of actual occurrence, the prosecution witnesses of fact are improving their version just to implicate and categorize all the accused in one circle which circle need be bifurcated between the two halves. On careful analogy of testimony and circumstances we may easily conclude that the fact of actual occurrence becomes crystal clear, therefore, no joint liability can be fixed on the present appellants- Shree Pal and Girraj for separate and exclusive act of other co-accused- Rukum Pal, Bhudeo and Sheoraj Singh. It has not come in the testimony of any prosecution witnesses of fact that all the five persons had common design or object or had reason to believe that such act or offence would be the outcome of embankment, so raised by accused Shree Pal and Girraj. They did not exhort anyone.

34. The learned trial court while appraising evidence and marshalling facts of this case did not heed to certain vital aspects and circumstance which are self evident on point of participation of the appellants and on point of vicarious liability for act of others.

35. Here, we give benefit of doubt to both the appellants Shree Pal and Girraj. The above discussion of testimony, facts and circumstances of this case lead us to the conclusion that the charges framed against the appellants- Shree Pal and Girraj- have not been proved beyond reasonable doubt and no liability can be fastened on them by use of Section 149 IPC. Consequently, their conviction recorded by the trial court under Sections 147, 307/149, 324/149 IPC becomes erroneous and perverse and they are acquitted of the same. Both the appellants are on bail. They need not surrender in this case. Their personal bonds and bail bonds are cancelled and sureties are discharged.

36. These are the reasons upon which we set aside the impugned judgment and order of conviction dated 2.5.1983 passed by the Additional Sessions Judge Vth, Aligarh in Sessions Trial No.415 of 1980 (State Vs. Shree Pal and others) arising out of Case Crime no. 6 of 1980, under Sections under Sections-147, 307/149 and 324/149 I.P.C., Police Station- Akrabad, District Aligarh.

37. However, we direct that the appellants will ensure compliance of provisions of Section 437A Cr.P.C. by appearing before the concerned trial court at the earliest.

38. Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

(2016) 9 ILRA 1526
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Criminal Appeal No.- 1475 Of 2015

State Of U.P. (State Appeal) **...Appellant**
Versus
Arjun & Anr. **...Respondents**

Counsel for Appellant:
Govt. Advocate

Counsel for Respondents:
Piyush Kumar Singh

CrPC, 1973 — Appeal against Acquittal — Sections 498-A, 304-B IPC & Section 3/4 Dowry Prohibition Act — Scope of interference — Dowry death — Presumption under Section 113-B Evidence Act — Ingredients not proved — No evidence of cruelty "soon before death" — Acquittal upheld.

Headnote:

Where prosecution fails to establish **demand of dowry** and **cruelty or harassment in connection therewith soon before death**, mere proof of **unnatural death within seven years of marriage** is not sufficient to sustain conviction under Section 304-B IPC.

In an appeal against acquittal, unless the findings of the trial court are **perverse, unreasonable, or wholly unsupported by evidence**, interference is not warranted.

Trial court's view being **plausible and supported by evidence**, acquittal affirmed.

Procedural History (Proceedings):

State appeal against judgment dated 08.12.2014 passed by Additional Sessions Judge, Barabanki.

Trial Court acquitted accused under Sections 498-A, 304-B IPC and Section 3/4 Dowry Prohibition Act (alternate charge under Section 302 IPC also framed).

Appeal filed by State challenging acquittal.

Facts:

Deceased Renu (aged 21 years) married to accused Arjun about 3½ years prior to incident.

Allegation: demand of **golden chain** as dowry and harassment.

On assurance by accused, deceased was sent to matrimonial home; within **four days**, she died by hanging.

FIR lodged by father; investigation culminated in charge-sheet.

Post-mortem revealed **ligature mark only**, no external injuries indicating assault.

Defence:
Deceased was in **depression** due to death of her elder sister.
Committed suicide; no dowry demand; father-in-law living separately.

Issues:
Whether prosecution proved **ingredients of Section 304-B IPC**?
Whether there was **cruelty/harassment for dowry "soon before death"**?
Whether trial court's acquittal was **perverse warranting interference**?

Court's Findings / Conclusion:
Unnatural death within 7 years of marriage established.
However:
No reliable evidence of **dowry demand**.
No proof of **cruelty or harassment**.
No **proximate link ("soon before")** between alleged harassment and death.
Testimony of parents inconsistent; no complaint to mediator; relations cordial.
Medical evidence ruled out physical assault.
Defence version of **suicide due to depression** found plausible.
Trial Court's findings **not perverse**; view taken is reasonable.

Ratio Decidendi:
For conviction under Section 304-B IPC, prosecution must prove:
(i) Unnatural death within 7 years of marriage,
(ii) Cruelty/harassment,
(iii) Such cruelty **for dowry**,
(iv) Occurring **soon before death** (proximate link).
Presumption under Section 113-B Evidence Act arises only when foundational facts are proved.
In appeal against acquittal, **double presumption of innocence** operates; interference only when judgment is **perverse or wholly unsustainable**.

Case Law Discussed:
Chandrappa v. State of Karnataka, (2007) 4 SCC 415
Maloth Somaraju v. State of A.P., (2011) 10 SCR 349
State of Punjab v. Iqbal Singh, AIR 1991 SC 1532
Surinder Singh v. State of Haryana, (2014) 4 SCC 129

Result:
Appeal dismissed.
Judgment of acquittal affirmed.

(Delivered by Hon'ble Ravindra Nath Mishra-II, J.)

1. Challenge is to the judgment dated 8.12.2014 passed in Sessions Trial No. 404 of 2013, arising out of Crime No. 166 of 2013 under Sections 498A, 304B I.P.C and ¾ Dowry Prohibition Act, Police Station Dewa, District Barabanki, whereby learned Additional Sessions Judge, Barabanki has acquitted respondent Arjun and Ambika Prasad of charges levelled against them.

2. Brief facts as revealed from written complaint dated 26.5.2013 (Exhibit Ka-1) are that complainant Suraj Lal son of Gaya Prasad, resident of Village Chandoora, Police Station Mohamamdpur Khala District Barabanki had married her daughter Renu aged 21 years to Arjun son of Ambika Prasad Resident of Village Chandauli, Police Station Dewa, District Barabanki. After three years of her marriage, her daughter Renu went to her matrimonial home in "Gauna". When his daughter came back from her matrimonial home, she complained about demand of golden chain by accused persons. She also complained that accused persons were threatening her to bring golden chain in dowry otherwise they would kill her. Hence his daughter Renu insisted on not to return to her matrimonial home. However, on 21.5.2013 accused persons came to complainant's house and requested for "vidai" of Renu and promised not to harass her again. After intervention of relatives and advice of family members, the complainant sent her daughter to her matrimonial home along with husband Arjun and father-in-law, Ambika Prasad, but only after four days respondent-accused killed her by hanging. The complainant Suraj Lal lodged written complaint (Exhibit-ka 1) in Police Station Dewa, District Barabanki on 26.5.2013, on the basis of which, case crime no-166 of 2013 was registered under Sections 498A, 304B I.P.C and Section ¾ Dowry Prohibition Act against respondent-accused in police station Dewa, Barabanki vide chick report (Exhibit-ka-9). Corresponding entries were made in General Diary of Police Station (Exhibit Ka-10). Inquest of dead body of Renu Devi was conducted and inquest report. was prepared by Umesh Singh, Deputy Tehsildar, Tehsil Sadar, District Barabanki. Investigating officer Vishal Vikram Singh, Circle Officer City Barabanki sent dead body for post-mortem along with Photonash (Exhibit Ka-3), Chalanlash (Exhibit Ka-4), letter to R.I. (Exhibit Ka-5), letters to C.M.O. Barabanki (Exhibit Ka-6). Dr. Shashi Bhushan Singh conducted autopsy of cadaver of Smt. Renu and prepared post-mortem report (Exhibit Ka-8). On the same day, investigating officer visited place of occurrence and prepared Site Plan (Exhibit Ka-11) on the pointing of complainant. He recorded statements of witnesses under section 161 of Cr.P.C. The investigation culminated in submission of charge-sheet (Exhibit Ka-12) in the Court.

3. On the basis of charge-sheet accused persons were summoned by the Court and case was committed to the court of sessions on 23.7.2012, where charges were framed against accused persons Arjun and Ambika Prasad under Section 498A, 304-B I.P.C. and Section ¾ Dowry Prohibition Act. Alternatively charge under Section 302 I.P.C was also framed. Accused persons denied the charges and claimed to be tried.

4. To substantiate the charges, prosecution examined P.W.-1, complainant Suraj Lal, P.W.-2 Smt. Ram Janki, P.W.-3 Umesh singh, P.W.-4 Dr. Shashi Bhushan Singh, P.W.-5 Head Constable Ram Raj and P.W.-6 Circle Officer Vishal Vikram Singh.

5. After conclusion of prosecution evidence, statement of respondent-accused was also recorded under Section 313 Cr.P.C. in which marriage was admitted, but they denied that they ever demanded any dowry or harassed deceased for dowry. Accused Arjun, who was husband of the deceased, inter alia, pleaded that about 15 to 20 days before the incident her elder sister had died due to which she was in depression and she did not want to come to her matrimonial home. When forced to come she committed suicide by hanging herself on 4th day of her coming to her

matrimonial home. He has also pleaded that at that time he was not present on the spot. He had gone in another village for cooking food in marriage. Accused Ambika Prasad, who happened to be father-in-law of the deceased has pleaded that he lived separately from accused Arjun. The deceased was in severe depression, due to death of her elder sister. She did not want to come to her matrimonial house. On persuasion of her relatives and insistence of accused to come to matrimonial home she came, but committed suicide by hanging herself when she found loneliness.

6. Respondent-accused examined D.W.-1 Devi Sharan, D.W.-2 Sohan LaL and D.W.-3 Ram Lakhan in their defense.

7. After hearing submissions made by prosecution and respondent-accused and appreciation of evidence, trial Court acquitted respondent-accused of charges framed against them concluding that prosecution has failed to prove demand of dowry and harassment in connection with dowry.

8. Feeling aggrieved by the judgment dated 08.12.2014, passed by the trial court, State has preferred this appeal.

9. Learned Additional Government Counsel, Smt. Smiti Sahay has vehemently argued that trial Court has wrongly and illegally acquitted the respondents without considering material evidence available on record. Deceased has died within seven years of her marriage and there is sufficient evidence available on record to prove demand of golden chain in dowry. She was also subjected to physical as well as mental cruelty soon before her death. Trial Court has committed error in law in acquitting the respondents. She has also argued that since judgment and order of trial Court is perverse, as it is against the weight of evidence, interference by the appellate court is required.

10. Per contra, learned counsel for the respondent-accused repelling the argument of learned A.G.A. has contended that except unnatural death of deceased within seven years of her marriage, none of ingredients of Sections 498A & 304B I.P.C. is proved. Trial Court has rightly held that deceased was in severe depression and therefore she committed suicide. There was no mark of injury on her body to conclude that it was a homicidal death. He has also argued that respondent-accused Ambika Prasad was living separate from his son accused Arjun. Trial Court after appreciating the evidence available on record has rightly concluded that charges are not proved. There is no perversity in the judgment, conclusion drawn by the trial court is plausible and if conclusion is plausible, it cannot be interfered in appeal against judgment of acquittal. Reversal of judgment is possible only if it is perverse or not supported by reasons.

11. Though so far as powers of the appellate court are concerned, no distinction has been made in the Criminal Procedure Code between an appeal from acquittal and an appeal from conviction and the appellate court has full power to review the evidence and to arrive at its own independent conclusion but keeping in view presumption of innocence of accused which is golden web of criminal jurisprudence and administration of criminal justice and the fact that after acquittal by the trial Court this presumption of innocence is further strengthened and reaffirmed, certain rule

of caution has been propounded by the Apex Court that has to be kept in mind. An accused enjoys double protection in criminal jurisprudence after acquittal by a competent court of Law.

12. There is plethora of cases on the power of appellate Court to interfere in judgment of acquittal. However summarizing broader principles on the point laid down in leading decisions of Hon'ble Apex Court, following principles have been culled out in **Chandrappa and others v. State of Karnakata** 2007 (4) SCC 415:

"(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 supplied by us)

13. The above view has been further endorsed in subsequent decisions of Hon'ble Apex Court. In **Maloth Somaraju vs. State Of A.P**. (2011) 10 SCR 349 it is observed;

"5. The law dealing with the judgments of acquittal is now settled. There can be no two opinions that merely because the acquittal is found to be wrong and another view can be taken, the judgment of acquittal cannot be upset. The appellate Court has more and serious responsibility while dealing with the judgment of acquittal and unless the acquittal is found to be perverse or not at all supportable and where the appellate Court comes to the conclusion that conviction is a must, the judgment of acquittal cannot be upset. We have to examine as to whether the High Court, while

upsetting the acquittal, has taken such care and it is quite clear from the High Court's judgment that the High Court has certainly taken that care."

14. in the backdrop of above broad principles relating to power of appellate court, the impugned judgment has to be examined as to Whether conclusion drawn by the trial court is perverse, distorted and not plausible and there is any substantial and compelling reason for interference?

15. Normal rule of evidence is that a person is presumed to be innocent until he is proved guilty; it is therefore the duty of the prosecution to prove its case by establishing both the actus reus of the crime and the mens rea. It must first satisfy the evidential burden to show that its allegations have something to support them. However there are some exceptions to the normal rule that the burden of proof is upon the prosecution. Some of the exceptions may be given as follows for example- (1) where the defendant pleads right of private defence after admitting the elements of the crime (the actus reus and mens rea), the evidential burden is upon the defendant to prove his defence. (2) Where the defendant pleads automatism, the evidential burden is upon him. (3) Where insanity is pleaded by the defendant as defence, both the evidential burden is upon him. (4) In some cases statute expressly places burden on the defendant; for example, a person who carries an offensive weapon in public is guilty of an offence unless he proves that he had lawful authority for carrying it. Similarly by the introduction of section 8A of the Dowry Prohibition Act the burden of proof was reversed in respect of prosecution for taking or abetting the taking or demanding of any dowry by making the person concerned responsible for proving that he had not committed any such offence.

16. Contemporaneously, Section 304B was introduced into IPC. Section 304-B I.P.C. spells out "dowry death" in following words:

*"**304B. Dowry death**.--(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

Explanation.-For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

17. Thus in order to seek a conviction against a person prosecution has to prove that:

a) the death of a woman caused by burns or bodily injury or had occurred otherwise than under normal circumstances;

b) such death should have occurred within seven years of her marriage;

c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

d) such cruelty or harassment should be for or in connection with the demand of dowry; and

e) to such cruelty or harassment, the deceased should have been subjected soon before her death.

If above conditions are fulfilled then a presumption of dowry death shall be drawn against the accused persons under Section 113-B of Indian Evidence Act and the burden of proof shifts upon the accused to prove that he is innocent. Section 113-B of Indian Evidence Act is extracted below:

"113-B. 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).]"

18. Explaining the reason for introducing Section 113-B of Indian Evidence Act Hon'ble Apex Court has observed in **State of Punjab v. Iqbal Singh** AIR 1991 SC 1532 that

"The legislative intent is clear: to curb the menance of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since such crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing sections 113A and 113B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage."

19. A conjoint reading of Section 113-B of Indian Evidence Act and Section 304-B I.P.C. shows that there must be some material to show that soon before the death the victim was subjected to cruelty and harassment by her husband or relative of husband for dowry in connection of marriage. There must exists live link between the effect of cruelty based on dowry demand and death.

20. Now adverting to the facts of present case, It has been alleged in written complaint (Exhibit-Ka 1) that the deceased was subjected to physical assault and then she was hanged. After her death an autopsy was conducted of her dead body. According to autopsy report (Exhibit-Ka 8) following injuries were found on the body of deceased at the time of examination:

"1. An oblique ligature mark of 25 cm present all around the neck with a gap of 5 cm on Lt. Side. Ligature mark present above thyroid cartilage in front passing obliquely upward and backward along the line of mandilble.

2. Ligature mark is 1.5. cm in broad, 6 cm below Rt. Ear, 3 cm below Lt. Ear and 4 cm away from chin.

3. Base of groove of ligature mark is hard and parchment like on opening subcutaneous and areolar tissue underneath ligature mark is glistening white in colour."

21. According to P.W-4 Dr. Shashi Bhushan Singh, who had conducted autopsy, no other injury except injuries mentioned above was found on the body of deceased at the time of examination. It negates any physical torture or assault before her death. Though physical assault of the deceased is not established by autopsy report and testimony of P.W.-4, but it is established beyond doubt that her death had occurred otherwise than under normal circumstances. It is also not disputed by respondent-accused.

22. Case of the prosecution is that deceased Renu, aged 21 years was married to accused Arjun about three and half years before her death. This fact is also proved by P.W.-1 Suraj Lal and P.W.-2 Smt. Ram Janki, father and mother of deceased. Father and mother are the best person to depose about age of marriage. From the perusal of statement of P.W.1 Suraj Lal and P.W.-2 Ram Janki, it transpires that the age of marriage is not disputed rather accused in their statements under Section 313 Cr.P.C. have admitted the factum of marriage with deceased Renu within seven years of her marriage. Thus it is established that deceased had died within seven years of her marriage.

23. In order to bring home charges under Section 304- B I.P.C., prosecution has also to prove that the deceased was subjected to cruelty or harassment by the husband or any relative of her husband before her death. Cruelty or harassment may be mental or physical. In the instant case, there appears no physical cruelty. In complaint (Exhibit-Ka 1), there is no allegation of any physical assault. It has been stated in Exhibit-Ka 1 that on 21.5.2013 when accused came to his house to take deceased to her matrimonial home, deceased refused to go. It has also been stated that on their undertaking and assurance that they would not harass her in future, he allowed her to go with the accused persons. The relevant portion may be quoted as below:

लगभग 8 या 9 महीना हुए दिन मंगलबार ता० 21-5-13 को लड़की विदा कराने आये वे मेरे विदा न करने को कहने पर खाफी खुशामद करने लगे कि अब लड़की को किसी भी बात पर प्रताडित नहीं करेंगे

Except above quoted lines nothing is written in report (Exhibit-Ka 1) with regard to harassment to constitute cruelty. The conduct of the complainant should be "grave and weighty". It must be something serious than ordinarily "wear and tear of married life" Petty quibbles, trifling differences should not be exaggerated and magnified as cruelty. From the perusal of the statement of P.W.-1 and P.W.-2 it is evident that the factum of harassment has not been proved by the prosecution.

24. Prosecution has also to prove that cruelty or harassment, if any, should be for or in connection with demand of dowry. Unless there is demand of dowry any kind of harassment whether mental or physical does not come within definition of Section 304-B I.P.C. Explanation appended to Sub-Section (1) of Section 304-B I.P.C. says that "dowry for the purposes of the this Section shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (for short 28 of 1961). Section 2 of Section 1961 Act defines "dowry" as follows:

"2. Definition of "dowry'. --In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly--

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person,at or before 1 [or any time after the marriage] 2 [in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies. 3 [***] Explanation II.-- The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code (45 of 1860)."

25. The definition of "dowry" reproduced above would show that the term is defined comprehensively to included properties of all sorts as it rests within its hold "any property" or "valuable security" given or agreed to be given in connection with marriage either directly or indirectly. It is not confined merely to the demand of money, property or valuable security. Expression "at or before or any time after the marriage" and in connection with marriage of the said parties were introduced by amending Act, 63 of 1984 and Act 43 of 1986 in the year 1985 and 1986 respectively. These amendments appear to have been made with the intention to recover all demands before and even after the marriage of the said parties.

26. In the instant case demand of golden chain is alleged to have been made by accused-respondents. Burden lies on prosecution to prove that accused persons demanded golden chain in dowry. In order to prove the demand of dowry, prosecution has examined P.W.-1, Suraj Lal and P.W.-2 Ram Janki, who are father and mother of the deceased respectively. The trial court has concluded that prosecution was not able to prove the demand of dowry. In this respect the trial court has referred some of the statements of P.W.-1 wherein he has stated that accused never demanded any dowry directly from him when he visited matrimonial home of her daughter. She also did not tell her about any demand. In written complaint (Exhibit-Ka 1) also there is nothing to

indicate that accused demanded any article directly from P.W-1. Trial court on the basis of statement of P.W-1 has concluded that they never complained about any demand to the mediator. This fact also negates the allegation of demand of dowry. The mediator Devi Saran has been examined as D.W-1, who has stated against any demand. The statement of P.W-1 and P.W-2 also shows that the relationship between complainant and accused was also very cordial.

27. P.W.-1 and P.W.-2 themselves have admitted that their daughter and son-in-law Arjun were living separately in the same house. This fact also makes prosecution story of demand of dowry doubtful.

28. Thus we do not find the conclusion of trial Court regarding demand of dowry to be baseless or perverse.

29. Explaining terms "soon before" and "cruelty" as used in sections 113-B of the Evidence Act and 304-B IPC Hon'ble Apex Court **in Surinder Singh v. State of Haryana** (2014) 4 SCC 129, has said:

"17. Thus, the words "soon before" appear in Section 113-B of the Evidence Act, 1872 and also in Section 304-B IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important.The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements.It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death."

29A. Thus as observed in above judgment a conjoint reading of Section 113-B of Indian Evidence Act and Section 304-B I.P.C. shows that in order to draw presumption of dowry death, prosecution has to prove that soon before her death the victim was harassed in connection of dowry. The word "soon before" is relevant evidence in that regard has to be led by the prosecution. No straight jacket formula can be laid down as to what would constitute of period of soon before the occurrence. It is a relative term and it would depend upon the circumstances of each case. No definite period can be given to bring the case within the expression "soon before". The expression "soon before" her death as used in Section 304-B I.P.C. and Section 113-B of the Indian Evidence

Act is pregnant with the idea of proximity. The expression normally implies that the interval should not be much between the cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect and cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the women concerned, it would be of no consequence.

30. As has been seen above, the harassment part of offence is absolutely lacking in this case. P.W.-1 in his statement himself has admitted that after death of her elder daughter, accused persons came to his house and wanted to take Renu (deceased) to their home and at that time they promised not to harass her. Thus matter appears to have been resolved. For the sake of argument, if in any way it is concluded that deceased was ever harassed, there is no evidence on record to show that after this promise and taking the deceased to her matrimonial home, she was harassed or subjected to any cruelty. Thus there is no proximity between so-called harassment and her death. Post-mortem (Exhibit-Ka 8) also negates any kind of harassment committed before her death. Case of accused is that, after death of her elder sister Renu was very much dejected and had gone in depression. She (deceased) committed suicide finding herself in loneliness. D.W.-1 Devi Sharan and D.W.-3 Ram Lakhan have supported the story of defense. The defense also finds support from the statement of P.W-1 where he has stated that after death of her elder sister to whom deceased was very much affectionate, she remained dejected and had gone in depression.

31. Thus the conclusion drawn by trial Court is very much supported by evidence on record, it cannot be called perverse or palpably wrong. Hence no interference is required. Therefore, this appeal is liable to be dismissed.

32. The appeal is dismissed.

(2016) 9 ILRA 1537
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 1678 Of 2006

Baday @ Mustaq **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Sri N.I. Jafri, Sri D.S. Mishra, Sri Dharmendra Dhar Dubey

Counsel for the Respondent:
Learned A.G.A.

HEADNOTES:
Murder – Section 302 IPC – Appreciation of evidence – Reliability of sole eye witness – Unnatural conduct – Contradictions regarding place and manner of occurrence – Benefit of doubt – Acquittal.
Arms Act – Section 4/25 Arms Act – Recovery of knife from open place – Recovery doubtful – Investigating Officer did not verify place of recovery – Conviction unsustainable.
Evidence – Ocular vs medical evidence – Variance between medical evidence and prosecution story – Multiple injuries of varying dimensions – Doctor's opinion suggesting possibility of more than one weapon – Prosecution story doubtful.
Witness – Related witness – Father of deceased as sole eye witness – Conduct of witness unnatural – Failure to intervene during assault – Presence doubtful.
Criminal Trial – Burden of proof – Prosecution must prove case beyond reasonable doubt – Suspicion however strong cannot take place of proof.

PROCEDURE:
The accused-appellant was convicted by the Additional Sessions Judge, Court No. 13, Bareilly in Sessions Trial No. 150 of 2002 arising out of Case Crime No. 183 of 2001 under Section 302 IPC and Case Crime No. 183-A of 2001 under Section 4/25 Arms Act, Police Station Cantt., District Bareilly.
The trial court sentenced the accused to:
Life imprisonment with fine under Section 302 IPC
One year rigorous imprisonment under Section 4/25 Arms Act
Aggrieved by the judgment and order dated 20.03.2006, the accused preferred the present criminal appeal before the High Court.

ISSUE:
Whether prosecution proved beyond reasonable doubt that accused committed murder of deceased Shanker Kashyap by knife.
Whether testimony of sole eye witness (father of deceased) was reliable.
Whether medical evidence supported prosecution case regarding time and manner of occurrence.

Whether recovery of knife under Section 4/25 Arms Act was legally proved.
Whether conviction recorded by trial court was sustainable in law.

CITATION:
Sadhu Saran Singh Vs. State of U.P. and others, 2016 (2) JIC 172 – Distinguished.
HELD:
Conduct of the sole eye witness (father of deceased) was found unnatural as he did not attempt to save his son during the alleged assault consisting of multiple knife blows.
Presence of eye witness on the spot became doubtful due to unexplained passive conduct.
Tes:timony of PW-2 Hulasi Ram was contradictory and it was proved that he reached the spot after 10–15 minutes of occurrence and therefore was not an eye witness.
Medical evidence showed 12 ante-mortem injuries of varying dimensions and doctor admitted possibility of use of more than one weapon, contradicting prosecution story of single knife.
Medical evidence also created doubt regarding time of death, suggesting death could have occurred earlier than time alleged in FIR.
Place of occurrence became doubtful due to contradictions in testimony of witnesses and site plan.
Recovery of knife from open place was not reliable; Investigating Officer failed to satisfactorily prove recovery.
Prosecution failed to prove guilt beyond reasonable doubt.
Trial court failed to properly appreciate contradictions emerging from cross examination of prosecution witnesses.
Benefit of doubt must go to accused.

CONCLUSION:
Appeal Allowed.
Judgment and order of conviction dated 20.03.2006 passed by Additional Sessions Judge, Court No.13, Bareilly in Sessions Trial No.150 of 2002 under Section 302 IPC and Section 4/25 Arms Act is set aside.
Accused-appellant **Baday @ Mustaq** is acquitted of all charges.
He shall be released forthwith, if not wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

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

1. Accused-appellant Baday @ Mustaq son of Gajruddin resident of Purana Mohanpur Police Station Cantt. District Bareilly, has preferred this appeal against the judgment and order of conviction dated 20.03.2006 passed by the Additional Sessions Judge, Court No. 13, Bareilly, in Sessions Trial No.150 of 2002, arising out of case crime nos. 183 of 2001 and 183-A of 2001 under sections 302 I.P.C. and Section 4/25 Arms Act, Police Station Cantt. District Bareilly, whereby the accused appellant has been sentenced to life imprisonment coupled with fine Rs. 10,000/- and fine stipulates six months' additional simple imprisonment under section 302 I.P.C., and one year rigorous imprisonment under section 4/25 Arms Act. Sentences to run concurrently.

2. Heard Sri D.S. Mishra, Advocate assisted by Sri Chandrakesh Mishra, learned counsel for the appellant, Sri A.N. Mulla and Kumari Meena, learned A.G.A. for the State and also perused the record.

3. The prosecution story as emanates from the record is based on first information report lodged by first informant Bholey Shanker son of Umray, resident of village Purana Mohanpur Police Station Cantt. District Bareilly, on 30.6.2001 at 11.10 A.M. at Police Station Cantt, District Bareilly at crime no. 183 of 2001 under section 302 I.P.C. with the allegation that the first informant's son Shanker Kashyap

aged about 17 years was a confectioner. He had some quarrel with children of one Gajruddin of the same village on 30.06.2001 in the morning wherein the matter was reconciled. Informant's son Shanker Kashyap prior to incident had sustained some burn injury on his hand on account sprinkling of hot Ghee and first informant was taking him to doctor (Jagdish Saran) in the village for bandage/dressing. As soon as he reached in front of hospital of Dr. Jagdish Saran, he saw Badey son of Gajruddin, resident of Mohanpur, possessing Lathi in his hand, standing over there. When they reached near him, he suddenly gave lathi blow on the head of informant's son (deceased Shanker Kashyap) due to which he fell down then Badey @ Mustaq (accused) whipped out a knife and gave several knife blows to his son. In the meanwhile Hulashi Ram son of Khemraj and informant's brother Nand Ram arrived on the spot. They tried to save Shanker and also tried to catch Badey son of Gajruddin, but the accused fled away from the scene. When occurrence took place, Sujata daughter of Nanhey Lal was also standing over there. This incident occurred around 9:30 A.M. Informant took his son to district hospital in a Jeep where he expired. His body was kept in district Hospital, therefore, request was made for lodging the report and action be taken. This written report is Ext. Ka. 1.

4. Entries of contents of written report were taken down in Check FIR at police Station Cantt. on 30.6.2001 at 11.10 A.M. at crime no. 183 of 2001 under Section 302 I.P.C. Check FIR is Ext. Ka. 17. On the basis of entries so made in Check FIR, the case was registered at concerned G.D. Entry No. 22 at 11.10 A.M. on 30.6.2001 which is Ext. Ka-18. Thereafter, Investigating Officer Arvind Pal Singh PW-8 took over investigation on 30.06.2001 and made arrangement through S.I. R.N. Singh to prepare the inquest report of deceased Shanker Kashyap on 30.6.2001 itself. Inquest commenced at 12.00 noon and completed at 1.00 P.M. Investigating Officer concurred with the opinion of inquest witnesses that the dead body be sent for post mortem examination in order to ascertain real cause of death. Thereafter, relevant papers were prepared and body of deceased was sent to mortuary Bareilly for conduction of post mortem examination. Post mortem examination was conducted by Dr. Ram Niwas PW-4 on 30.6.2001 at 3.45 A.M. wherein following ante mortem injuries were noted by the doctor:

1. Incised wound 2.5 x 1 cm x muscle deep over the left chin 0.2 cm below the left angle of mouth. Margins clear cut.

2. Incised wound 1 cm x 5 cm x muscle deep under the skin 1 cm away from injury no. 1

3. Incised wound 1 cm x 5 cm x muscle deep over right side neck 8 cm below right ear, sharp margins.

4. Incised wound 1.5 x 1 cm over left side of chest cavity deep 7 cm above left nipple at 12 O' clock position

5. Incised wound 1.5 cm x 1cm x muscle deep left side of chest 6 cm above left nipple at 10 O' clock position.

6. Incised wound 2 cm x 1 cm x cavity deep right side of chest 10 cm below right nipple at 6 O'clock position.

7. Incised wound 2 cm x 1 cm x muscle deep over ring finger of right hand.

8. Multiple small incised wound in one area 5 x 2 cm over the chest cavity deep left side of chest 6 cm below left nipple at 4 O ' clock position.

9. Multiple incised wound in the area of 17x 16 cm over the left arm and fore arm and elbow.

10. Incised wound 1 cm x 0.5 cm x muscle deep in left arm 5 cm above wrist joint.

11. Incised wound 4 cm x 1 cm over thumb of the left hand.

12. Multiple incised wound 5 x 1 cm over left side of the angle of left scapula.

In the opinion of doctor, duration between time of death and post mortem examination was noted about ½ day and cause of death was described due to shock and haemorrhage as a result of ante mortem injuries. Dr. Ram Niwas PW-4 has proved post mortem examination report as Ext. Ka-3.

5. Thereafter, various steps were taken by the Investigating Officer for recording the statement of the prosecution witnesses. He prepared site plan of the incident and also arrested the accused on 02.07.2001 and recovered knife from him and made recovery memo of the same which is Ext Ka-6. The Investigating Officer also prepared memo of blood stained and simple soil from spot which Ext. Ka-14. The Investigating Officer sent certain clothes and the blood stained soil and the recovered knife etc. for chemical examination to Chemical Laboratory at Agra and report was obtained on 07.08.2001 which is Ext. Ka-16. The site plan of place of recovery and arrest was also prepared by the Investigating Officer which is Ext. Ka-4. Site plan of the main occurrence under section 302 I.P.C. is Ext. Ka- 13 and Investigating Officer also prepared site plan Ext. Ka. 14-A. After completing the investigation, the Investigating Officer submitted charge sheet Ext. Ka-2.

6. It is also gathered from record that in this case, accused Baday @ Mustaq was arrested by Inspector Arvind Pal Singh, Investigating Officer PW-8 on 02.07.2001 around 2:35 p.m. and the knife allegedly used in the commission of offence was also recovered from his pointing out and a report regarding the same was lodged at case crime no. 183-A of 2001 under section 4/25 Arms Act on 02.07.2001 at 17.25 hours against the appellant at Police Station Cantt., District Bareilly. This check FIR is Ext. Ka-20. Recovery memo as discussed above has already been proved as Ext. Ka-6. The site map of place of recovery as discussed above was also made by Arvind Pal Singh PW-8 which is Ext. Ka. 14-A. Relevant G.D. entries whereby case under section 4/25 Arms Act against appellant was registered is Ext. Ka. 21 and has been proved by Arvind Pal Singh PW-8.

7. It is also reflected from record that investigation of this case pertaining to Arms Act was carried out by Suresh Pal Singh PW-6. He recorded statement of the first informant, Arvind Pal Singh, S.H.O., S.I. Jagdish Kumar and also recorded statement of other witnesses and prepared site plan of the occurrence

which is Ext. Ka-4. Thereafter he submitted charge sheet dated 04.07.2001 under section 4/25 Arms Act against accused which Ext. Ka-5.

8. Thereafter, the case was committed to the court of Sessions where both the aforesaid Case Crime Nos. 183 of 2001 and 183-A of 2001 were tried together in the aforesaid Sessions Trial No. 150 of 2002. The accused appellant was heard on point of charge and he was charged under section 302 I.P.C. and section 4/25 Arms Act. Charges were read over and explained to the accused who denied the charges and claimed to be tried.

9. In order to prove its case, the prosecution produced in all 8 witnesses. Brief description of whom is herein under:

10. Bholey Shanker PW-1 is first informant and eye witness. Hulasi Ram PW-2 is witness of fact and he claims to be an eye witness. S.I. Raj Pal Singh PW-3 is subsequent Investigating Officer of the case pertaining to case crime no. 183 of 2001 and he has stated that previous Investigating Officer was Arvind Pal Singh. He completed rest of the investigation and filed charge sheet Ext. Ka. 2. Dr. Ram Niwas PW-4 has conducted the post mortem examination on the cadaver of the deceased and has proved the same as Ext. Ka. 3. Anoop PW-5 is witness of fact. Suresh Pal Singh PW-6 is Investigating Officer of the case regarding the case registered at case crime no. 183-A of 2001 under the Arms Act and he has detailed his investigation. He has also filed charge sheet under relevant section of Arms Act as Ext. Ka-5. S.I. Raghu Nath Singh PW-7 is witness to fact of recovery of knife from the accused-appellant and he has also held inquest of deceased Shanker Kashyap on 30.6.2001 and also prepared relevant papers for sending dead body of Shanker Kashyap for post mortem examination. Arvind Pal Singh PW-8 is the previous Investigating Officer of this case under section 302 I.P.C. and he has detailed various steps he took during the course of investigation. He has also prepared recovery memo of knife at the pointing out of the accused-appellant on 02.07.2001 and has proved recovery memo as Ext. Ka-6. Besides, he has also proved relevant check FIR and entries made in the concerned G.D. whereby offence under section 302 I.P.C. was registered at police station Cantt. on 30.6.2001 as Ext. Ka-17 and Ext. Ka-18, respectively. He has also proved check FIR and relevant G.D. Entries as Ext. Ka-20 and Ka-21 pertaining to case crime no. 183-A of 2001 under section 4/25 Arms. Act.

11. Thereafter the evidence for prosecution was closed and statement of accused was recorded under section 313 Cr.P.C. wherein he has denied his involvement in this case and claimed false implication on account of enmity and he has also stated that at the time of occurrence, he was at the residence of his sister.

12. The defence has led testimony of one Smt. Purnima Sharma DW-1. She was Principal of Shyam Bihari Memorial Junior High School. She has stated fact about the date of birth of the accused-appellant as 28.05.1986 as noted in scholar register. Thereafter the evidence for the parties was closed and the matter was posted for hearing of argument.

13. The learned Trial Court after hearing both the parties on merit and considering the evidence on record and appraisal of facts, recorded aforesaid finding of conviction vide judgment and order dated 20.03.2016.

14. Consequently this appeal.

15. It has been vehemently urged on behalf of the accused-appellant that the conviction recorded under section 302 I.P.C. and 4/25 Arms Act by the trial court vide judgment and order dated 20.3.2006 and awarding sentence of life imprisonment and one year rigorous imprisonment coupled with fine is absolutely erroneous illegal and is based on misreading of evidence, whereas, the fact is that the incident has neither been witnessed by any person nor has it been reasonably proved by testimony of the prosecution witnesses.

16. The very nature of ante mortem injuries found on the dead body of deceased Shanker Kashyap describe the injuries of varying dimensions particularly, measurements of injuries on the face speak loud about use of different weapons rather than use of only one weapon i.e. knife. How is it possible that the father who was accompanying his son aged 17 years, when intercepted by the accused-appellant around 9:30 a.m. in the month of June, brutally assaulted with knife his son shall remain passive and mute spectator to the incident. Admittedly, the appellant was alone and was stated to have been possessing Lathi. He gave Lathi blow first to the deceased Shanker Kashyap and when he fell down, he was severely assaulted by the knife which knife blows were not one or two but were discovered to be 12 in number as reflected from post mortem examination report Ext. Ka-3.

17. The fact is that on account of some unfounded enmity, the appellant has been roped in, in this case, whereas, the fact is that the deceased Shanker Kashyap was found to be involved in eve-teasing and was killed by some unknown persons. His body was thrown behind the school. When the first informant came to know about these facts, he out of imagination in collusion with the police gave live picture to an unfounded incident and claimed himself to be an eye witness which is falsified by the attendant circumstances of the case. The first informant, father of the deceased neither sustained any mark of injury on his person nor did he actively try to save his son so brutally assaulted before him, this conduct on his part is most unnatural and unbecoming of a natural eyewitness.

18. The doctor has suggested that such type of death may have occurred between 8 to 20 hours from the time of post mortem examination. The death could have been caused from from 3:00 p.m. on 29.6.2001 to 3:00 a.m. on 30.6.2001. The doctor has also suggested that deceased might have taken food 5 to 6 hours before his death and thus, under circumstances, is a pointer to reality that the death of Shanker Kashyap took place sometime in the darkness of night. The place of incident is neither proved by the first informant nor by the Investigating Officer.

19. The testimony of the witnesses of fact is contradictory in material particulars and presence of Hulasi Ram PW-2 on the spot is managed by the prosecution. In the testimony of PW-1 itself, it emerges out that Hulasi Ram PW-2 arrived on the spot after 10-15 minutes of the incident. Hulasi Ram saw first informant carrying dead body of Shanker Kashyap in Rikshaw upto Naktiya police out post from where a

jeep was arranged for conveying the dead body. This fact per se, shows that the dead body was taken from the open land where it was lying and this particular fact has been deliberately concealed by PW-1. and the Investigating Officer Arvind Pal Singh PW-8 is found to have been supporting the first informant all the time on such concealment of vital fact (regarding place of incident).

20. The recovery of knife is absolutely false. Nothing incriminating was recovered from possession of accused. The investigating Officer of crime (183A/2001) pertaining to recovery of knife has himself proved that he was not shown the place of recovery/occurrence by the first informant from where recovery of knife was effected on 2.7.2001 at the pointing out of the appellant. The Investigating Officer also did not see the knife which was recovered at the pointing out of the appellant, therefore, conviction under section 4/25 of Arms Act is based on imagination and misreading of fact and evidence.

21. Learned AGA while replying to aforesaid arguments, has submitted that the case of the prosecution has been proved consistently. Each and every particulars of incident, motive for committing the crime, fair investigation by the police have also been established. Injuries caused on the deceased have been very much proved by the testimony of PW-1 Bholey Shanker. He is an eye witness of the incident. Hulasi Ram PW-2 also witnessed the incident and merely because the first informant did not receive any injury and did not intervene when the assault was being caused to his son wound not nullify his presence on the spot.

22. The absence of Lathi blow on the head of the deceased both in the inquest report as well as in post mortem examination report will not nullify the ocular testimony of PW-1 that Lathi blow was not given. In more or less similar matter, where Lathi blow was not found, where blow was stated to have been given the Hon. Apex Court in the matter of Sadhu Saran Singh Vs. State of U.P. and others 2016(2) JIC 172 has held that non mention of such blow would not prejudice the prosecution case if ocular testimony of the occurrence is found to be cogent and consistent.

23. After considering the aforesaid submissions and after perusing the record, the core consideration that engages our attention for deciding this appeal, relates to fact; whether the prosecution has been able to bring home charges under section 302 IPC and 4/25 Arms Act against the accused-appellant and has proved charges beyond reasonable doubt and the first informant, and Hulasi Ram happen to be eye witness of the occurrence and whether the conviction and sentence so recorded is justified?

24. We may start with the allegations made in the first information report wherein very motive assigned for committing the crime has been stated to be some altercation between children of Gajruddin and children of first informant. It is stated that first informant scolded his son Shanker Kashyap and got the matter reconciled. This episode took place in the morning on 30.6.2001.

25. It further contains detail regarding fact that the informant's son Shanker Kashyap sustained some burn injury on his right hand prior to the incident, therefore, first informant was taking him for dressing to village doctor Jagdish Saran. As soon as he reached in front of Jagdish Saran's hospital, he saw the appellant standing over there possessing Lathi in his hand. He suddenly abused and gave Lathi blow on the head of Shanker Kashyap due to which, he fell down and the accused-appellant whipped out knife and

gave several knife blows to the deceased Shanker Kashyap (when only he fell down). In the meanwhile Hulasi Ram and his brother Nand Ram arrived on the spot. They tried to catch the accused appellant but he escaped from the scene. Sujata daughter of Nanhey Lal also witnessed the incident. It was around 9.30 A.M. and in the concluding part of the first information report, it has been stated that the first informant took his son Shanker Kashyap to the hospital in a jeep where he expired. The dead body has been kept in the hospital. Report be lodged and appropriate action be taken.

26. Therefore, it is obvious that no previous motive for committing the crime has been given in the first information report. However, the motive for committing crime arose the very same day on 30.6.2001 and thereafter a brief description of the incident has been made in the first information report. In such factual background of incident, we have to scrutinize carefully testimony of eyewitnesses qua facts and circumstances of the case and particularly on the point regarding the presence of both the eyewitnesses PW-1 and PW-2, on the spot.

27. But before we proceed with the scrutiny of eye account testimony of witnesses, it would be convenient to take note of ante mortem injuries as appearing in the post mortem report Ext. Ka-3.

28. We notice that as many as 12 ante mortem injuries were found on the body of the deceased as has been mentioned in the preceding paragraphs of our judgment. We may observe that few ante mortem injuries i.e. injuries no. 2, 3 and 10 are of measurement of incised wound 1 cm x 5 cm x muscle deep under the skin 1 cm away from injury no. 1. Incised wound 1 cm x 5 cm x muscle deep over right side neck 8 cm below the right ear, sharp margins and incised wound 1 cm x 0.5 cm x muscle deep in the left arm 5 cm above wrist joint.

29. Similarly, other injuries no. 1 incised wound 2.5 x 1 cm x muscle deep over the left chin 0.2 cm below the left angle of mouth. Margins clear cut, then injuries no. 4 and 5 are Incised wound 1.5 x 1 cm over the left side of the chest cavity deep 7 cm above left nipple at 12 O' clock position and incised wound 1.5 cm x 1cm x muscle deep left side of chest 6 cm above left nipple at 10 O' clock position, respectively. Injuries no. 6 and 7 are Incised wounds 2 cm x 1 cm x cavity deep right side of the chest 10 cm below right nipple at 6 O'clock position and incised wound 2 cm x 1 cm x muscle deep over ring finger of the right hand, respectively.

30. These injuries are very specific for our consideration because of varying dimensions mentioned in the post mortem examination report, Ext. Ka-3. We will discuss its impact and effect at subsequent relevant stage of our judgment.

31. We may now move to the meritorial aspect of this case which is centred to the point of occurrence, manner of causing occurrence and presence of eye witnesses on the spot as claimed by the prosecution. In this process, we may examine the prosecution witnesses of fact and particularly, first informant Bholey Shanker, PW-1, who happens to be father of deceased Shanker Kashyap. He claims himself to be an eyewitness of the occurrence and he has lodged written report and has claimed to have seen the entire incident.

32. Before divulging any opinion on point of occurrence, it would be convenient to take motive part of incident to the effect as to what prompted the accused to commit the crime. We gather from the first information report that on the fateful day i.e. 30.6.2001, some altercation took place between children of first informant and Gajruddin which was pacified by interference of first informant Bholey Shanker who reprimanded his son Shanker Kashyap not to indulge in such act. Thereafter, it is claimed that the appellant Baday alias Mustaq was not satisfied with all this, therefore, he assaulted Shanker Kashyap son of first informant with Lathi and knife blows due to which Shanker Kashyap died.

33. Now, we may switch over to the description of the occurrence as emerging from the testimony of prosecution witnesses of fact. Perusal of testimony of Bholey Shanker PW-1 reflects that his son Shanker Kashyap had sustained some burn injuries on his hand and he was being taken to doctor Jagdish Saran at village Mohanpur. When first informant reached near hospital of Jagdish Saran, he saw Baday alias Mustaq standing over there possessing Lathi in his hand. As soon as they reached near the accused, he gave Lathi blow on the head of Shanker Kashyap due to which informant's son fell down on the ground, whereupon, the accused whipped out his knife and gave knife blows to his son. This incident took place around 9.30 A.M. on 30.06.2001.

34. On alarm being raised by the first informant, Hulasi Ram and Nand Ram arrived on the spot and they saw the incident. They tried to save the deceased Shanker Kashyap and the accused Baday @ Mustaq fled away towards western side by waving Lathi and knife. In the examination in chief on page 18 of the paper book, it has been stated that the first informant took his son to the district hospital Bareilly in a jeep, and on way they met with one constable at the police out post who also boarded in the jeep and accompanied them to the hospital. In the hospital, the doctor declared Shanker Kashyap dead.

35. The first informant got scribed his written report from one Lal Bahadur Saxena of his village thereafter, the same was read over and explained to him. He appended his thumb impression on the report and went to the police station, gave the report to Diwanji, whereupon, the case was registered. He has been cross examined at length on several different aspects of this case including the incident. He has also stated that this main road from village Mohanpur is heavily used by public from 7.00 a.m. onwards.

36. At this stage, we may take into consideration site plan of the incident which is Ext. Ka. 13. As per this site plain, hospital of Dr. Jagdish Saran has been shown to the western side of road and place 'A' in front of this hospital is the place which is marked as spot where the accused caused knife blow to the deceased and place 'B' is shown to be spot where the first informant was standing and watching incident. Place 'C' is the place from where Hulasi Ram and Nand Ram saw the incident and place 'D' is the place from where Sujata witnessed the incident.

37. Obviously, Sujata and Nand Ram has not been produced as prosecution witnesses and only Hulasi Ram, has been examined as PW-2. We come across the testimony of PW-1 at page 25. In his cross examination at page 25 of the paper book, after alarm was raised, his brother-in-law, (Hulasi Ram) and brother (Nand Ram) arrived on the spot after 11 to 15 minutes. This by itself is sufficient for construing absence of Hulasi Ram at the actual time of occurrence on the spot. Therefore, the claim of Hulasi Ram that he also witnessed the incident is very much disclaimed by the testimony of first informant itself.

38. Now, only eye witness remains to be examined is Bholey Shanker PW-1. Obviously, inquest report of deceased Shanker Kashyap and his post mortem report do not certify the fact regarding causing of any Lathi blow on head of deceased which by itself is leading to the conclusion that in fact no Lathi blow was given to Shanker Kashyap. We may consider the happening in its practical shape by reviving the incident/happening as described by the prosecution.

39. We have before us, testimony of PW-1 that in the morning there was little altercation between children of first informant and Gajruddin and the matter was settled by the first informant Bholey Shanker himself but the elder son of Gajruddin (present accused) was not satisfied with that and he had some grudge against the first informant. On 30.6.2001 around 9.30 A.M., the first informant was accompanying his son Shanker Kashyap (deceased) to the hospital of Dr. Jagdish Saran of his village for dressing of his hand as some burn was caused on his right hand because of engagement of the deceased at some confectionery shop since he was a confectioner.

40. Indisputably, the age of the deceased Shanker Kashyap was 17 years. As soon as the first informant and his son reached near Dr. Jagdish Saran Hospital, the accused was standing over there possessing Lathi in his hand. He gave Lathi blow on the head of Shanker Kashyap, who fell down and thereafter the accused gave several knife blows to the deceased. First informant watched his son in the meanwhile.

41. Fact is that the accused was alone and son of first informant was seriously assaulted by knife blow not once or twice on one part of the body, but on various parts of his body twelve times by causing knife blows thus causing twelve injuries specific, thus, the point engages our consideration on possibility of a man remaining passive throughout the entire incident (i.e. act of assault) and watching his son being assaulted with knife brutally and mercilessly by another person. If there is no compelling reason for not extending immediate help to the victim by his own natural father, then obviously, the father, whose son is being assaulted so brutally before him, will never resist temptation and will be infuriated at such ghastly assault and will immediately intervene and will try to protect and rescue his child from such murderous assault.

42. We are surprised that not a single act of interference or rescuing his son was done by the father of the deceased Shanker Kashyap which may suggest active interference of first informant while the crime was being committed in his presence. He was admittedly accompanying his son and he had every opportunity at least to react to the situation, but most expected reaction on the part of first informant was altogether missing, which particular aspect is fair enough to give rise to suspicion regarding actual presence of the first informant on the spot. Thus, presence of informant on the spot when the incident occurred becomes doubtful. Had he been present on the spot, there would have been explanation for his remaining passive and mute spectator to such atrocious assault being caused to his son. Therefore, the natural behaviour of first informant itself speaks loud about his absence on the spot at the time of occurrence. His behaviour in not reacting to the assault and doing nothing to save his son, raises doubt on his presence on the spot. No explanation was given by the prosecution.

43. Now, we may also discuss about the incident as to how it happened its manner and style of happening as alleged. Prosecution asserts that the incident has been consistently proved by the testimony of PW-1 Bholey Shankar which inspires confidence and circumstances fully establish the incident and the theory of assault caused by the accused. But the argument does not hold for the reason that very perusal of post mortem examination report Ext. Ka-3 reveals that as many as 12 specific assaults were caused on the body of the deceased and these assaults are of varying description and dimensions and their respective measurements itself speak the reality that the entire process of assault must have taken its own time and it cannot be said that during entire span of such assaults, no time was left for the father (PW-1) of the deceased to rush to the rescue of his son. How and why, he remained passive spectator to the occurrence is beyond our apprehension and no worthy explanation and no express or implied circumstance demonstrate that intriguing action.

44. We have also discussed above several injuries of varying dimensions. Ante mortem injuries no. 2, 3 and 10 are virtually of same measurement. Similarly injuries no. 4 and 5 have been described to be of different measurement as 1.5 cm x 1 cm each and then injuries no. 6 and 7 measuring 2 cm x 1 cm x cavity deep and 2 cm x 1 cm x muscle deep on chest and right hand respectively. Injury no.1 incised wound of measurement 2.5 cm x 1 cm x muscle deep on face and injury no. 8 reflects dimension in shape 3 cm x 2 cm over chest cavity deep on the left side of chest and then injury no. 9 in form of small incised wounds extending in area 17 cm x 16 and similarly, we notice injuries no. 11 and 12 as incised wounds of varying dimensions say 4 cm x 1 cm and 5 cm x 1 cm on left hand thump and back of scapular region, respectively.

45. Contention has been raised in relation to above varying dimensions of injuries that all the aforesaid injuries cannot be result of use of one weapon i.e. one knife. In this context, argument on the face, holds good because of varying dimensions of injuries. Had there been only one knife which was used for causing such injuries then, at least it would have given more or less identical cuts resembling similarity with each other.

46. This contention gets support from testimony of Dr. Ram Niwas PW-4 who conducted post mortem examination on the body of the deceased Shanker Kashyap. In his testimony as appearing in cross examination on page 42 of the paper book, on being queried by the defence on the point of varying dimensions of injuries, he replied that these injuries might have been caused by use of 2 or three weapons, therefore, argument that the varying dimension of various incised wounds cannot be caused by use of one knife carries force and under circumstances of the case, we cannot ignore varying dimensions of injuries numbering 12 in all. Not only this, in so far as time of death is concerned, this doctor witness in his cross examination on page 41 has also testified that possible time of death may commence from 3.00 P.M. in the evening of 29.6.2001 to 3.00 A.M. in the morning of 30.6.2001. It means that the claim of the first informant that knife blow was given at 9.30 A.M. becomes suspicious and doubtful.

47. It is true that in the examination in chief, this witness (PW-4) on page 40 of the paper book, has stated that these injuries could have been caused at 9.30 A.M. on 30.6.2001 by use of knife and he has also stated at some places that these injuries could have been caused only when someone caught the deceased in standing position and then knife blows were caused.

48. Obviously, the varying description of time of death as emerging from the cross examination of doctor (PW-4) can be treated to be in additional to his testimony in examination in chief pertaining to the time of death and it cannot be read in isolation, but in line with attendant facts, testimony and circumstances of this case and that factual aspects when properly weighed tilts testimonial probability more in favour of suggestion made by defence than the time of occurrence told by PW-1. A reasonable query arose at this stage, as to how things can take shape in such a manner? Then we may have recourse to testimony of prosecution witnesses itself.

49. First informant Bholey Shanker PW-1 has stated on page 25 in cross examination that he had informed Darogaji that 50 to 100 people had gathered on the spot where his son was lying (dead). It means that when he saw his son Shanker Kashyap (deceased), 50-100 people had thronged on the spot. This witness on same (page 25 of the paper book), has also stated that Hulasi Ram and his brother Nand Ram arrived on the spot after 10-15 minutes after he raised alarm. Hulasi Ram in his testimony in his examination in chief, has claimed himself to be an eyewitness and has stated that he saw the incident himself. He has stated that they tried to take in grip Baday @ Mustaq, then he said that in case they proceed any further, they will also be treated in the same way, but this piece of testimony cannot be taken to be correct in the face of testimony of PW-1 regarding arrival of these witnesses on the spot after 10-15 minutes of the incident.

50. Again on page 33 of the paper-book, this witness (PW-2) has stated that the dead body was taken in a rickshaw upto Naktiya and from there, it was conveyed in a Jeep, but there is no such whisper like carrying the dead body in any rickshaw, either in the first information report or in the ocular testimony of Bholey Shanker PW-1. Theory of carrying away dead body of the deceased in Rickshaw, is totally unknown to the first informant and that part of the story has been concealed. It smells of something fishy and beacons of embellishment.

51. Not only this, this witness has also stated on page 34 that he had informed Darogaji that father of the deceased had conveyed dead body of deceased in a rickshaw upto Naktiya. At this stage, he has been suggested by the defence that dead body of Shanker Kashyap was not taken from a place lying 100 meters away to the northern side of his house in Rickshaw upto Naktiya. The suggestion has been denied by this witness and he has categorically stated that it is incorrect to say so. Meaning thereby that dead body of Shankar Kashyap was found somewhere at a place 100 meters away from house of Hulasi Ram PW-2.

52. He has been further suggested that the first informant and Hulasi Ram received information that dead body of Shanker Kashyap is lying away in north side to the house of this witness whereupon they went there and they falsely implicated the accused. Witness (PW-2) has denied such a suggestion.

53. Thus, it is obvious that place of occurrence becomes doubtful. At this stage we notice that the Investigating Officer Arvind Pal Singh PW-8 has stated on page 69 of the paper book in his cross examination that Bholey Shankar did not tell him that his house is lying half kilometer away from hospital of Dr. Jagdish Saran. Therefore, it is obvious that the place of occurrence cannot be ascertained with certainty as all the prosecution witnesses are blowing hot and cold on this aspect of the case.

54. Both PW-1 and PW-2 are residents of Purana Mohanpur police station Cantt. District Bareilly. Now, above testimony stands corroborated by the testimony of Anoop PW-5 who happens to be witness of fact that on the fateful day in the morning he went to take milk from dairy of Gajruddin father of the accused at 7.30 a.m. when he heard Gajruddin saying to Baday @ Mustaq (accused) that Shanker Kashyap has an evil eye on his daughter and he has blocked his drainage, therefore, eliminate him today i.e. on the day of occurrence. But in his cross examination, he has stated that prior to four years, his wife eloped with Ilias, resident of Thiriya. Now it is obviously a pointer that he was inimical towards Mohamdans of the area because his wife had eloped with one Muslim of the area. On page 47, it has been specifically testified in the last but one paragraph of his testimony that it is correct to say that **the dead body of Shanker Kashyap was found behind the school** and he cannot tell about time.

55. Upon careful perusal of site plan Ext. Ka 13-the place of occurrence, we notice school of Shyam Behari shown in the northern side of site plan. If dead body was lying behind the school, then it is obvious that the place of occurrence is changed. Time and again the prosecution witnesses of fact have been confronted with specific suggestion that in fact Shanker Kashyap was killed by some unknown person in the darkness of night and after death of Shanker Kashyap, fact of his death came to the knowledge of first informant then he deliberated upon the matter and falsely implicated the accused on account of enmity.

56. This suggestion carries force in view of the above discussion on the point of role of first informant on the spot when the incident occurred and he remained passive. He has tried to insert Hulasi Ram as eye witness which attempt was exposed by himself in his cross examination when he says that Hulasi Ram arrived on the spot 10-15 minutes after alarm was raised. PW-1 has himself stated on page 24 that his son was lying 100 meters away to the northern side of his house. The fact that the dead body was conveyed through rickshaw, at last up to Naktiya Police outpost, has been testified by Hulasi Ram PW-2 which is quite consistent with theory that the dead body was lying somewhere else than the place shown and marked by letter 'A' in the site plan-in front of hospital of Dr. Jagdish Saran. How can PW-1 testify in such manner that the dead body was lying 100 meters away in the northern side of his house. PW-1 has not received not a single injury while his son was so severely assaulted by one accused only. Testimony of doctor witness PW-4 that death of deceased could have occurred from 3.00 P.M. on 29.6.2011 upto 3.00 A.M. in the morning of 30.6.2001 causes dent in the actual time of death and thus creates lots of doubt on the timings of occurrence. On page 41 of the paper book, doctor witness has stated in his cross examination that death of deceased might have been caused 8 to 20 hours prior to conduction of post mortem examination. Manner of injuries being caused can be caused in standing posture if one has caught the deceased in that position-is also worth consideration. And at cost of repetition we may add that it is highly doubtful that all the ante-mortem injuries were caused by use of one knife.

57. Now, we may scrutinize the testimony of the Investigating Officer in so far as fact of use of rickshaw for conveying dead body of Shanker Kashyap from the place where the dead body was in fact taken upto the place Naktiya from where the dead body was placed in Jeep and taken to the hospital. On page 69 of the paper-book, Investigating Officer Arvind Pal Singh PW-8 in his cross examination has stated that during the course of investigation, he did not come across any such fact regarding conveyance

of the dead body by rickshaw and he cannot say any thing on point that first informant found his son 100 meters north to his house.

58. At this stage, he (PW-8) has been queried by suggesting on page 70 of paper book that he has deliberately changed the place of occurrence and has shown the same to be located at a place half kilometer away from the house of first informant. He has denied this suggestion. Again suggestion has confronted Investigating Officer that it was solely on this count that he did not record statement of residents of nearby/surrounding area of the place of occurrence, but he again dened. He has also admitted that recovery memo of simple and blood stained clay roll (Ext. Ka-14) was taken from the spot but no specific mention of any identifiable particular spot has been made. This fact by itself raises serious doubt on the place of occurrence.

59. Obviously, at this stage we have occasion to discuss point of recovery of knife, as accused claimed to have been made on 2nd July 2001 by Arvind Pal Singh-Investigating Officer-after arrest of the accused-appellant.

60. First of all, it is worth consideration that the place of recovery is an open place and it can be easily planted by another person and this fact is admitted to Arvind Pal Singh-Investigating Officer PW-8- on page 71 (of paper book) of his testimony. The Investigating Officer of case crime no. 183A of 2001 is PW- 6 Suresh Pal Singh. He has stated that he inspected the place of recovery and prepared site plan Ext. Ka-4. His cross examination on page 49 of paper book is quite interesting because he has categorically stated that he did not see the recovered knife during investigation of this case. He was not shown the place of occurrence by PW-8 Arvind Pal Singh-the informant of case pertaining to Case Crime No.183A of 2001. This specific testimony obviously shows that the recovery of knife in fact is fake and wholly unreliable. Place of recovery itself is doubtful. Therefore, the prosecution could not establish the fact that all ante mortem injuries (12 in numbers), could have been caused by use of this recovered knife alone.

61. In such scenario, we have every opportunity to record our satisfaction that Bholdey Shanker PW-1 though claiming to be eyewitness of the occurrence was neither present on the spot nor did he witness the incident because of his inexplicable inaction on the spot and remaining passive during assault on his deceased son Shanker Kashyap, is highly unnatural and unbecoming of a father who was around 35 years of age. It is obvious that the accused was alone while he committed the crime. Thus the overall reaction/conduct of PW-1 as an eye witness on the spot is most unnatural, therefore, his presence on the spot becomes doubtful.

62. In so far as aforesaid citation *of Sadhu Saran Singh Vs. State of U.P. and others 2016(2) JIC 172* is concerned, we may observe that we have carefully perused this judgment and upon perusal, we find that both on the factual as well as legal count, this case in hand is distinguishable from the case of Sadhu Saran Singh (supra), for the reason that prosecution testimony and circumstances of the case (in hand) are apparently pointing to non-presence of PW-1 on the spot at the relevant time of occurrence and in so far as the place of occurrence is concerned, the same has not been satisfactorily proved by the prosecution. Therefore, the State shall not get any advantage of aforesaid citation of Hon'ble Apex Court.

63. Consequently, the version of PW-1 regarding the incident and the manner of causing assault upon the deceased Shanker Kashyap by the accused is wholly unreliable. It appears that he arrived on the spot only after he received information of death of his son and dead body of his son was spotted 100 meters away to the north side of his house. The investigating Officer has also not investigated fairly certain on vital facts of incident. The testimony of prosecution witnesses on the whole does not inspire confidence.

64. It is obvious that Hulasi Ram PW-2 was not an eye witness but being relative of PW-1 was tried to be produced as an eyewitness which bid is discovered to be false and stands exposed in the cross examination of PW-1 himself. The whole prosecution story is improbable that accused committed murder of his son at 9.30 A.M. on 30.6.2001. We have every reason to discredit the claim of prosecution that the murder was committed by the accused and genuine doubt is created in the prosecution story and charges framed against the accused cannot be said to have been proved beyond doubt.

65. The learned trial court could not appreciate substantive facts and testimony of this case in right perspective and consider things from narrow angle without properly scrutinizing the same on its entirety but only on its face value, whereas, proper scrutiny of fact vis a vis testimony on record would have brought truth on the surface. It is very easy to consider and examine testimony recorded in examination in chief, whereas, the Court has to cautiously contemplate on testimony as emerging from cross examination and then to scrutinize the same on merit for arriving at just conclusion.

66. Thus, the finding of conviction recorded by the trial court is on the face erroneous and perverse and the same cannot be sustained in the eye of law, as such the prosecution has not been able to prove its charges beyond reasonable doubt. Therefore, judgment and order of conviction dated 20.03.2006 passed by the Additional Sessions Judge, Court No. 13, Bareilly, in Sessions Trial No.150 of 2002, arising out of case crime nos. 183 of 2001 and 183-A of 2001 under sections 302 I.P.C. and Section 4/25 Arms Act, Police Station Cantt. District Bareilly, is hereby set aside. Accordingly, the instant appeal is allowed.

67. In this case, the accused-appellant is in jail since 2001. He is acquitted of aforesaid charges under aforesaid sections of I.P.C. and Arms Act, respectively. He be released forthwith if not wanted in connection with any other case after ensuring compliance of Section 437A Cr.P.C.

68. Let a copy of this judgment/order be certified to the court concerned for necessary informant and follow up action.

(2016) 9 ILRA 1552
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 2844 Of 2016

The National Insurance Co. Ltd. ...Appellant
Versus
Smt. Rajni Devi & Ors. ...Respondents

Counsel for the Appellant:
Vinay Kumar Khare

PROCEDURE:

Appeal under Section 173 of the Motor Vehicles Act, 1988 against the award dated 30.04.2016 passed by Motor Accident Claims Tribunal, Kushinagar, awarding compensation of Rs. 5,61,000/- with 7% interest. Tribunal directed insurer to pay compensation with liberty to recover from owner due to non-production of valid driving licence.

ISSUE:

Whether, in absence of proof of a valid driving licence (breach of policy conditions), the insurance company can still be directed to satisfy the award at the first instance with liberty to recover the amount from the owner of the offending vehicle?

Headnotes:

the insurer is statutorily liable under Section 149 of the Motor Vehicles Act to satisfy the award in favour of third-party claimants even in case of breach of policy conditions, with right to recover the amount from the insured.

LEGAL PRINCIPLES:

Section 149(1) creates a **statutory obligation** upon the insurer to satisfy awards against insured persons in respect of third-party risks.
Even where insurer establishes a defence under Section 149(2) (e.g., absence of valid driving licence), it does not absolve the insurer from **initial liability to pay**.
Under Section 149(4) & (5), insurer is entitled to **recover the amount** from the insured after satisfying the award.
The Motor Vehicles Act is a **beneficial legislation**, intended to protect victims of accidents.
The principle of **"pay and recover"** is well settled and consistently upheld by the Supreme Court.

CASE LAW DISCUSSED:
British India General Insurance Co. vs Capt. Itbar Singh, (1960) 1 SCR 168
Skandia Insurance Co. Ltd. vs Kokilaben Chandravadan, (1987) 2 SCC 654
Sohan Lal Passi vs P. Sesh Reddy, (1996) 5 SCC 21
National Insurance Co. Ltd. vs Swaran Singh, (2004) 2 AWC 1589 (SC)
National Insurance Co. Ltd. vs Challa Upendra Rao, (2004) 8 SCC 517
Oriental Insurance Co. Ltd. vs Nanjappan, AIR 2004 SC 1630
Manager, National Insurance Co. Ltd. vs Saju P. Paul, (2013) 2 SCC 41
United India Insurance Co. Ltd. vs Smt. Shashi Prabha Sharma, 2015 (5) AWC 4774 (FB)

CONCLUSION:
Appeal dismissed.
The direction of the Tribunal requiring the insurer to **pay the compensation to claimants and thereafter recover the same from the owner** is legally justified.
Insurance company directed to deposit the awarded amount, and recovery to be effected in accordance with law as per Full Bench guidelines.

(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 National Insurance Company Limited challenging the judgment and award dated 30.04.2016 passed by the Additional District Judge (Court No. 3)/Motor Accident Claims Tribunal, Kushinagar at Padrauna awarding a sum of Rs.5,61,000/- along with 7% simple interest as compensation on death of Satya Prakash Dwivedi, predecessor-in-interest of the claimant-respondents in a motor accident. Tribunal further gave insurance company a right to recover the awarded amount from the owner of the offending vehicle as driving license of the driver of the offending vehicle was not produced.

2. Learned counsel for the appellant contends that once driving license of the driver of offending vehicle was not produced in evidence, it shall be presumed that driver was not having a valid driving license and vehicle was being driven in violation of the insurance policy and thus, the appellant - insurance company was not liable to pay the award and the tribunal committed manifest error of law in fastening the said liability upon the insurance company.

3. The issue for consideration is whether in such a circumstance the insurance company can be fastened with the liability to satisfy the amount and recover the same from the insured.

4. Section 149 of the Motor Vehicles Act 1988, herein after referred to as the 'Act' prescribes the duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks, which reads as under :

"**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.**

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

a. that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

i. a condition excluding the use of the vehicle--

a. for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

b. for organised racing and speed testing, or

c. for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a Transport vehicle, or

d. without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

b. that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3). Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is

registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4). Where a certificate of insurance has been issued under sub- section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147 be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5). If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6). In this section the expressions "material fact" and "material particular" means, respectively, a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7). No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation.--For the purpose of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168.

5. A bare reading of the aforesaid provision goes to show that after certificate of insurance has been issued under Section 147 (3) of the Act and a judgment or award has been made in respect of a

liability covered by Section 147 (1) (b) against a person insured by the policy then even if the insurer is entitled to avoid or cancel or has avoided or cancelled the policy shall pay to the person entitled to the benefit of the award any sum not exceeding the sum assured as if he was the judgment debtor. Section 149 (1) puts obligation upon insurer to satisfy award made against a person insured by the policy. This obligation is depended upon three conditions, namely, (i) that a certificate of insurance has been issued under Section 147 (3); (ii) that the judgment or award is in respect of a liability required to be covered by Section 147 (1) (b); and (iii) that the judgment or award is against the person insured by the policy. The liability of the insurer is based upon legal fiction i. e. insurer must pay as if he is the judgment debtor.

6. In view of the provisions of sub-section (4) of Section 149, the insurer is under liability to pay even if it is entitled to cancel or avoid the policy or has actually cancelled or avoided it. The provisions of sub-section (4) enables the insurer to recover any sum paid by it towards the discharge of a liability of any person covered by the policy from him. Proviso provides statutory remedy to the insurer to recover the amount paid by it in discharge of the liability imposed upon the insured under a judgment or award.

7. It is undisputed that Motor Vehicles Act is a beneficent statute. The social need of the victim or his dependents to be compensated was subject matter of consideration by the Hon'ble Apex Court in the case of ***British India General Insurance Co. Vs. Capt. Itbeer Singh, (1960) 1 SCR - 168*** and it was observed as under :

"Again, we find the contention wholly unacceptable. The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore, to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided has has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and thus he has full liability to do so. Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay, he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that if is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries."

8. The same view has been reaffirmed by the Hon'ble Apex Court in ***Skandia Insurance Company Limited Vs. Kokilaben Chandrvadan and others (1987) 2 SCC-654, Sohan Lal Passi Vs. P. Sesh Reddy and others (1996) 5 SCC-21***.

9. ***In the case of National Insurance Co. Ltd., Vs. Swaran Singh 2004 (2) AWC 1589 SC,*** while analysing the provision of Section 149, it has again been held that once the assured proved that the accident was covered by the compulsory insurance clause, it was for the insurer to prove that it falls within an exception. The liability of the insurer was held to be statutory and its liability to satisfy the decree passed in favour of the third party was also held to be of the same character. The Apex Court emphasised that if the

insurer was made to satisfy the award even though it was not bound to pay the same under the contract of insurance. It was open to him to recover it from the assured. In this context, the Hon'ble Apex Court in paragraph 81 of the reports has observed as under :

"81. Sub-section (5) of Section 149 which imposed a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading."

10. Hon'ble Apex Court summed by the conclusion in respect of point in issue in paragraphs 101 and 102 of the reports as under :

"101. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time."

"102. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle."

11. In the case of ***National Insurance Co. Ltd. Vs. Challa Upendra Rao, (2004) 8 SCC 517,*** it has been observed as under :-

"Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing Court shall take assistance of the Regional Transport Authority concerned. The executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property

or properties of the owner of the vehicle i.e. the insured. In the instant case considering the quantum involved it is in the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured.

12. Same principle was reiterated by the Hon'ble Apex Court in the case of ***Oriental Insurance Co Ltd Vs Nanjappan, AIR 2004 SC 1630*** in the following words:-

"For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured.

13. It may also be pertinent to point out that in the case of ***National Insurance Co. Vs. Roshan Lal passed in SLP (C) No. 5669 of 2006*** vide order dated 19th January, 2007 the issue whether direction can be issued to the insurance company to discharge the liability under the award first and then recover it from the owner has been referred for adjudication by a larger Bench. Similarly, in ***National Insurance Co. Ltd. Vs. Parvathneni (2009) 8 SCC 785***, the Apex Court has referred the following identical question for consideration by a larger Bench :

(1) If an insurance company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle.

(2) Can such a direction be given under Article 142 of the Constitution, and what is he scope of Article 142?"

14. During the pendency of adjudication of the aforesaid questions by larger Bench, the matter again came up for consideration before Apex Court in the case of ***Manager, National Insurance Co. Ltd. Vs. Saju P. Paul, (2013) 2 SCC 41*** and it was held that pendency of consideration of the above questions by a larger Bench does not mean that the law laid down by the judgment in the case of ***Baljit Kaur and Challa Upendra Rao (supra)*** should not be followed particularly. Accordingly, the insurance company was permitted to recover the amount paid from the owner by following the procedure laid down in Challa Upendra Rao. Undoubtedly, the issue as to whether a direction can be issued to the insurance company to pay the amount in the first instance and to recover it thereafter from the owner, following the procedure which is laid down in Challa Upendra Rao is a matter pending reconsideration before a larger Bench of the

Supreme Court. However, as observed, pendency of the reference to a larger Bench by itself does not mean that the same course should not be followed in the meantime.

15. While considering the question of right of the insurance company to file an appeal under Section 173 of the Act where the insurer has been directed to pay the compensation awarded to the claimant and thereafter to recover it from the owner of the offending vehicle, a Full Bench of our Court in the case of ***United India Insurance Company Limited Vs. Smt. Shashi Prabha Sharma and others, 2015 (5) AWC - 4774*** has held as under :

"In these circumstances, we hold that where the insurer is directed to pay the amount in the first instance despite having been held not to be under a legal liability to pay the awarded amount, while permitting the insurer to recover the amount from the owner, the procedure which has been laid down in Challa Upendra Rao (supra) would have to be followed. This would envisage that before the amount is released to the claimant, the owner of the offending vehicle shall furnish security for the amount which the insurer has to pay to the claimants. The offending vehicle is to be attached as a part of the security for the purpose of recovering the amount from the insured. The insurer shall not be required to file a suit and may initiate a proceeding before the executing Court. The executing Court may pass appropriate orders in accordance with law as to the manner in which the insured, namely the owner of the vehicle, shall make payment to the insurer. In the event that there is any default, it is open to the executing Court to direct realisation by the disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle. In the event that the person on whose behalf payment has been made by the insurer, does not furnish security or is not in a position to furnish security to the insurer, the insurer should promptly move the executing Court. The executing Court shall then duly ensure that it exercises all its available powers in execution in accordance with law so that while on one hand payment is made to the person to whom it is due, the concerns of the insurer are duly balanced. We may only add here that all necessary and proper steps should be taken by the executing Court to ensure that the intent and object of the legislature in enacting the beneficial provisions of the Act is duly preserved and are expeditiously implemented."

16. In view of the aforesaid settled legal proposition by judicial pronouncements of the Apex Court as well as Full Bench of this Court, we do not find any force in the argument advanced by the learned counsel for the appellant that since there was a breach of the terms and conditions of the policy the insurance company cannot be put under a responsibility to satisfy the award and to recover it from the insured thereafter. The appeal is, thus, devoid of merits and accordingly stands dismissed.

17. The insurance company shall proceed to deposit the entire awarded amount with the tribunal who in turn shall release the same to the claimants after following the direction and procedure prescribed for release of the amount by the Full Bench of this Court in the case of United India Insurance Co. Ltd. (supra).

(2016) 9 ILRA 1560
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 2846 Of 2016

The New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Sarita Kapoor & Ors. ...Respondents

Counsel for the Appellant:
Vinay Kumar Khare

Counsel for the Respondents:
Suresh Kumar Gupta

Procedure:

Appeal under Section 173 of the Motor Vehicles Act filed by the Insurance Company challenging the award passed by the Motor Accident Claims Tribunal, Kanpur Nagar.
The challenge was confined only to the **quantum of compensation**.
Tribunal awarded Rs. 21,52,800/- with findings on negligence, valid driving licence, and insurance coverage.

Issues:

Whether rental income of the deceased is to be included while computing compensation?
Whether the multiplier applied by the Tribunal was correct?
Whether compensation under non-pecuniary heads was adequate?
Whether compensation can be enhanced in appeal filed by the Insurance Company in absence of cross-appeal by claimants?

Headnotes:

(i) Rental Income:

Rental income continues to accrue to legal heirs even after death.
Hence, **it cannot be treated as loss of dependency**.
Tribunal erred in including Rs.1,20,000/- rental income.

(ii) Multiplier:

Tribunal wrongly applied multiplier of **8**.
As per **Sarla Verma v. Delhi Transport Corporation**, correct multiplier for age group 51–55 years is **11**.

(iii) Non-Pecuniary Damages:

Amount awarded by Tribunal was **inadequately low**.
Following principles laid down in:
Rajesh v. Rajbir Singh
Kalpanaraj v. Tamil Nadu State Transport Corporation
Court enhanced compensation under conventional heads:
Funeral expenses: Rs.25,000/-
Loss of consortium: Rs.50,000/-
Loss of estate: Rs.50,000/-

(iv) Power of Appellate Court:
Under Order XLI Rule 33 CPC, appellate court has wide powers to do **complete justice**.
Compensation can be **enhanced even without cross-appeal**.
Reliance placed on:
Mahant Dhangir v. Madan Mohan
Delhi Electric Supply Undertaking v. Basanti Devi

Conclusion:

Deducting rental income and applying correct multiplier, compensation recalculated.
Enhanced compensation awarded to claimants.
Final Award:
Total compensation: **Rs. 26,98,740/-**
Interest: **7% per annum** from date of claim petition till payment

Result:

Appeal dismissed.
Award modified and enhanced in favour of claimants.
No order as to costs.

Case Law Discussed:

Sarla Verma v. Delhi Transport Corporation
Rajesh v. Rajbir Singh
Kalpanaraj v. Tamil Nadu State Transport Corporation
Mahant Dhangir v. Madan Mohan
Delhi Electric Supply Undertaking v. Basanti Devi

(Delivered by Hon'ble Krishna Murari, J.
&
Hon'ble Prashant Kumar, J.)

1. This appeal has been filed by Insurance Company against the judgement and award dated 28.5.2016 passed by the Motor Accident Claims Tribunal/District Judge, Kanpur Nagar in M.A.C.P. No. 813 of 2014 (Smt. Sarita Kapoor and others vs. Abhijeet Singh Sanga and others) awarding a sum of Rs.21,52,800/- as compensation.

2. Facts, in brief, giving rise to dispute are as under :

An application seeking compensation to the tune of Rs.45 Lac was made by the claimant-respondents on the allegations that on 2.4.2004 at about 12.30 p.m. when Durgesh Kapoor, the predecessor-in-interest of the claimant-respondents, was going on his scooter from Sachan Guest House to Barra, he was hit from behind by Safari car bearing registration no. UP-78DV-2879, which was being driven very rashly and negligently. He suffered grievous injuries in the said accident and died while being taken to hospital. The deceased was aged about 54 years and was a contractor with Kanpur Development Authority having annual income of Rs.3,50,000/-.

3. The proceedings were contested by the respondents no. 3 & 4, the owner and driver of the offending vehicle as well as the appellant Insurance company by filing written statement.

4. The Tribunal on analysis of evidence both oral and documentary brought on record by the parties returned a finding that the accident was caused due to rash and negligent driving of the offending vehicle and there was no contributory negligence on the part of the deceased. It was further held that the driver of the offending vehicle was having a valid driving license and the offending vehicle was duly insured with the insurance company and it was having all valid documents.

5. In so far as the quantum is concerned, the Tribunal, on the basis of the income tax return for the last three financial years i.e. 2010-11, 2011-12 and 2012-13 filed in evidence, determined the average income of the deceased to be Rs.3,32,460/-. The Tribunal added 20% towards future prospect in accordance with Rule 220-A of the Motor Vehicles Rules and after deducting 1/3 towards personal expenses determined a sum of Rs.2,65,975/- as annual income of the deceased. After applying a multiplier of 8, a sum of Rs.21,27,800/- was determined by the Tribunal as compensation payable. The Tribunal also awarded a sum of Rs.5000/- towards funeral expenses, Rs.10000/- towards loss of consortium and Rs.10000/- towards loss of estate. In this manner, a sum of Rs.21,52,800/- was determined as total compensation payable to the claimant-respondents.

6. At the outset, learned counsel for the appellant confines the scope of this appeal only to the question of quantum.

7. Learned counsel for the appellant submits that a sum of Rs.1.2 Lac reflected in the income-tax return for the financial year 2012-13 towards rental income has wrongly been taken into account inasmuch as even after death, the rental income would be received by the dependent and thus, the said amount is not liable to be taken into consideration while determining the average income.

8. From a perusal of the income tax return for the financial year 2012-13, we find that Rs.1.20 Lac is reflected as rental income which ought not to have been taken by the Tribunal while determining the average income of the deceased.

9. Learned counsel for the appellant is right in contending that rental income would be continued to be received by the heirs of the deceased and thus the same was not liable to be taken into account while determining the average income.

10. In view of above, the average income of the deceased is to be calculated taking into account the income reflected in the income tax return for last three financial years after deducting a sum of Rs.1.2 Lac received as rental income. The said amount works out to Rs.2,32,460/-. Adding 20% towards future prospects in accordance with the Rule 220A, the amount works out to Rs.3,50,961/-. After deducting 1/3 towards personal expenses, the amount comes to Rs.2,33,974/-.

11. From the perusal of the impugned judgement and award, we find that the Tribunal has applied multiplier of 8 in accordance with the Second Schedule of the Motor Vehicles Act. However, Hon'ble Apex Court in the case of ***Sarla Verma vs. Delhi Transport corporation, reported in (2009) 6 SCC 121*** has held that multiplier to be used should be as mentioned in Column-4 of the said judgement. Multiplier prescribed by the Hon'ble Apex court in the age group of 51-55 years is 9. It may be relevant to quote 21 of the said judgment, which reads as under :

"We, therefore, hold that the multiplier to be used should be as mentioned in Column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlier) which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

12. In view of dictum of the Hon'ble Apex Court in the case of ***Sarla Verma (Supra),*** we are of the considered opinion that the Tribunal has wrongly applied multiplier of 8. Whereas multiplier of 11 ought to have been applied by the Tribunal. If a multiplier of 11 is applied, the amount of compensation works out to Rs.25,73,740/-.

13. We also find from a perusal of the impugned award that only a sum of Rs.5000/- has been awarded towards funeral expenses, Rs.10000/- towards loss consortium and Rs.10000/- towards loss of estate. The amount awarded by the Tribunal under the non-pecuniary headsis extremely on the lower side.

14. 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."

15. 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).***

16. 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.50000/- to the respondent-wife towards loss of consortium and Rs.50000/- towards loss of estate.

17. 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.

18. 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.

19. 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.

20. 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.]

21. 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."

22. 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***.

23. 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.

24. 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.

25. 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.26,98,740/- as compensation along with 7% simple interest from the date of making of the application till the date of actual payment.

26. Accordingly, though the appeal filed by the appellant Insurance Company stands dismissed but the award stands modified to the extent directed above.

27. In the facts and circumstances, we do not make any order as to costs.

(2016) 9 ILRA 1567
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3123 Of 2013

Durga & Ors. **...Revisionists**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Revisionists:
Deepak Kumar Pandey, Rajul Bhargava

Counsel for the Opposite Parties:
Govt. Advocate, Sandeep Kumar Singh

Procedure: Section 323 Cr.P.C. – Scope of committal to Sessions Court
The power under Section 323 Cr.P.C. can be exercised by a Magistrate at any stage before judgment if it *appears* that the case ought to be tried by the Court of Session. However, such discretion must be exercised judicially, cautiously, and on proper grounds, and not on mere conjectures or slight pretext.

Issue: Legality of summoning under Section 376 IPC at a later stage
Whether the Magistrate was justified in allowing application under Section 323 Cr.P.C. and summoning the revisionists under Section 376 IPC when allegations of rape were not disclosed in earlier statements under Sections 161 Cr.P.C. or in the application under Section 156(3) Cr.P.C.

Headnotes:
The prosecutrix did not allege rape in:
Statement under Section 161 Cr.P.C.
Application under Section 156(3) Cr.P.C. by her husband
Allegation of rape was made for the first time during deposition without details of date, time, and place.
In cross-examination, prosecutrix denied physical relations and made contradictory statements.
Husband (PW-1) did not support allegation of rape.
The Magistrate failed to properly analyse the evidence and exercised jurisdiction under Section 323 Cr.P.C. mechanically and under misapprehension of offence.
Revisional Jurisdiction – Section 397 Cr.P.C.
Revisional powers are limited and do not permit re-appreciation of evidence; however, interference is justified where the order suffers from illegality, impropriety, or incorrect exercise of jurisdiction.

Case Law Discussed:
Prem Das vs State of U.P. & Anr., Criminal Revision No. 2066 of 2010
Islamuddin v. State, 1975 Cri LJ 841 (Del HC)
G. Vasudevan v. K.M. Malabari, 1978 Mad LJ (Cri) 617
Bundoo v. Smt. Mahrul Nisa, 1978 All LJ 1002

Conclusion:
The impugned order dated 21.10.2013 passed by the Magistrate allowing the application under Section 323 Cr.P.C. and summoning the revisionists under Section 376 IPC was held to be illegal and passed without proper application of mind. The order was set aside and the criminal revision was allowed.

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

1. This criminal revision has been preferred against the impugned order dated 21.10.2013 passed by the learned Additional Chief Judicial Magistrate, Court No.4, District- Mathura in Case No. 1117 of 2012 (State vs. Durga and others) arising out of Case Crime No. 417 of 2011, under Sections 498, 504, 506, 147, 120-B and 342 I.P.C., Police Station- Highway, District- Mathura, whereby the application under Section 323 Cr.P.C. moved by the opposite party no.2 has been allowed and revisionists have been summoned under Sections 376, 120-B, 504, 506, 342 I.P.C. to face the trial.

2. Learned counsel for the revisionists has relied upon a judgment passed by this Court in **Prem Das vs. State of U.P. & another decided on 21 September, 2012 in Criminal Revision No. 2066 of 2010**.

3. Learned counsel for the revisionists has argued as follows:-

(i). The alleged victim PW-2, prosecutrix Smt. XYZ w/o Surya Dev has never stated about the commission of rape upon her prior to her deposition before the Magistrate on date 12.4.2013 in the trial.

(ii). The prosecutrix, Smt. XYZ has never stated about the commission of rape upon her in her statement recorded under Section 161 Cr.P.C. by the Investigating Officer.

(iii). This alleged incident of commission of rape upon Smt. XYZ by the accused persons has never been disclosed even by her husband in his application dated 5th May, 2011 preferred under Section 156(3) Cr.P.C.

(iv). The prosecutrix, Smt. XYZ has abruptly levelled charges of commission of rape upon her by the accused persons without mentioning the date, time and place in her deposition before the learned Magistrate at the very first time.

(v). Learned Magistrate has erroneously analysed the definition of the offence under Section 498 I.P.C.

4. Sri Awadh Bihari Pandey, Advocate, holding brief of Sri Sandeep Kumar Singh, learned counsel for the opposite party no.2 and Ms. Anita Srivastava, learned A.G.A. have opposed the arguments advanced by the leaned counsel for the revisionist. They have argued as follows:-

(i) PW-2, prosecutrix Smt. XYZ has deposed on dated 12.4.2013 in her examination-in-chief that the rape was committed upon her by all the five accused persons.

(ii) PW-2, prosecutrix Smt. XYZ, in her cross-examination has deposed that she has stated about the incident of rape to 'Daroga Ji' when he visited the village. She has also deposed before the court of the learned Magistrate that she has disclosed about the incident of rape to her husband. Further, she has also deposed that she is discussing about the incident of rape at the first time in the court.

5. Heard Sri Rajul Bhargava, learned Senior counsel, learned counsel for the revisionists as well as Sri Awadh Bihari Pandey, Advocate, holding brief of Sri Sandeep Kumar Singh, learned counsel for the opposite party no.2 and Ms. Anita Srivastava, learned A.G.A. for the State and perused the record.

6. Section 323 of Code of Criminal Procedure, 1973 is quoted verbatim as follows:-

"**323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.--** If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained (and thereupon the provisions of Chapter XVIII shall apply to the commitment so made) added by Cr.P.C. (Amendment) Act, 1978, S.26"

7. Section 397 of Code of Criminal Procedure, 1973 is quoted verbatim as follows:-

"**397. Calling for records to exercise of powers of revision**.--(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.--All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If any application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

8. The revisional jurisdiction does not postulate re-appreciation of evidence, but that should be appreciated in the light of the limitation on the right to go in appeal, Islamuddin v. State, 1975 Cri LJ 841, 842 (Del HC). G. Vasudevan v. K.M. Malabari, 1978 Mad LJ (Cri) 617; Bundoo v. Smt. Mahrul Nisa, 1978 All LJ 1002 (All HC).

9. A bare reading of Section 323 Cr.P.C., 1973 reveals that the trial should be before the court of Magistrate and order under this Section may be passed by him at any stage of proceedings before signing the judgment or in other words, before culmination of the trial by pronouncement of the verdict. In the meantime, when the proceedings are pending and it appears to the Magistrate that the case deserves to be one which should be tried by the court of Session then he shall commit it to the court of Session and thereafter provisions of chapter XVIII of Code of Criminal Procedure, 1973 shall apply in the case.

10. Now the word 'appears' is of paramount importance, it does not require the Magistrate to analyse and discuss all the evidence before him and this power may be exercised by the Magistrate at any stage of proceedings before signing the judgment but at the same time it is also true that at the very slight pretext, such type of power should not be exercised. The discretion should be exercised with abundant caution.

11. On the other hand, it should be also borne in mind of the trial Magistrate that no injustice is caused to either of the parties. The word 'appears' denotes objective as well as subjective satisfaction of the trial Magistrate.

12. In the revisional jurisdiction, re-analysing of the evidence is not possible. It has also narrow compass to re-appreciate the evidence.

13. In the present case in hand, PW-2, prosecutrix Smt. XYZ in her cross-examination has clearly denied regarding the fact of making physical relationship with her by anyone.

14. She has also deposed that she has disclosed the incident of rape to her husband but her husband PW-1, Surya Dev has not deposed as such before the trial Magistrate. PW-1 Surya Dev in his application under Section 156(3) Cr.P.C. has not mentioned about the commission of rape with his wife. PW-2 prosecutrix Smt. XYZ has denied about the commission of rape upon her in her statement recorded under Section 161 Cr.P.C.

15. The learned Magistrate should have exercised his discretion after analysing the evidence. No anarchic approach should have been adopted which appear to affront the basic principles of law. Since, the discretion given to the Magistrate is judicial one; it should be exercised

with care and on some proper ground. Every circumstance of aggravation must be carefully weighed.

16. This committal has been made under misapprehension of the correct offence.

17. Thus, the revision deserves to be allowed and the impugned order dated 21.10.2013 passed by the learned Additional Chief Judicial Magistrate, Court No.4, District- Mathura is liable to be set aside.

18. Resultantly, the criminal revision is allowed and the impugned order dated 21.10.2013 passed by the learned Additional Chief Judicial Magistrate, Court No.4, District- Mathura is hereby set aside.

(2016) 9 ILRA 1572
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 5863 Of 2005

Smt. Vidya Devi & Ors. ...Appellants
Versus
The State Of U.P. ...Respondent

Counsel for Appellants:
D.S.M. Tripathi, Brijesh Kumar Singh, Devi Jai Shanker, Jai Shanker Prasad Singh, Km. S. Srivastava, Prasad Singh, Smt. Satya Srivastava, Sunil Vashisth

Counsel for Respondent:
Government Advocate

HEADNOTES:
Dowry Death – Sections 304B, 498A IPC and Section 4 Dowry Prohibition Act – Death within 7 years of marriage – Demand of motorcycle and cash – Presumption under Section 113B Evidence Act – Role of relatives – Sentence modification
Marriage of deceased Seema was solemnized with Varunendra Kumar Singh on 21.05.2004 and her death occurred on 08.09.2004 within four months of marriage in unnatural circumstances. FIR alleged persistent demand of dowry in the form of motorcycle (Splendor Plus) and Rs.50,000/- and cruelty by husband and his relatives namely mother-in-law, father-in-law, jeth and jethani.
Postmortem report revealed ligature mark and multiple ante-mortem contusions on legs indicating physical violence prior to death. Defence plea of suicide due to frustration was not supported by evidence. Testimony of PW-1 (brother) and PW-2 (mother) proved consistent demand of dowry and harassment soon before death.
Court held that essential ingredients of Section 304B IPC were satisfied as:
Death occurred otherwise than under normal circumstances.
Death occurred within 7 years of marriage.
Evidence established cruelty and harassment soon before death.
Cruelty was connected with demand of dowry.
Presumption under Section 113B Evidence Act was rightly drawn against accused persons.
However, High Court distinguished role of husband from other relatives and held that life imprisonment awarded by trial court to all relatives was disproportionate in facts of the case. Sentence modified considering degree of involvement and relationship of accused with deceased.
Conviction under Sections 304B, 498A IPC and Section 4 Dowry Prohibition Act affirmed. Sentence under Section 304B IPC reduced:
Father-in-law and mother-in-law – 10 years RI
Jeth and Jethani – 7 years RI
Appeal partly allowed on point of sentence.

ISSUE:
Whether prosecution proved essential ingredients of dowry death under Section 304B IPC?
Whether cruelty or harassment soon before death in connection with dowry demand was established?
Whether conviction under Section 498A IPC and Section 4 Dowry Prohibition Act was justified?
Whether sentence of life imprisonment awarded to relatives of husband was disproportionate and liable to modification?

PROCEEDING:
Appeal against judgment dated 19.12.2005 passed by Special Judge (E.C. Act)/Additional Sessions Judge, Varanasi in Sessions Trial No.876 of 2004 convicting appellants under Sections 498A, 304B IPC and Section 4 Dowry Prohibition Act.
Trial court awarded life imprisonment under Section 304B IPC and lesser sentences under Section 498A IPC and Section 4 Dowry Prohibition Act.
High Court reappreciated evidence including FIR, postmortem report, testimony of prosecution witnesses and defence evidence and examined applicability of presumption under Section 113B Evidence Act.

CONCLUSION:
Conviction of appellants under Sections 304B, 498A IPC and Section 4 Dowry Prohibition Act upheld.
Sentence modified on ground of proportionality considering role of relatives distinct from husband.
Life imprisonment awarded by trial court under Section 304B IPC reduced:
10 years RI each to father-in-law and mother-in-law
7 years RI each to jeth and jethani
Appeal partly allowed only to extent of modification of sentence. Remaining conviction and sentences maintained.

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

1. Appellants Smt. Vidya Devi (mother-in-law), Smt. Minto (Sister-in-law), Samar Bahadur Singh (father-in-law), Trivendra Kumar Singh (brother-in-law) have preferred this appeal against the judgment and order of conviction dated 19.12.2005 passed by the Special Judge (Essential Commodities Act)/Additional Sessions Judge, Varanasi in Sessions Trial No.876 of 2004, State Vs. Varunendra Kumar Singh and others, arising out of Case Crime No.214 of 2004, under Sections 498A, 304B I.P.C. And 3/4 Dowry Prohibition Act, Police Station Shivpur, District Varanasi, whereby the accused-convicts have been sentenced to 3 years' rigorous imprisonment with fine of Rs.5000/- under Section 498A IPC, in default of payment of fine, six months' additional imprisonment, further sentenced to life imprisonment under Section 304 B IPC and one year rigorous imprisonment coupled with fine of Rs.2000/-, in case of default in payment of fine, two months' additional imprisonment under Section 4 of Dowry Prohibition Act shall be suffered by them. Sentences to run concurrently.

2. The aforesaid accused-convicts were acquitted of charge under Section 3 of Dowry Prohibition Act by the same impugned judgment.

3. Relevant to mention at this stage that Varunendra Kumar Singh, husband of deceased convicted by the trial court under aforesaid sections of IPC and Dowry Prohibition Act,

respectively, was sent to the Juvenile Justice Board, Varanasi, for passing appropriate orders on the point of sentence.

4. Heard Sri R.K. Singh, learned Advocate assisted by Sri Yogesh Srivastava, learned counsel for the appellants and Sri Saghir Ahmad, learned A.G.A. assisted by Sri Hasan Abdi, brief holder for the State and perused the records available on file.

5. Prosecution case giving rise to this appeal has its seed in the first information report lodged by the first informant, Pankaj Singh (brother of the deceased) son of late Doodhnath Singh, resident of Gram-Mahada, Police Station Cholapur, District Varanasi, at Police Station Shivpur, Sub-District Sadar, District Varanasi, on 08.09.2004 at 18.30 hours to the effect that his sister Seema had tied her nuptial knot with Varunendra Kumar Singh son of Samar Bahadur Singh on 21st May, 2004. His sister Seema was tortured by her in-laws for not bringing sufficient dowry and they were threatening her of life for not bringing Splendor Plus motorcycle. Today i.e. 08.09.2004, some unknown person informed about death of his sister saying that her in-laws are trying to dispose of corpse of Seema. When the first informant Pankaj Kumar Singh in company of his co-villagers went to the spot at Shyampuri Colony, he saw that his sister was murdered by hanging and her in-laws were trying to dispose of the corpse. In the latter part of first information report, it has been specifically alleged that because of non-fulfillment of dowry, his sister, Seema was murdered by Varunendra Kumar Singh (husband), Trivendra Kumar Singh (Jeth), Smt. Minto (Jethani), Smt. Vidya Devi (mother-in-law) and Samar Bahadur Singh (father-in-law). Report be lodged and appropriate action be taken. Scribe of this report is Ram Pratap Singh. This report is Exhibit Ka-1.

6. The contents of aforesaid information were taken down in Check FIR on 08.09.2004 at 18.30 hours at Crime No.214 of 2004, under Sections 498A, 304B IPC and 3/4 Dowry Prohibition Act, Police Station Shivpur, District Varanasi. Check FIR is Exhibit Ka-6 on record. On the basis of entry so made in Check FIR, a case was registered against the aforesaid accused persons in the General Diary vide Entry No.39 at 18.30 hours on 08.09.2004, which is Exhibit Ka-7. Thereafter investigation ensued.

7. As the investigation proceeded further inquest report of deceased Seema wife of Varunendra Kumar Singh was got prepared by Murli Dhar Mishra PW-3,(A.S.D.M. Sadar, Varanasi). The preparation of inquest commenced on 09.09.2004 at 10:00 a.m. and ended at 2:00 p.m. the same day. This inquest report is Ext. Ka-2. In the opinion of inquest witnesses, it was suggested that dead body of deceased Seema be sent for postmortem examination, for ascertaining real cause of death. In this way, certain relevant papers were prepared for sending the dead body for postmortem examination. Letter to Chief Medical Officer is also marked as Exhibit Ka-7. Relevant to mention at this stage that the concerned General Diary entry whereby the case was registered against the aforesaid appellants had already been marked, as Exhibit Ka-7, therefore, this letter to CMO may be read for the sake of convenience in this judgment, as Exhibit Ka-7A. Letter to S.H.O. Lanka, Varanasi is Exhibit Ka-8. Photonash is Exhibit Ka-9 and Police Form-13 Challan dead body is Exhibit Ka-10.

8. Thereafter, the dead body of Seema was sent for autopsy at mortuary BHU, Varanasi, where Dr. S.K. Tripathi PW-7 conducted postmortem examination on the dead body of Seema on 09.09.2004 at 5.15 p.m. Following ante-mortem injuries were found on the dead body of the deceased (Seema) by Dr. S.K. Tripathi PW-7, which are extracted herein below:-

Ligature Mark- 29 cm x 2-3 ½ cm obliquely placed over high up neck, 3 cm below right ear knot impression and 5 cm below left ear. On cut - ecchymosis found on the subcutaneous.

Ante-mortem injuries

1- Contusion 3 cm x 1 cm on the front of right leg shin area 12 cm below right knee.

2- Contusion 2 cm x 1 cm on the front of left leg shin area 6 cm below right Knee.

3- Contusion 2 cm x ½ cm on the shin left leg 12 cm blow left Knee.

4- Contusion 3 cm x ½ cm on front of left thigh 8 cm above left knee.

Cause of death was stated to be due to asphyxia as a result of hanging. Duration from time of death upto time of postmortem examination was said to be 1-¾ day.

Dr. S.K. Tripathi PW-7 has proved this postmortem examination report, as Exhibit Ka-6.

9. The Investigating Officer, Santosh Kumar, Circle Officer, PW-5 Cantt., Varanasi proceeded to the spot and prepared site plan, which is Exhibit Ka-3 on record. He recorded statement of the arrested accused in Parcha No.2 dated 09.09.2004. He also recorded statement of the concerned Magistrate and inquest witnesses in Parcha No.2A on the same day. He also obtained marriage card of deceased Seema Devi with accused Varunendra Kumar Singh and has proved the same as Exhibit Ka-4. After completing various formalities, he filed charge-sheet against the accused persons under Sections 498A, 304B IPC and 3/4 Dowry Prohibition Act, at Crime No.214 of 2004, on 20.9.2004 and has proved the same as Exhibit Ka-5 on record.

10. Thereafter, the case of the appellants was committed to the Court of Sessions from where it was made over of the aforesaid trial court for conduction of trial and disposal. The learned trial Judge heard the appellants on the point of charge and found prima facie ground existing for framing charges under Sections 498A, 304B IPC and Section 3/4 of the Dowry Prohibition Act vide his order dated 18.11.2004. After framing charges under aforesaid sections of IPC and the Dowry Prohibition Act the same were read over and explained to the accused persons, who denied charges and opted for trial.

11. The prosecution in order to prove guilt of the accused persons examined as many as eight prosecution witnesses. Brief reference of the same is sketched herein under:-

12. Pankaj Kumar Singh PW-1 is the first informant and brother of the deceased Seema Devi. He has proved written report Exhibit Ka-1. Smt. Radhika Singh PW-2 is the mother of the deceased. She has testified fact about dowry demand and torture meted to her daughter by the accused persons. Murli Dhar Mishra, A.S.D.M. (Sadar), Varanasi is PW-3. He got inquest report prepared on 09.09.2004 and has proved the same as Ext. Ka-2. Constable Rajesh Kumar Singh is P.W.4. He has participated in the proceeding meant for inquest report and has also testified fact that he conveyed corpse of the deceased Seema at mortuary, BHU, Varanasi. Santosh Kumar, Circle Officer, Cantt. Varanasi is PW-5. He has detailed about various steps taken by him for completing the investigation. Besides proving a number of papers, he has also proved charge sheet Ext. Ka-5. Constable Shyam Sunder Giri PW-6 has prepared Check FIR and has made entry in General Diary at Serial No.39 dated 08.09.2004 at 6.30 p.m. and has proved Ext. Ka-6 and Ext. Ka-7, respectively. Dr. S.K. Tripathi PW-7 has conducted postmortem examination on dead body of the deceased Seema and has proved postmortem examination report Ext. Ka-6. Virendra Vikram Singh, Sub-Inspector, Police Station Rohaniya, Varanasi PW-8 has prepared inquest report under supervision of Additional City Magistrate-III and has verified facts of preparation of inquest report and other papers prepared at the time of preparation of inquest report for sending the dead body of the deceased for postmortem examination.

13. Thereafter the evidence for prosecution was closed and statement of appellants was recorded under Section 313 Cr.P.C. The appellants in their statement under Section 313 Cr.P.C. took plea that neither any demand for dowry was ever made by them nor was the deceased ever tortured for the same.

14. The accused Samar Bahadur Singh (father-in-law) has stated in his statement that at the time of occurrence, he was posted as constable at Police Station Bairiya and he was not present on the spot. His wife Smt. Vidya Devi (mother-in-law) also resided with him. Smt. Seema (deceased) committed suicide out of frustration. No demand of dowry was ever made and the marriage of deceased with his son Varunendra Kumar Singh took place because Seema was daughter of a widow and she was educated and was under employment.

15. Thereafter, the defence also led ocular testimony and has produced Ajay Kumar Singh DW-1. He has testified fact that he was a mediator in the marriage of Seema (deceased) and Varunendra Kumar Singh (husband). Besides, he has also testified certain relevant points.

16. Chandra Shekhar DW-2 claims himself to be a compounder at Dr. Sudha Surgical Hospital, Tagore Town, Varanasi. He has testified certain facts regarding treatment of deceased and has proved papers of treatment of the deceased as Exhibit Kha-1. Constable 496 Rama Kant Singh, DW-3, Police Station Bairiya, District Ballia has proved certain GD entry dated 07.09.2004 and 08.09.2004, as Exhibit Kha-2 and Kha-3.

17. Thereafter evidence for the defence was closed and the matter was posted for arguments. Learned trial court after hearing both the parties and appreciation of evidence and marshalling of facts passed the aforesaid judgment and order of conviction dated 19.12.2005 and sentenced the appellants under Sections 498A, 304B IPC and Section 4 of Dowry Prohibition Act as aforesaid. Appellants were acquitted of charge under Section 3 of The Dowry Prohibition Act, 1961 by the trial court.

18. Consequently, this appeal.

19. It has been vehemently claimed on behalf of the appellants that in this case, the conviction is without any base and against evidence on record, hence the same is vitiated, for the reason that essential ingredients of dowry death as contained under Section 304B IPC are neither made out nor have been legally proved in this case against the appellants. The appellants had no motive to commit death of a lady, who was employed as 'Shikshamitra'. The deceased was herself an asset for her in-laws and they knew it better that the deceased will fetch good fortune in future and condition of her parental house (maiyka) was well known to the appellants. There is no proof regarding any physical or mental torture given by the appellants to the deceased for non-fulfillment of dowry demand soon before the death.

20. It is obvious in the testimony of prosecution witnesses that no dowry was demanded at the time of marriage. The reason for death of deceased has been explained by the appellants by producing DW-1 Ajay Kumar Singh and DW-2 Chandra Shekhar, who have given a number of reasons for death of deceased. In this regard, testimony of Chandra Shekhar DW-2 is quite convincing. The relationship between the two families was cordial and peaceful and no such disagreement ever took place for demand of dowry as alleged in the first information report.

21. Appellant-Samar Bahadur Singh (father-in-law) is a constable and was employed at Police Station- Bairiya, District Ballia at the time of occurrence. At the relevant point of time, his presence on the spot can neither be anticipated nor has it been so proved by the prosecution witnesses. The appellants cannot be said to be beneficiary of dowry demand. In this case, implication of all the appellants is false and without any reason. The deceased herself committed suicide out of frustration given by her own mother and brother by demanding the stipend/remuneration, which she was getting as 'Shikshamitra'.

22. Lastly, learned counsel also contended that in this case, punishment awarded against the appellants is too harsh and is not justified under facts and circumstances of the case. Smt. Vidya Devi (mother-in-law), Smt. Minto (Jethani), Samar Bahadur Singh (father-in-law) and Triveni Kumar Singh (Jeth) of the deceased have been awarded sentence of life imprisonment, which is extreme penalty prescribed for offence under Section 304B IPC and is not justifiable looking to the attendant facts and circumstances of the case and the same is disproportionate to the offence proved and the relationship of accused with the deceased. Therefore, the trial court ought to have taken lenient view, which the trial court failed to take and this particular aspect may be considered in

right perspective by this Court and just order may be passed in this case on quantum of sentence in the interest of justice.

23. Learned AGA, while replying to the aforesaid arguments, has submitted that testimony of all the prosecution witnesses is consistent, clinching and inspiring confidence. All ingredients of Section 304B IPC have been proved and every aspect, as required under law, has been established. The appellants were unable to bring out and establish their case of suicide by the deceased. Presumption under Section 113B has been rightly drawn by the trial court against the appellants and their conviction under Sections 304B, 498A IPC and Section 4 of the Dowry Prohibition Act is based on material on record. The trial court has considered all the substantial facts and circumstances of the case comprehensively and based its judgment of conviction on the same, which cannot be faulted with.

24. He further added that so far as sentencing part of the judgment is concerned, the same is also justified, for the reason that a helpless and innocent lady was brutally murdered for non-fulfillment of dowry demand, which is inhuman and barbaric against her, apart from being a social crime. The sentence awarded by the trial court is reasonable and justified under the facts and circumstances of the case.

25. Also considered above submissions.

26. The moot point involved for adjudication of this appeal relates to fact whether the prosecution has not been able to prove dowry death under Section 304B IPC and cruelty to deceased under Section 498A IPC and demand of dowry subsequent to marriage of Seema with Varunendra Kumar Singh under Section 4 of the Dowry Prohibition Act and whether the sentence imposed on the appellants particularly under Section 304B IPC is disproportionate and not justifiable?

26A. Before proceedings further with the case it would be relevant to reflect on certain relevant facts at this stage. In this case both the sides admit factum of marriage between Seema and Varunendra Kumar Singh on 21st May, 2004. Also both the sides admit death of Seema Devi to be unnatural. The only point in controversy remains to be decided revolves around factum of cruelty, demand of dowry and dowry death of Seema whether committed by the accused?

27. Thereafter, our consideration of the case is confined particularly to the appraisal of facts, circumstances and evidence on aforesaid aspects of dowry demand, cruelty and on point of dowry death or theory of proposed suicide committed by the deceased Seema out of frustration?

28. At the very outset, a glance at the contents of first information report reveals allegation of dowry death of Seema Devi by and at the hands of the appellants. It is named FIR against Varunendra Kumar Singh (husband of the deceased), Trivendra Kumar Singh (Jeth), Smt. Minto (Jethani), Smt. Vidya Devi (mother-in-law) and Samar Bahadur Singh (father-in-law) of the deceased Seema who allegedly caused her dowry death on 08.09.2004.

29. At this stage, we may scrutinize testimony of Dr. S.K. Tripathi P.W.7, wherein, he has described ligature mark with dimension 29 cm x 2-3 ½ cm obliquely placed over high up neck, 3 cm below right ear knot impression and 5 cm below left ear. On cut - ecchymosis found on the subcutaneous. Injury No.1- Contusion 3 cm x 1 cm on the front of right leg shin area 12 cm below right knee. Injury No.2- Contusion 2 cm x 1 cm on the front of left leg shin area 6 cm below right Knee. Injury No.3- Contusion 2 cm x ½ cm on the shin left leg 12 cm blow left Knee. Injury No.4- Contusion 3 cm x ½ cm on front of left thigh 8 cm above left knee.

30. Obviously, these injuries have been proved by Dr. S.K. Tripathi, PW-7. In the opinion of the doctor, the death could have taken place prior to 1-¾ days. One thing is apparent that apart from above referred ligature mark, the deceased also sustained several injuries on her legs. The point for consideration arises as to whether these injuries as found on both legs can be attributed to case where a person has committed suicide? The answer is certainly in the negative, for the reason that there is no such attendant circumstance or independent corroboration that may establish or allude to the possibility that these injuries on legs of the deceased could have been caused by instrumentality of the deceased herself or by instrumentality of other object on the spot, because in this case, it is virtually established that when the corpse of Seema was seen by the first informant-Pankaj Kumar Singh, it was kept in the lobby of the house. The defence has also asked certain relevant question with Murli Dhar Mishra PW-3 (A.S.D.M. Sadar, Varanasi) in his cross-examination, wherein he has stated that he did not see the room where the deceased was stated to have been hanging from the ceiling of the house.

31. Special mention may be made from testimony emerging in cross-examination of Investigating Officer Santosh Kumar, Circle Officer, PW-5, Cantt., Varanasi on page 28 of paper book, wherein certain particular questions have also been put to this witness in cross-examination on point whether the room (where hanging was alleged to have taken place) was not bolted from inside? The answer was given that it was not bolted from inside the room simlarily answer has been given that there was no chair found inside the room with some table on it.

32. Now, the point for consideration regarding presence of appellant Samar Bahadur Singh whether on duty at District Ballia or at the place of occurrence (at Varanasi) assumes importance. In this context, the defence has led testimony of Constable-496 Rama Kant Singh, DW-3, Police Station Bairiya, District Ballia. As per his testimony, some information was received at the Bairiya police station and he has proved relevant GD dated 08.09.2004. It emerges from his testimony, that some information regarding serious condition of Seema was received on that date (8.9.2004) around 12 noon when appellant Samar Bahadur Singh gave leave application and started off for his house (at Varanasi). The relevant GD entries have been placed on record as Ext. Kha-2 and Ext. Kha-3, respectively.

33. However, this special aspect was also investigated into by Investigating Officer Santosh Kumar, Circle Officer, PW-5, Cantt., Varanasi. He has stated in his cross-examination on page-29 of the paper book that during investigation, he did not come across any such material that Samar Bahadur Singh was on duty at the time of incident.

34. Here one relevant aspect need be elaborated by us that Samar Bahadur Singh was posted as a Constable at Police Station Bairiya. There is nothing on record from which we may either infer or whisper that police personnel are trying to scale down fact of engagement of the appellant Samar Bahadur Singh at Police Station Bairiya and instead making his presence at his house. There is no point for holding that police personnel, who are engaged in the investigation of this case have any grudge against the appellant Samar Bahadur Singh.

34A. It has also come in the testimony of DW-3 that the distance between the place of occurrence (Shyampuri Colony Sector B Meerapur Basahi, P.S. Shivpur, District Varanasi) and Police Station Bairiya can be covered by road travel within 4-5 hours. Therefore, assuming it to be; that any person is on duty at Bairiya police station, even then he can manage things in his own way within 4 or 5 hours and he may easily return from his house at Varanasi to Ballia. Therefore, merely because an application for leave was given at Police Station Bairiya at 12.00 noon on 8.9.2004, would not be fair enough to show that the appellant Samar Bahadur Singh had no occasion to be present at the place of occurrence (at Varanasi) at relevant point of time.

35. Now coming to the merit of the case, we may consider factum of demand of dowry. Pankaj Kumar Singh PW-1 (brother of the deceased) and Smt. Radhika Singh PW-2 (mother of the deceased), are the two witnesses of fact. They have proved fact of dowry demand subsequent to marriage of the deceased Seema with Varunendra Kumar Singh. Evidence of the two witnesses of fact establishes demand of dowry in the shape of motorcycle and Rs.50,000/- by all the appellants from deceased Seema. In this case, the deceased Seema had occasion to visit her parental home (maiyaka) and she used to remain there from Monday to Saturday almost every week and then she used to go back to her husband and in-laws house in the evening of Saturday and then again she used to leave her in-laws house in the morning of following Monday, because the deceased was working as 'Shikshamitra' in village Mahda for which she was being paid fixed stipend.

36. The defence has tried to suggest that the deceased was suffering from severe mental tension because her mother and brothers insisted for obtaining her remuneration/stipend, while she was not willing to give the same to them. But evidence on record does not support such a situation that the deceased was ever under mental pressure. Had it been so, she would not have committed suicide in the house of her in-laws, but could have easily expressed her anguish first in some manner and then she would have taken extreme decision to end her life and she would not have gone over to her parental home (maiyaka) and would have resided there every week from Monday to Saturday. As per testimony on record, factum of demand of dowry and non-fulfillment of the same by the complainant side has been well established and rightly so concluded by the trial court regarding which, we see no reason to interfere in the same at this stage.

37. At this juncture, it would be relevant to refer Sections 304 B and 498A IPC for correct appreciation of law and fact under context, these sections are extracted herein below:-

[304B. Dowry death.--*(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her*

marriage and it is shown that soon before her death she was subjected to cruelty or har-assment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprison-ment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

498A. ***Husband or relative of husband of a woman subjecting her to cruelty.****-- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be pun-ished with imprisonment for a term which may extend to three years and shall also be liable to fine.*

Explanation.--For the purpose of this section, "cruelty" means--

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

38. It has come in the testimony of both the witnesses of fact namely Pankaj Kumar Singh PW-1 and Smt. Radhika Singh PW-2 that her daughter used to tell them about harassment and torture meted out to her at the hands of her in-laws for non-fulfillment of dowry demand. In this way factum of harassment also stands proved. Thus, death of the deceased Seema as we discussed above admittedly took place within 7 years of her marriage with Varunendra Kumar Singh (husband) and she was subjected to cruelty and harassment soon before her death repeatedly by her husband and in-laws in connection with demand for dowry stands proved against the present appellants.

39. Thus each and every essential ingredient of Section 304B IPC and 498A IPC has been proved by the prosecution satisfactorily and the evidence on record profusely establishes the same beyond reasonable doubt. The persistent demand of dowry has been proved to have occurred after marriage, therefore, demand of dowry subsequent to marriage is also well proved and is punishable as such under Section 4 of the Dowry Prohibition Act. Entirety of the prosecution testimony on record also reveals that the case of the prosecution regarding dowry demand, and causing of dowry death stands established and proved against the accused persons.

40. We may also take note of contention raised on behalf of the appellants that in case this Court comes to the conclusion that charges against the appellants under Section 304B, 498A IPC and 4 Dowry Prohibition Act are found to have been proved, then they should be given some latitude on point of quantum of sentence, as the sentence awarded by the trial court is not proportionate to the alleged crime. Several circumstances have been placed before us for consideration, which we will discuss when the context so requires.

41. In the final count, we find that the charges under Sections 498A, 304B IPC and under Section 4 of the Dowry Prohibition Act have been reasonably proved and the suggestion by defence in regard to commission of suicide committed by the deceased Seema has neither any relevance nor any force under prevailing facts and circumstances of the case. Therefore, we see every reason to concur with the finding of conviction recorded against the appellants by the trial court vide its judgment and order dated 16.12.2005 under aforesaid sections of IPC and Section 4 of Dowry Prohibition Act, 1961.

42. On sentencing point, as discussed above, some contention has been raised that the sentence awarded against the appellants is disproportionate to the offence committed and the same may be modified in the interest of justice. In this regard, submission raised on behalf of the appellants need be mentioned.

43. Firstly; the husband of deceased Varunendra Kumar Singh has been declared juvenile, as he claimed juvenility and has been given benefit thereof by sending him to the Juvenile Justice Board, Varanasi on sentencing point, secondly, the other accused persons and particularly the present appellants - Trivendra Kumar Singh (Jeth), Smt. Minto (Jethani), Smt. Vidya Devi (mother-in-law) and Samar Bahadur Singh (father-in-law) bear and stand in different relationship with the deceased Seema Devi, whose role is distinguishable from the husband, as they are distant relative, and they cannot be said to be direct beneficiaries of dowry demand, had it been fulfilled. Thirdly, may be that, the role of Samar Bahadur Singh (father-in-law) and Smt. Vidya Dev (mother-in-law) would assume greater responsibility for demanding dowry but Trivendra Kumar Singh (Jeth) and Smt. Minto (Jethani) would not have been beneficiary in the event of fulfillment of dowry demand.

44. More so, in this case it was exclusively upto the husband to have taken care of his wife and could have refused to bow down to the insolent behavior of Samar Bahadur Singh (father-in-law) and Smt. Vidya Devi (mother-in-law), if they insisted for any demand of dowry. Therefore, role of Samar Bahadur Singh (father-in-law) and Smt. Vidya Devi (mother-in-law) under the facts and circumstances of the case is placed at different footing with the two other co-accused, namely, Trivendra Kumar Singh (Jeth) and Smt. Minto (Jethani).

45. We have given our thoughtful consideration to entirety of facts and circumstances, as appearing and proved in this case and also taken note of respective position of each appellant and the nature of offence. No doubt, the husband has primary responsibility to take care of his wife and his case can be distinguished, from all other co-accused persons of this case.

46. In this case, we also notice that Samar Bahadur Singh (father-in-law) was an employed person and a police constable and was earning member of his family. In such a family set up like that of the

present appellants we cannot not resist factual reality and strong reason for believing that dowry demand would have directly benefited husband of deceased- Varunendra Kumar Singh rather than the appellants. Therefore, the present appellants cannot be said to be direct beneficiary of dowry demand, if fulfilled.

47. In this view of the matter, sentence of life imprisonment awarded by the trial court against aforesaid four appellants under Section 304B IPC appears to be disproportionate to the offence proved (304B IPC), under particular facts and circumstances of the case and the respective positions held by Samar Bahadur Singh (father-in-law) and Smt. Vidya Devi (mother-in-law) vis-a-vis position of Trivendra Kumar Singh (Jeth) and Smt. Minto- Jethani of deceased Seema. We find it just and appropriate to modify/alter sentence of life imprisonment awarded against all the four appellants to the period of 10 years rigorous imprisonment each for Samar Bahadur Singh (father-in-law) and Smt. Vidya Devi (mother-in-law) and further 7 years rigorous imprisonment each for Trivendra Kumar Singh (jeth) and Smt. Minto (Jethani), as that would meet the ends of justice.

48. Rest of the sentence imposed by the trial court on all the appellants for offences under Section 498A IPC and Section 4 Dowry Prohibition Act is justified and is proportionate to the offence committed in the wake of facts and circumstances of this case, as such requires no interference by us. Accordingly, the sentencing part of the impugned judgment stands modified to the extent aforesaid.

49. In view of above churning of the facts and circumstances and evidence on record, the present appeal is liable to be allowed partly on point of quantum of sentence only i.e., confined to (Section 304B IPC), while maintaining the conviction and sentence of the present appellants passed by the trial court for charges under Section 498A IPC and under Section 4 of the Dowry Prohibition Act, 1961. Accordingly, this appeal is **allowed partly** in the terms aforesaid.

50. All the aforesaid sentences to run concurrently.

51. It is obvious that the imprisonment part of sentence has been suffered by Samar Bahadur Singh, however, sentence of fine, as imposed by the trial court, if not deposited, shall be dealt with in accordance with law. However it is directed that the period of detention suffered by Samar Bahadur Singh which is found to be exceeding 10 years period in jail, then the sentence of fine shall be liable to be adjusted in proportion to the period exceeding 10 years incarceration. If it is found that Samar Bahadur Singh has suffered entire sentence imposed upon him then he shall be set free forthwith if not wanted in connection with any other case. Rest of the appellants Smt. Vidya Devi (mother-in-law), Trivendra Kumar Singh (Jeth), Smt. Minto (Jethani) are on bail. Their personal bonds are cancelled and sureties are discharged. They shall be taken into custody forthwith to serve out the remaining part of their respective sentences.

52. Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

(2016) 9 ILRA 1584
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 6502 Of 2003

Sanjay Thapa @ Dinesh Thapa ...Appellant
Versus
State Of U.P. ...Respondent

Counsel for the Appellant:
Sri Vijayendra Kumar, Sri Ashok Nath Tripathi, Sri Gaurav Kakkar, Sri Mohd. Afzal, Sri Pankaj Kumar Tyagi, Sri Rajeev Sisodia, Sri Vikas Srivastava

Counsel for the Respondent:
Learned A.G.A.

Headnotes:
Indian Penal Code, 1860 — Sections 302/34, 307/34, 201 — Common intention — Murder and attempt to murder — Conviction upheld
Where the accused persons jointly assaulted the complainant party with deadly weapons (sword and country-made pistol), resulting in death of one person and injuries to another, the prosecution case was found reliable on the basis of consistent testimony of injured eyewitness and corroborative medical evidence.

Minor discrepancies in testimony do not affect the core prosecution case when ocular evidence inspires confidence and is supported by medical evidence.

Absence of specific motive against deceased does not weaken prosecution case when direct eyewitness account establishes participation of accused and common intention under Section 34 IPC.

Recovery of dead body from canal side does not create doubt when Investigating Officer explained that villagers had taken out the body from canal prior to arrival of police.

Conviction under Sections 302/34, 307/34 and 201 IPC held justified.
Appeal dismissed.

Procedure:
Appeal against judgment and order dated **04.12.2003** passed by **Additional Sessions Judge, Court No.6, Bijnor** in **Sessions Trial No. 423 of 2000**, arising out of **Case Crime No. 770 of 1999**, Police Station **Najibabad**, District **Bijnor**, whereby the appellant was convicted under Sections **302/34, 307/34 and 201 IPC** and sentenced to:
Life imprisonment with fine under Section 302/34 IPC

Five years RI under Section 307/34 IPC
One year RI under Section 201 IPC
Sentences to run concurrently

Issues:
Whether prosecution proved guilt of the appellant beyond reasonable doubt?
Whether conviction with aid of Section 34 IPC was legally justified?
Whether absence of specific motive against deceased weakens prosecution case?
Whether discrepancies regarding place of recovery of dead body create doubt about prosecution story?
Whether testimony of injured eyewitness supported by medical evidence is sufficient for sustaining conviction?

Citation:
Relied on principle relating to:
Common intention — Section 34 IPC
Evidentiary value of injured eyewitness
Minor discrepancies not fatal to prosecution case

Conclusion:
The High Court held that testimony of injured eyewitness was reliable and duly corroborated by medical evidence and surrounding circumstances.
Participation of the appellant along with co-accused established existence of **common intention**.
Conviction recorded by trial court under Sections **302/34, 307/34 and 201 IPC** found proper and justified.
Appeal dismissed.
Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

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

1. The aforesaid criminal appeal has been preferred by appellant Sanjay Thapa @ Dinesh Thapa against the judgment and order of conviction dated 04.12.2003 passed by the Additional Sessions Judge, Court No.6, Bijnor in Sessions Trial No.423 of 2000 arising out of Case Crime No.770 of 1999 under sections 302/34, 307/34 and 201 IPC, Police Station Najibabad, District Bijnor, whereby he has been sentenced to life imprisonment under section 302 read with Section 34 IPC coupled with fine Rs. 5,000/-, in case of default, additional imprisonment for one year. Further, five years rigorous imprisonment under section 307 read with Section 34 IPC coupled with fine Rs. 2,000/-, default in payment of fine stipulates six months' additional imprisonment and one year rigorous imprisonment under section 201 I.P.C. All sentences to run concurrently.

2. We have heard Smt. Archana Tyagi, learned counsel for the appellant and AGA Shri Saghir Ahmad assisted by Sri J.K. Upadhyay, Sri Hasan Abidi brief holders for the State and perused the records.

3. The prosecution story as unfolded in the first information report appears to be; that the first informant Vijay Singh Negi son of late Chandan Singh Negi resident of Devi Marg, Kotdwar, District Pauri, lodged written report at Police Station Najibabad, Bijnor on 22.10.1999 at 11.20 A.M. against the two accused persons Kulwant Singh @ Kattha and Sanjay Thapa @ Dinesh Thapa to the effect that first informant was going to attend court's proceeding at 10.20 a.m. in the court of Additional Chief Judicial

Magistrate, Nagina by his Jeep No. U.P. 21A-6899. He was being accompanied by his friends Abhay Tripathi and Surendra Singh. He stopped his Jeep 3 km ahead of Nazibabad on Kotwali road in village Shravanpur near temple and was checking radiator, two persons Kulwant Singh @ Kattha and his friend Sanjay Thapa riding TVS Suzuki motor cycle, appeared on the scene of occurrence with whom first informant was acquainted on account of landed property dispute and they tried to give sword blow on his head with intention kill him. The first informant tried to ward off attack/blow by raising his hands as a result of which he sustained injuries on thumb of his right hand and on left side head. In order to save himself, he ran away towards Najibabad and his friend Surendra also ran away with him. But his companion Abhay Tripathi was killed by giving sword blow besides causing fire arm injuries by country made pistol. Thereafter, accused persons took away Jeep of first informant placed Abhay Tripathi inside the jeep took him near and threw him in the canal. When the first informant was running away he was threatened with life. Report be lodged and action be taken. This written report is Ext. Ka-1.

4. The contents of this written report were taken down in Check FIR on 22.10.1999 at 11.20 A.M. at Police Station Najibabad at Case Crime No.770 of 1999 under sections 302, 201, 307, 427, 506 I.P.C. Check FIR is Ext. Ka-4. On the basis of entry made in Check FIR, a case was registered against accused persons under aforesaid sections of I.P.C. in the relevant General Diary, rapat no. 29 on 22.10.1999 at Crime No.770 of 1999, at the same Police Station, copy whereof is Ext. Ka-5.

5. Thereafter investigation of the case took place and injured first informant Vijay Singh Negi was sent for medical examination at Primary Health Centre Najibabad, Bijnor, where he was medically examined by Dr. Vinod Kumar at 12.50 P.M. same day who found following injuries on his persons:

1. Incised wound 8.0 x 0.5 cm bone deep on left side of skull, 8.5 cm above from left ear. Margins are clear cut. Fresh blood present. Colour is reddish.

2. Incised wound on palmar aspect of right thumb 4.5 cm x 1.0 cm x 0.3 cm deep, 10.5 cm distal from right wrist joint. Margins are clear cut, fresh blood present. Colour is reddish.

3. Complaint of pain on left side of chest posteriorly in scapula region.

In the opinion of doctor, injuries no. 1 and 2 were caused by some sharp object and simple in nature. Duration is about 1-2 hours. No opinion was given in respect of injury no.3.

5A. After receipt of information, the police arrived on the spot and also recovered dead body of deceased Abhay Tripathi from the southern side of canal and after appointing inquest witnesses, prepared inquest report of Abhay Tripathi. It commenced at 14.45 hours and completed at 15.35 hours. Inquest report is Ext. Ka-6.

6. In the opinion of inquest witnesses and Investigating Officer, it was found appropriate to send dead body for post mortem examination in order to ascertain real cause of death. Therefore, necessary formalities were completed and relevant papers were prepared and dead body was sent for post mortem examination at mortuary Bijnor where post mortem examination on dead body of Abhay Tripathi was

conducted by Dr. Ghanshyam Singh on 23.10.1999 at 1.00 A.M. who noted following ante mortem injuries:

1. Multiple fire arm wounds of entrance (pellets) each of size 0.5 cm x 0.5 cm x muscle to bone deep in an area of 17 cm x 12 cm on left side of face and neck, margins are inverted and blackish approximately wounds are 20.

2. Fire arm wound of entrance of size 5 cm x 5 cm x cavity deep on left side of face just below left ear pinna and lower part of ear pinna is missing, wound is cavity deep and margins are inverted.

3. Incised wound 8 cm x 1.5 cm x bone deep on left side skull 5.0 cm above left ear.

4. Incised wound of size 6 cm x 2 cm x bone deep on lower and lateral aspect of left wrist. Left reddish bone found fractured lower part.

5. Incised wound of size 4 cm x 1 cm x bone deep on dorsam of left hand middle part.

6. Linear abrasion of size 8 cm on medial part of right cubital fossa.

7. Abrasion of size 2 cm on lateral border of right wrist.

8. Contusion 5 cm in diameter on lateral aspect of left arm middle.

9. Incised wound of size 8 cm x 1 cm x bone deep on right side face, placed horizontally at right maxillary prominences.

Cause of death was stated to be shock and hemorrhage as a result of ante mortem injuries. Duration was said to be one day. This post mortem examination report is Ext. Ka-3.

7. It is further reflected from records that the Investigating Officer also recorded statement of various witnesses and prepared recovery memo of blood stained and simple soil from the place of occurrence which is Ext. Ka- 13. He also prepared recovery memo of blood stained clothes of informant Vijay Singh Negi which is Ext. Ka-15. Report from Vidhi Vigyan Prayogshala dated 24.1.2000 is Ext. Ka. 17. The investigating Officer also prepared site plan of the place from where dead body of Abhay Tripathi was recovered near canal which is Ext. Ka-11. The Investigating Officer also prepared site plan of place of incident which is Ext. Ka-12. The Investigating Officer after completing the investigation, filed charge sheet against accused persons Kulwant Singh @ Kattha and present appellant Sanjay Thapa @ Dinesh Thapa in abscondence, which is Ext. Ka. 14.

8. Thereafter, the case of the appellant was committed to the court of Session from where the case was made over to the court of Additional Sessions Judge, Court No. 6 Bijnor, for trial and disposal. The learned Trial Judge, after hearing the appellant on the point of charge, found, prima facie, ground

existing for framing charges under sections 302/34, 201, 307/34 and 427/34 I.P.C. Charges were readover and explained to the accused who denied the charges and opted for trial.

9. The prosecution was asked to adduce its testimony for proving guilt. The prosecution produced in all 10 witnesses, brief description of whom is herein below:-

Vijay Singh Negi PW-1 is first informant and injured eye witness. Surendra Singh PW-2 is also witness of fact and he is stated to be eye witness of the incident. Dr. Vinok Kumar PW-3 has medically examined the injured informant Vijay Singh. Dr. Ghanshyam Singh PW-4 has conducted post mortem examination on the dead body of Abhay Tripathi. Constable Sant Ram PW-5 took the dead body to mortuary at Bijnor. Constable Yashpal Singh PW-6 has prepared Check FIR Ext. Ka-4 and relevant G.D. registering the case against accused-appellant Ext. Ka-5. Sunderlal Kanaujiya PW-7, Investigating Officer has detailed various steps which he took during investigation and later on it was taken over by another Investigating Officer Kiran Pal Singh PW-8 who has also detailed about investigation conducted by him on certain aspects of the case. Thereafter investigation was handed over to R.P. Sharma PW-9 who filed charge sheet against accused Kulwant Singh @ Kattha and present appellant Sanjay Thapa @ Dinesh Thapa which is Ext. Ka-14 on record. Shri Prempal Singh PW-10 took into his possession blood stained clothes of Vijay Singh Negi and prepared recovery memo of such clothes in his hand writing and has proved it as Ext. Ka-15.

10. Thereafter the evidence for prosecution was closed and the statement of accused appellant Sanjay Thapa @ Dinesh Thapa was recorded under Section 313 Cr.P.C., wherein he stated that another co-accused Kulwant Singh @ Kattha was his friend and Kulwant Singh @ Kattha was having dispute regarding some property with the first informant Vijay Singh Negi due to which, he has been falsely implicated in this case. He was not present on the spot. No evidence whatsoever has been led by the defence.

11. The trial court, after hearing both the sides on merit, recorded findings of conviction against the appellant under aforesaid sections of I.P.C. imposed aforesaid sentence on him vide impugned judgment and order dated 04.12.2003.

12. Consequently this appeal.

13. It has been vehemently claimed by learned counsel for the appellant that presence of the appellant on the spot is doubtful. Neither the incident was caused by the appellant nor had he any motive to commit such crime. The appellant has admitted his friendship with Kulwant Singh @ Kattha. Since Kulwant Singh @ Kattha was having enmity with Vijay Singh Negi relating to some landed property, therefore, the name of appellant has been dragged in falsely by the first informant in this case. The presence of first informant is doubtful. His description in respect of the incident is self contradictory and also in contrast with testimony of so called other prosecution witnesses of fact. No injury whatsoever was caused on the person of first informant Vijay Singh Negi. The appellant had no apparent motive to commit the crime, at no point of time, he participated in the crime.

14. It is next contended that assuming it to be; some enmity was persisting between first informant and Kulwant Singh @ Kattha regarding some landed property then commission of crime against Abhay Tripathi is beyond any reason. Why Abhai Tripathi was killed by the appellant has not been explained by the prosecution. The appellant had no motive nor intention to commit offence and participate in such crime then his conviction by invoking help of section 34 I.P.C. is erroneous and misapplication of law. Injuries found on the person of Vijay Singh Negi were not caused by the appellant but it was caused by another person, which was his isolated act and nature of injuries as appearing after medical examination of injured Vijay Singh Negi (injury report-Ext. Ka-2) reveals that these injuries were simple in nature, therefore, conviction under sections 307/34 and 302/34 I.P.C. is not legally justified. The place of incident is most uncertain.

15. Learned counsel for the appellant has further added that the first informant's claim is that accused persons took away Abhay Tripathi (deceased) in Jeep (of informant) to the canal and threw away his dead body into the canal but dead body was recovered from southern side of canal, thus, there is no explanation as to how and when dead body was taken out of canal and placed on southern side of canal. Facts indicate that Abhay Tripathi was killed somewhere else by some unknown persons and his dead body was placed at southern side of canal and a cooked up story has been brought forward by the first informant on account of enmity with Kulwant Singh @ Kattha indirectly hitting at the appellant, for the reason that he happens to be friend of Kulwant Singh @ Kattha. The incident is not supported by independent witness. No active role whatsoever has been assigned to the appellant for causing any specific injury either upon the first informant or upon Abhay Tripathi (deceased). It is a case of blind murder.

16. While refuting aforesaid arguments, it has been submitted by the learned A.G.A. that it is well established that the appellant is named in the first information report. The occurrence took place in broad day light around 10.20 a.m. on 22.10.1999. The first information report was promptly lodged within one hour of the incident at 11.20 a.m. at Police Station Najibbad. Medical examination of the injured-first informant was conducted at 12.50 p.m. on 22.10.1999 i.e. to say soon after the incident, post mortem examination on the dead body of Abhay Tripathi was conducted by Dr. Ghanshyam Singh PW-4, on 23.10.1999 at 1.00 A.M.

17. Learned AGA has further added that the presence and participation of the appellant in the incident is proved by testimony of prosecution witnesses. How the dead body was carried over from the place of incident upto canal has also been substantiated by eye witnesses. After arrival of the police, inquest report was prepared. The inquest commenced at 14.45 hours and ended at 15.35 hours. In view of participation of the appellant in the crime, his conviction with the help of section 34 I.P.C. is wholly justified. The place of incident is certain and site plan has been proved by the Investigating Officer and place of recovery of dead body has also been proved by the concerned Investigating Officer.

18. We have considered above submissions.

19. The question involved in this appeal relates to fact whether the prosecution has been able to prove charges beyond reasonable doubt and whether the conviction recorded with the help of section 34 I.P.C. against appellant is erroneous and illegal and he has been falsely roped in, in this case?

20. After careful scrutiny of testimony of the prosecution witnesses on record and, particularly testimony of eyewitnesses PW-1 Vijay Singh Negi and PW-2 Surendra Singh respectively, it emerges out that both the eyewitnesses were going to attend proceedings of some case before court of Additional Chief Judicial Magistrate at Nagina, by Jeep No. U.P 21A-6899. They were also accompanied by the deceased Abhay Tripathi. As soon as, jeep reached 3 Kms. ahead of Najibabad at Village Shravanpur, near temple, then engine thereof got heated and it was stopped for checking its radiator.

21. The first informant was checking radiator, it was around 10.20 A.M. on 22.10.1999 in the meanwhile a TVS motorcycle being driven by Kulwant Singh @ Kattha with pillion rider Sanjay Thapa @ Dinesh Thapa, stopped near first informant. Kulwant Singh @ Kattha was possessing sword and Sanjay Thapa @ Dinesh Thapa was possessing 12 bore countrymade pistol. Kulwant Singh @ Kattha gave sward blows with intention to kill first informant Vijay Singh Negi and in order to word off blow, the first informant raised his right hand, due to which, he sustained injury on his hand and head. In the meanwhile, both the first informant and Surendra Singh extricated themselves from the assailants and ran towards Najibabad, but both the accused Kulwant Singh @ Kattha and Sanjay Thapa @ Dinesh Thapa caught Abhay Tripathi and began to assault him. Sanjay Thapa @ Dinesh Thapa fired on him, whereas, Kulwant Singh @ Kattha gave sword blows on him. The first informant and his friend Surendra Singh raised alarm from the short distance, whereupon, the accused person put Abhay Tripathi inside Jeep which was driven by Kulwant Singh @ Kattha and motorcycle was driven by Sanjaya Thapa @ Dinesh Thapa. Abhay Tripathi expired. The accused persons took the dead body in the jeep and threw it away into canal. This piece of specific testimony as appearing in the testimony of both the witnesses of fact PW-1 and PW-2 corroborates material contents of first information report.

22. The motive attributed for committing the offence has been stated to be dispute on account of landed property and pending litigation regarding the same. In this context, Vijay Singh Negi PW-1 has stated in his examination in chief that he had purchased 12 acres of land in the name of his mother Bhagirathi at village Aurangjebpursali nearly 10-11 years ago within periphery of police station Nageena Dehat. The consolidation proceedings qua the land took place and possession of the land was handed over to the first informant. Accused Kulwant Singh @ Kattha and his family members tried forcibly to take possession of this land and litigation regarding the same was pending in the court of Munsif Nageena, on criminal and civil side.

23. Thus so far as the motive part of the incident is concerned, obviously, the first information report entails point of enmity between first informant and Kulwant Singh @ Kattha. In testimony of PW-1 Vijay Singh Negi, details of landed property and litigation pending between the accused Kulwant Singh @ Kattha and first informant has been testified to the satisfaction of the trial court. In this regard, we may record that finding on the point of motive is based on material on record.

24. Contention has been raised by the appellant's counsel at this stage that assuming it to be that enmity between first informant and Kulwant Singh @ Kattha, was persisting in respect of some landed property but there was no occasion to cause death of Abhay Tripathi. The death of Abhay Tripathi would have been caused somewhere else by some unknown person than the present appellant Sanjay Thapa @ Dinesh Thapa.

25. Further contention raised relates to specific point that appellant Sanjay Thapa @ Dinesh Thapa has no sufficient motive either to participate in the crime or to cause death of Abhay Tripathi because he was not having any specific motive to commit crime. Appellant Sanjay Thapa @ Dinesh Thapa had no enmity with the deceased Abhay Tripathi. Both the eye witnesses have given vivid and lively description of the incident and both of them have been cross examined and their cross examination corroborated the version of the prosecution as described in the first information report. The point of enmity on account of landed property between accused Kulwant Singh @ Kattha and the first informant Vijay Singh Negi has been satisfactory established. It is correct that Surendra Singh and Abhay Tripathi, both colleagues of the first informant who accompanied him at the relevant point of time, were unconcerned with such litigation. It is gathered from their testimony that they being friend, accompanied the first informant for the time being. Both the eye witnesses have identified Sanjay Thapa @ Dinesh Thapa and they have stated that they knew him as he used to come along with Kulwant Singh @ Kattha during the proceedings in the court at Nageena.

26. Regarding participation of the present appellant in the incident, it has emerged in cross examination of PW-1 on page 18 of the paper book that two shots were fired on the spot. No shot was fired on the first informant. Kulwant Singh @ Kattha assaulted him with sword. The appellant Sanjay Thapa @ Dinesh Thapa did not assault the first informant. It has been deposed that motor cycle was driven by Kulwant Singh @ Kattha and he had kept his sword into sheathe which was tightened with waist of Kulwant Singh @ Kattha. First informant was not under impression that Kulwant Singh @ Kattha will cause any assault on him, therefore, he did not run away from the scene. It has been stated on page 19 of the paper book that after sword blow was given to him, he did not fell. Surendra Singh also ran away with him towards Najibabad for about 15-20 steps and raised alarm. Then the assailants did not chase them instead they surrounded Abhay Tripathi and gave him several blows. They witnessed the incident from a distance of 15 steps. The entire incident lasted for about 2-3 minutes. They remained at the place of occurrence for about one minute or two and thereafter they went towards Najibabad by three wheeler. They have also stated that they reached at the police station within one hour. Before reaching police station, Vijay Singh Negi got his report written by Rajesh Rawat, scribe of the report, who met Vijay Singh Negi just before the police station. The report was written within 5 to 10 minutes. Only the first informant and Surendra Singh went to the police station, the scribe of the report did not accompany them and they remained inside the police station for about one hour.

27. Record reveals that after the first information was lodged, the injured first informant was taken to Primary Health Centre, Najibabad for medical examination wherein he was medically examined by Dr. Vinod Kumar PW-3 on 22.10.1999 at 12.50 P.M. Perusal of this injury report shows that Injury no.1 is incised wound 8.0 x 0.5 cm bone deep on left side of skull, 8.5 cm above from left ear. Margins are clear cut. Fresh blood present. Colour is reddish. Injury no.2 is incised wound on

palmar aspect of right thumb 4.5 cm x 1.0 cm x 0.3 cm deep, 10.5 cm distal from right wrist joint. Margins are clear cut, fresh blood present. Colour is reddish. Injury no.3 is complaint of pain on left side of chest posteriorly in scapula region.

28. In the opinion of doctor, injuries no. 1 and 2 were caused by some sharp edged object and simple in nature. Duration is about 1-2 hours. No opinion was given in respect of injury no.3.

29. In this view of the matter, we have before us testimony of doctor witness (PW-3) wherein he has stated that injury nos. 1 and 2 may be caused by some sharp edged weapon like sword. This injury report is Ext. Ka-2 on record. Dr. Vinod Kumar PW-3 has specifically stated on page 34 of the paper book in his examination in chief that these injuries could have caused at 10.20 on 22.10.1999 through instrumentality of sword. He has stated in his cross examination that the injured was taken to hospital by constable. He has also stated that in case there is any fall headlong on some incised weapon then these injuries can be caused. No specific challenge has been made to the point that these injuries could not have been caused around 10.20 A.M. on 22.10.1999. Timing and duration of these injuries have synchronized with the time of incident. Fresh blood was found present. Therefore, presence of at least PW-1 on the spot cannot be doubted. Two injuries one on his head and the other on his right hand thumb virtually corroborate his ocular testimony that he was given sword blow and in order to ward off the blow, he raised his right hand.

30. It is indisputable that specific testimony of doctor regarding date and time of injury being caused to Vijay Singh Negi PW-1 has not been put to challenge by the defence. In so far as above contention raised on point of absence of motive on the part of the appellant Sanjay Thapa @ Dinesh Thapa to commit any crime against Abhay Tripathi is concerned, the same loses relevance in view of eyewitness account of incident given by PW-1 and PW-2. Surendra Singh PW-2 has not shown to be inimical towards appellant and he is not interested in availing conviction of the present appellant. At this stage, motive is relegated to the background of the case and eye witness account of the incident is consistently proved, and so the incident in its entirety also stands proved, therefore, factum of absence of any motive for committing murder of Abhay Tripathi gives no advantage to the appellant.

31. We have also been persuaded to believe that the conviction of the appellant by aid of section 302/34 and 307/34 IPC is not sustainable in the eye of law. At this stage, we may observe that the commission of crime as per testimony of PW-1 culminated into death of Abhay Tripathi and injuries have been caused to Vijay Singh Negi PW-1, therefore, commission of crime and its outcome apparently establishes joint participation of both the accused on the spot and both appear to have been showing common intention to commit crime. It may even be taken to have developed on the spot.

32. It is obvious that Sanjay Thapa @ Dinesh Thapa was possessing country made pistol and he used that weapon for commission of the crime and other co-accused Kulwant Singh @ Kattha, who was possessing sword, gave sword blow to the injured Vijay Singh Negi and deceased Abhay Tripathi. Therefore, the commission of crime as a whole and entire acts reflect sharing of common intention between the accused persons. They had every intent to open assault on the complainant side which may cause extreme damage to them. The entire act, as per testimony of the prosecution witnesses on record,

is established reasonably to have been done in furtherance of common intention of both the accused persons.

33. At this stage, it would be relevant to have reference to Section 34 of the Indian Penal Code which is extracted herein below:

"34. Acts done by several persons in furtherance of common intention. *-When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

34. Thus, it is obvious that act of the appellant was in furtherance of common intention of both the accused and as per mandate as contained in section 34 I.P.C., the persons participating in the commission of crime shall be liable for outcome of consequence of crime as if act was done by him alone.

35. At this juncture, we may scrutinize the post mortem examination report. Post mortem examination on the cadaver of deceased Abhay Tripathi was conducted by Dr. Ghanshyam Singh on 23.10.1999 at 1.00 a.m. As many as 9 ante mortem injuries have been noted on external examination. The post mortem examination report has been proved by Dr. Ghanshyam Singh PW-4 as Ext. Ka-3. Duration between death and timing of post mortem examination was stated to be about one day. Cause of death was stated to be shock and hemorrhage as a result of ante mortem injuries.

36. On being cross examined, PW-4 Ghanshyam Singh has testified that injury nos. 1 and 2 could have been caused from a distance of 1 to 2 ft and the same can be caused by the two fires. Except as above, no further cross examination has been done by the defence from doctor witness PW-4, whereas, it has been specifically stated in the examination in chief on page 37 of the paper book in the last line of paragraph that death could have been caused possibly at 10.20 a.m. on 22.10.1999. Therefore, factum of death of the deceased Abhay Tripathi at the relevant point of time described in the FIR and in the testimony of prosecution witnesses of fact stands corroborated in this case.

37. The argument on the point that these injuries could not have been caused in such way by headlong fall on sharp edged weapon also does not hold ground, evidence for no such factual aspect exists nor does any circumstance support it. Perusal of post mortem examination report Ext. Ka-3 reveals two gun shot injuries, whereas, injury no.3 to injury no. 9 are incised wounds of varying sizes. The testimony of doctor witness PW-4 has not been put to challenge even in the least by the defence, therefore, causing of injuries on the deceased Abhay Tripathi by both the accused persons stands proved even by medical testimony on record.

38. We have also been persuaded to believe that the first information report is ante timed and all the proceedings undertaken by the Investigating Officer were mechanically completed at the police station itself. However, we hardly find any force in the aforesaid contention, for several reasons. In so far as point of FIR being ante time is concerned, we have before us testimony of Yashpal Singh PW-6 who has proved presentation of written report by the first informant Vijay Singh Negi and contents of

this written report were taken down by this witness PW-6 in the concerned check FIR no. 330 of 1999 which check FIR has been proved as Ext. Ka-4. On the basis of such entries, the case was registered at serial no.29 of the concerned G.D. dated 22.10.1999 at 11.20 A.M. at Police Station Najibabad which G.D. Entry has been proved as Ext. Ka-5. There is nothing adverse emerging from cross examination of PW-6 which may render his testimony doubtful or unreliable. Therefore, contention regarding first information report being ante timed remains a suggestion only. Moreover filing of the written report has also been proved by the cogent testimony of PW- 1 Vijay Singh Negi.

39. The various steps taken by the Investigating Officer Sunder Lal Kanaujiya P.W. 7 has been proved. He has proved preparation of inquest report as Ext. Ka-6 which commenced at 2.45 P.M. and completed at 3.35 P.M. Similarly, the Investigating Officer also collected simple and blood stained soil from the place of occurrence on 22.10.1999 itself and prepared memo of the same as Ext. Ka-13. Therefore, the place of occurrence has also been proved and things have taken itself in due sequence and it cannot be said that sequence of incident was tried to be adjusted in any manner by the concerned police personnel. Moreover, the Investigating Officer has also proved site plan of place of occurrence as Ext. Ka-12.

40. The contention has been raised by the appellant's counsel that the dead body of Abhay Tripathi was kept on the southern side of canal, whereas, as per testimony of PW-1 and PW-2, the accused persons threw away the dead body into canal. In this context, we may take recourse to testimony of another Investigating Officer Sunderlal Kanaujiya PW-7, he categorically stated in his cross examination on page 44 of the paper book that the canal was full of water and the dead body was taken out by the villagers prior to his arrival on the spot, where the dead body of Abhay Tripathi was placed by the side of canal. We notice that this piece of testimony has not been put to any challenge by the defence which specific testimony remains intact and unimpeachable under prevailing circumstances.

41. The Investigating Officer Sunderlal Kanaujiya PW-7 has also prepared site plan of the place of recovery of dead body by the side of canal which place has been marked by word 'B' has been shown to be placed moored in water and place 'A' marked in the map shows the place where the dead body was placed after it was taken out of canal. It is obvious that PW-1 and PW-2 did not pursue the assailants/accused persons when they drew away jeep No. U.P. 21-A-6899 wherein they had placed the dead body of Abhay Tripathi, but it is very much obvious that the first information report contains details of fact that after commission of crime, accused persons placed Abhay Tripathi in side the jeep and thereafter threw away his body into canal and this specific description of first information report has been proved by both the witnesses in their ocular testimony as PW-1 and PW-2. This particular piece of testimony of the prosecution witnesses that the dead body was taken by the jeep upto the canal has not been put to any serious challenge by the defence.

41A. We also could not come across any such piece of testimony or any adverse circumstance which may throw any doubt on otherwise innocuous, clinching and consistent testimony of two witnesses of fact PW-1 and PW-2 respectively. It is correct that certain minor discrepancies in the statement of the prosecution witnesses have emerged but point for consideration is whether these discrepancies occurred substantially and hit at the root of the prosecution story or that they are trivial in

nature which have capacity to take away from the point of commission of the offence. The minor discrepancies appearing in the testimony of prosecution witnesses do not extend any advantage to the appellant. It is cardinal principle of criminal law that the testimony of prosecution witnesses, if found to be clinching and upto the mark and proves consistently the case of the prosecution substantially and remains unimpeachable, which by careful scrutiny is found to be carrying high probity value then such testimony would inspire confidence for establishing guilt of the accused.

42. By perusal of the statement of the accused Sanjay Thapa @ Dinesh Thapa recorded under section 313 Cr.P.C., we do not come across any conspicuous reason explained as a factor for false implication of the appellant except one that he being friend Kulwant Singh @ Kattha, therefore, he was involved in this case. But the point based on reason guides us to observe here that the first informant side has no extraneous reason to rope in, the appellant deliberately in this case and sparing the real culprit. He has merely stated that he was not present on the spot at the time of occurrence but the point is that he could not describe about his presence elsewhere. Also we could not gather from facts and circumstances the claim of appellant that he was not present at the time of occurrence on the spot. Therefore, the plea of alibi taken by the appellant is of no advantage to him.

43. In view of above discussion, the prosecution has been able to establish reasonably guilt of the accused under charges brought against him and the prosecution has proved its case beyond reasonable doubt.

44. Learned trial court while appraising the evidence on record and marshaling facts considered every aspect of the case and has recorded just finding of conviction against the appellant and has imposed proper sentence under section 302/34 and 307/34 against him which warrants no interference by us in instant appeal. We uphold the judgment and order of conviction dated 04.12.2003 passed by the Additional Sessions Judge, Court No.6, Bijnor in Sessions Trial No.423 of 2000 arising out of Case Crime No.770 of 1999 under section 302/34, 307/34 and 201 IPC, Police Station Najibabad, District Bijnor.

45. In the result, the instant appeal being devoid of merit is dismissed. In this case, appellant Sanjay Thapa @ Dinesh Thapa is in jail. He shall serve out his remaining sentence imposed upon him by the trial court.

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

(2016) 9 ILRA 1596
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 18174 Of 2002

Union Of India & Ors. **...Petitioners**
Versus
Shyam Sunder Sharma **...Respondent**

Counsel for the Petitioners:
Prashant Mathur, Umesh Narain Sharma

Counsel for the Respondent:
S.C., Ali Hasan, R.K. Nigam, R.K. Singh

HEADNOTES:
Service Law — Pay Protection — Absorption of casual employee from Group-C to Group-D — Whether pay of higher post can be protected after regularization in lower cadre — Tribunal directing protection of pay in Group-C scale — Validity — Held, not sustainable — Judgment in *Ram Kumar Vs. Union of India* not applicable — Supreme Court in *General Manager, Northern Railway Vs. Jageshwar* clarified that casual employee regularized in Group-D cannot claim pay protection of Group-C merely because he worked temporarily on higher post — Pay fixation permissible prospectively but excess payment already made not recoverable in absence of fraud or misrepresentation — Writ petition partly allowed.

PROCEDURE:
Petition under Article 226 of the Constitution of India filed against judgment and order dated 13.10.1998 passed by Central Administrative Tribunal, Allahabad in O.A. No. 1843 of 1998 whereby Tribunal directed protection of pay of respondent in Group-C scale after his regularization in Group-D post.

ISSUE:
Whether an employee absorbed and regularized in **Group-D** is entitled to **protection of pay of Group-C post** on the ground that he had earlier worked on Group-C post for certain period.

NOTICE:
Court considered the applicability of judgments in *Ram Kumar Vs. Union of India* and *Union of India Vs. Motilal* in light of later judgment of Supreme Court in *General Manager, Northern Railway Vs. Jageshwar* (Civil Appeal No. 6413 of 2002 decided on 01.04.2009).

ACTS:
Article 226, Constitution of India
CITATION:
Ram Kumar and others Vs. Union of India and others, 1987 SCALE (2) 1192

Union of India Vs. Motilal, (1996) 7 SCC 481
General Manager, Northern Railway and others Vs. Jageshwar and others, Civil Appeal No. 6413 of 2002, decided on 01.04.2009 (SC)

CONCLUSION:
Direction of Tribunal granting protection of pay of respondent in **Group-C scale (Rs. 950-1500)** despite regularization in **Group-D** held unsustainable and set aside. However, excess amount already paid shall **not be recovered** as there was **no fraud or misrepresentation** on part of employee. Petitioners permitted to refix pay prospectively.
Writ petition partly allowed. No costs.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Prashant Mathur, learned counsel for the petitioners and Sri Ali Hasan, Advocate for respondent-Shyam Sunder Sharma.

2. This writ petition under Article 226 of the Constitution of India has come up against judgment and order dated 13.10.1998 passed by Central Administrative Tribunal, Allahabad (*hereinafter referred to as the "Tribunal"*) in Original Application No. 1843 of 1998, whereby referring to judgment of Supreme Court in **Ram Kumar and others Vs. Union of India and others, 1987 SCALE (2) 1192** Tribunal has directed petitioners to protect pay of respondent-Shyam Sunder Sharma in Group-C which he was getting before his absorption and regularization in Group-D.

3. Sri Prashant Mathur, learned counsel for petitioners, has objected to this part of judgment whereby it has directed petitioners to protect pay of respondent-Shyam Sunder Sharma in pay scale of Rs. 950-1500 which was applicable to Group-C though respondent-Shyam Sunder Sharma was screened and regularized in Group-D. It is submitted that judgment in **Ram Kumar (supra**) has no application to the facts this case and on the contrary in **General Manager, Northern Railway and others Vs. Jageshwar and others (Civil Appeal No. 6413 of 2002),** decided on 01.04.2009 Supreme Court has clearly said, when a casual employee is regularized in Group-D, mere fact that for some time he has worked on a post in Group-C, his pay cannot be protected in higher scale for the reason that in Railway, Group-C post are liable to be filled in only by promotion. Therein Tribunal has followed Supreme Court's judgment in **Union of India Vs. Motilal, 1996(7) SCC 481** but Court in its judgment dated 01.04.2009 in **General Manager, Northern Railway and others Vs. Jageshwar (supra)** said that judgment in Union of India Vs. Motilal (supra) has no application. In paras 3, 4 and 5 Court held:

"3. Motilal (supra) has no application. In that case, respondents were directly appointed as casual mates in Class III, though the post of made was an exclusive promotion post. They were regularized in a lower post. The Tribunal directed that they should be regularized as 'mates'.This Court held that respondents were not entitled to be regularized in Group III posts. But

having regard to their long service of 22 to 25 years, this Court in exercise of powers under Article 142 left their regularization as mates undisturbed making it clear that the direction should not be treated as precedent.

4. ***This Court in Motilal case (supra) did not lay down any proposition that when an employee is absorbed in a different organization, his previous pay should be protected. Absorption in Railways was not in pursuance of any legal right****. To avoid hardship to the employees of the construction organization on humanitarian grounds, the Railways chose to consider the surplus labour of that organization for absorption after screening them.* ***When being so screened and absorbed, an employee cannot counted that he should be absorbed in a post equivalent to a post he was holding in the previous organization nor could the Tribunal or High Court direct that his pay should be protected.***

5. In view of the above, the appeal is allowed, the orders of the High Court and Tribunal are set aside and as a consequence the original application is dismissed."

(emphasis added)

4. When confronted, Sri Ali Hasan, learned counsel appearing for respondent, could not dispute this fact and also could not show anything from judgment in **Ram Kumar (supra**) that said judgment was applicable in the case in hand. In these facts and circumstances, direction of Tribunal to petitioners to protect pay of respondent in pay scale of Group-C till he gets promotion in Group-C cannot be sustained and to this extent impugned judgment dated 13.10.1998 is hereby set aside.

5. However, we may also providethat whatever amount already paid to respondent shall not be recovered by petitioners under this order but they will be at liberty for re-fixation of pay and other benefits which shall be applicable prospectively. We reiterate that excess amount, if any, already paid to respondent shall not be recovered for the reason that there is no fraud or misrepresentation on his part and it would be unjust now to allow petitioners to recover amount already paid after more than one and half decades.

6. Subject to aforesaid clarification and direction the writ petition is partly allowed.

7. No costs.

(2016) 9 ILRA 1599
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.09.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Misc. Bench No.- 18314 Of 2016

Basanti & Anr. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioners:
Ran Vijay Singh

Counsel for Respondents:
Govt. Advocate

PROCEDURE:
Petition under Article 226 of the Constitution of India was filed seeking issuance of a writ of **certiorari** for quashing FIR/Case Crime No.118 of 2016 under Sections 363 and 366 IPC, Police Station Bangarmau, District Unnao.
During pendency, interim protection was granted and further investigation was directed by the Superintendent of Police. A short counter affidavit was filed indicating that in further investigation, no offence was made out. The prosecutrix's statements under Sections 161 and 164 Cr.P.C., along with medical evidence, were placed on record.

ISSUES:
Whether ingredients of offences under Sections 363 and 366 IPC are made out when the prosecutrix voluntarily leaves her parental home and marries the accused.
Whether criminal proceedings can be quashed under Article 226/Section 482 Cr.P.C. when the material on record clearly negates the allegations in the FIR.
Whether continuation of prosecution in such circumstances amounts to abuse of process of law.

CITATIONS:
Shaheen Parveen vs. State of U.P. & Ors., W.P. No.3519 (M/B) of 2015
S. Varadarajan vs. State of Madras, (1965) 1 SCR 243
Rajiv Thapar vs. Madan Lal Kapoor, (2013) 3 SCC 330
State of Haryana vs. Bhajan Lal, AIR 1992 SC 604

Headnotes:
The prosecutrix was found to be **major (19 years)** as per medical evidence and consistently stated in her statements under Section 164 Cr.P.C. that she had **voluntarily left her home and married petitioner no.2**.
Essential ingredients of Sections 363 and 366 IPC, namely kidnapping, inducement, or coercion, were **not satisfied**.

Where a girl of the age of discretion voluntarily accompanies the accused without inducement or force, **no offence of kidnapping is made out**, even if parental consent is absent.
The material on record was of **sterling and unimpeachable quality**, clearly displacing the allegations in the FIR, satisfying the test laid down in *Rajiv Thapar*.
The case squarely falls within the categories laid down in *Bhajan Lal*, particularly where allegations do not disclose any offence and proceedings are **maliciously instituted due to personal grudge**.
Continuation of proceedings would be an **exercise in futility** and an **abuse of process of law**, especially when the prosecutrix herself does not support the prosecution case.
Accordingly, the writ petition was **allowed**, and FIR/Case Crime No.118 of 2016 along with all consequential proceedings were **quashed**.

(Delivered by Hon'ble Ravindra Nath Mishra-II, J.)

1. This petition seeks issuance of a writ in the nature of certiorari quashing F.I.R./Case Crime No.118 of 2016, under Sections 363, 366 I.P.C., Police Station Bangarmau, District Unnao (Annexure No.1).

2. Short counter affidavit has been filed on behalf of the investigating agency in deference to order dated 8.8.2016. Order dated 8.8.2016 reads as under :-

"1. This petition seeks issuance of a writ in the nature of certiorari quashing Case Crime No.118/2016 under Sections 363, 366 I.P.C., P.S.Bangarmau, district Unnao (Annexure-1).

2. Learned counsel appearing for the petitioners has argued that petitioner No.1 willingly got married to petitioner No.2. The marriage has not been accepted by respondent No.4, therefore, the petitioners were being tormented. The petitioners approached this Court by way of filing Writ Petition No.9791(M/B) of 2016 Smt. Basanti and another versus State of U.P. and others to seek protection. Order in that regard has been placed on record as Annexure-3 dated 5.5.2016.

3. It has been pleaded that in abuse of process of the law and process of the Court, impugned proceedings have been initiated. In the course of investigation, petitioner No.1 has been found to be nineteen years as per her medical examination. In the statement given by petitioner No.1 under Section 164 CrPC (Annexure-5), it has been made evident that petitioner No.1 was not kidnapped; rather got married to the accused.

4. It has been pleaded by learned counsel for the petitioners that the case is squarely covered by judgment dated 23.7.2015, rendered by a Division Bench of this Court in Writ Petition No.3519(M/B) of 2015 Shaheen Parveen and another versus State of U.P. and others.

5. In Shaheen Parveen's case (supra), the following (relevant portion) has been held :

"6. Petitioner no.-2 is accused of committing an offence under Sections 363/366 of the Indian Penal Code.

7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any person from lawful guardianship shall be punished in terms of sentence provided in the provision.

8. "Kidnapping from lawful guardianship" has been defined under Section 361 of the Indian Penal Code. The provision when extracted reads as under:-

*"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 illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

9. Section 366 of the Indian Penal Code inheres that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with a sentence, as provided in the provision.

10. At the time of considering whether on admitting the allegations made in the F.I.R., offence has been committed or not, the ingredients of the offence are required to be considered, in context of the evidence collected during the course of investigation.

11. In the peculiar facts and circumstances of this case, the Court has minutely examined the facts that have emerged on investigation of the case.

14. The Investigating Agency is concluding that at the point in time when the victim left in the company of the accused, she was a few months less than 18 years, which is the relevant age mentioned in Section 361 of the Indian Penal Code, above extracted. Clearly, the Investigating Agency is taking a hypertechnical view of the issue. The other relevant facts and circumstances of the case are being ignored.

15. The issue whether the victim was kidnapped or abducted is required to be examined in context of the statement of the prosecutrix recorded under Section 164 Cr.P.C.

16. If the statement of the prosecutrix, above noted, is taken into account, it becomes evident that ingredients of the offence under Sections 363/366 of the Indian Penal Code in regard to coercion, kidnapping or abduction allegedly committed by Sarfaraj, are not satisfied. The

provisions of Section 363 of the Indian Penal Code are required to be considered in context of provisions of Section 361 of the Indian Penal Code. So as to satisfy the ingredients of Section 361 of the Indian Penal Code, it has to be established by the prosecuting agency that the accused/sarfaraj took or enticed the prosecutrix out of the keeping of the lawful guardian of the prosecutrix, without the consent of the guardian/respondent no. 4. In the case in hand, it is the case of the prosecutrix herself that she of her free will went with Sarfaraj, lived with him, wants to live with him and is expecting his child. Element of coercion and enticement by Sarfaraj is absent, although consent of the guardian had not been taken.

17. The writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused.

18. Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/ defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.

19. The facts that have emerged from the record make it evident that the impugned criminal proceedings have been initiated because mother of the Prosecutrix/victim (respondent no.-4) has not accepted the marriage of her daughter with petitioner No.2.

20. In case, despite the evidence that has come on record, as noted above, proceedings are not quashed, petitioner no.-2 would be required to face criminal charges and undergo the agony of a trial.

21. We have also taken into account the fact that in case the petitioner No.2 is allowed to be prosecuted, the matrimonial life of petitioner No.1/the alleged victim would be disrupted. Her husband would be incarcerated and there would be no one to take care of her child, who is yet-to-be-born.

22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving

her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.

23. A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.

24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.

25. So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. (The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).

26. When the above noted situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim (petitioner No.1) was a few months short of attaining age of 18 years. The said petitioner had attained age of discretion, however, not age of majority. Petitioner No.1, the victim in her statement recorded under Section 164 CrPC has clearly demonstrated that it was she who went of her free will and accord on 10.2.2014 with Mohd. Sarfaraj, without any coercion, and stayed with him, and got married to him willingly. It is a consensual act on the part of petitioner No.1 all through. Such clear stand of the victim makes it evident that Mohd. Sarfaraj respondent No.2 cannot be attributed with coercing petitioner No.1, inducing petitioner No.1 or kidnapping or abducting her in commission of offence, as alleged. Surely, a girl who has attained an age more than 17 years and who is already carrying pregnancy cannot be stated to have not attained age of discretion. In such circumstances, a technicality in law would not be attracted. The Court has not been shown any material which would indicate coercion, inducement or forceful act on the part of Sarfaraj (petitioner No.2) so as to conclude that offence has been committed by him.

27. The writ Court considering totality of fact and circumstances, cannot ignore or disregard the welfare of the petitioners, particularly when the exercise of trial is going to be in futility, as observed hereinabove.

28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get married as per their discretion, particularly when there is no evidence to indicate that the marriage is void.

30. In view of above, petitioner No.2 cannot be said to have committed offence either under Section 363 I.P.C. read with Section 361 I.P.C. or under Section 366 I.P.C.

31. In the above noted facts and circumstances, we are of the view that ends of justice would be served if the petition is allowed."

6. Issue notice to serve respondent No.4, returnable on 16.9.2016.

7. Learned counsel for the State, in view of the medical evidence and statement of prosecutrix recorded under Section 164 CrPC has not been able to dispute that the case would be covered by Shaheen Parveen's case (supra).

8. We direct Superintendent of Police, Unnao to take notice of the facts and circumstances, review the entire investigation conducted till date and if necessary get the matter further investigated in the light of Shaheen Parveen's case (supra) and file his affidavit as to under what circumstances, despite no evidence of kidnapping having come on record, the petitioners are proceeded against.

9. Till the next date of listing, petitioners shall not be taken in custody.

10. Further proceedings shall remain stayed, till the next date of listing.

11. List on 16.9.2016."

3. In deference to contents of paragraph 8 of the order above extracted, it appears that Superintendent of Police, Unnao directed further investigation as is evident from the order passed by Superintendent of Police, Unnao placed on record as Annexure Nos.SCA-5 appended with the short counter affidavit. It appears that further investigation has been conducted. The relevant evidences have been placed on record. The evidences available on record have been reviewed.

4. Allegedly, the accused committed offence under Sections 363 and 366 I.P.C. Ingredients of Sections 363 and 366 I.P.C. have been considered by this Court in judgement dated 23.7.2015,

rendered by a Division Bench of this Court in *Writ Petition No.3519 (M/B) of 2015 : Shaheen Parveen and another Vs. State of U.P. And others*. The following is the relevant portion :-

"7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any person from lawful guardianship shall be punished in terms of sentence provided in the provision.

8. "Kidnapping from lawful guardianship" has been defined under Section 361 of the Indian Penal Code. The provision when extracted reads as under:-

*"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 illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

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10. At the time of considering whether on admitting the allegations made in the F.I.R., offence has been committed or not, the ingredients of the offence are required to be considered, in context of the evidence collected during the course of investigation.

XXXXXXX

22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.

23. A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.

24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.

25. So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. (The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras)."

5. The petition has been filed on the strength of the pleadings that petitioner no.1, who is daughter of respondent no.4 fell in love with petitioner no.2 and wanted to marry him. Respondent no.4 was not ready to accept the marital arrangement, rather no.4 threatened the petitioners by saying that if petitioner no.1 did not break the relationship with petitioner no.2, they would be killed.

6. Petitioner no.1 did not relent and left the house of the complainant/the parental house and eloped with petitioner no.2 of her free will for solemnising the marriage. Marriage was solemnised on 26.4.2016. In evidence of the fact that they are married, document Annexure No.2 has been placed on record.

7. In view of the fact that the petitioners felt threatened from the family of petitioner no.1, the petitioners approached this Court by way of filing a joint petition vide *Writ Petition No.9791 (M/B) of 2016 : Smt. Basanti and another Vs. State of U.P. and others*. The plea taken by the petitioners in the said petition, appears to be to the effect that the petitioners have attained age of majority and have married of their free will, however, members of their families are not accepting the marriage and under the pressure of the family members, police are harassing them. This court vide order dated 5.5.2016 directed the respondents not to interfere in the peaceful matrimonial life of the petitioners, unless criminal proceedings are initiated.

8. *De hors* the repeated stand of petitioner no.1, impugned proceedings were initiated at the instance of respondent no.4 vide impugned F.I.R. with the allegation that petitioner no.1 is 16 years of age and had been enticed/induced by petitioner no.2 to go with him.

9. After registration of the impugned F.I.R., the petitioners have approached this Court for quashing of the F.I.R.

10. Petitioner no.1, Basanti has filed her affidavit in endorsement of the facts pleaded in the writ petition. Petitioner no.1 Basanti is the prosecutrix and the victim of offence, allegedly the kidnappee. By virtue of this petition, Basanti has again reiterated her stand that she had not been enticed or induced by petitioner no.2, rather she willingly got married to petitioner no.2. The age given by petitioner no.1 in the affidavit is 20 years.

11. Alongwith the petition, the petitioners have placed on record medical examination report of petitioner no.1, according to which petitioner no.1, the prosecutrix, has been found to be 19 years of age. The petitioners have also filed statement given by petitioner no.1 in the course of investigation under Section 164 Cr.P.C. As per the statement, the prosecutrix/the alleged kidnappee has stated that her marriage was scheduled with Nar Singh. They were both in love with each other, however, her parents refused to get them married and therefore she left her parental home of her free will. Nar Singh met her near Kali Mitti and both got married in a Mandir and have been living as husband and wife. Petitioner no.1 has clearly stated that she got married to petitioner no.2 of her free will after running away from her house.

12. Perusal of the counter affidavit indicates that the investigation has been conducted in context of age of the prosecutrix so as to consider whether offence under Section 363 I.P.C. has been committed or not. The fact that petitioner no.1 has attained age of majority, has been endorsed by the investigating agency while relying on medical certificate, Annexure No.SCA-3. Age of petitioner no.1 has been found to be 19 years.

13. So as to consider whether petitioner no.1 had been kidnapped or not, statements of the prosecutrix have been recorded under Section 161 Cr.P.C. as also under Section 164 Cr.P.C. Both the statements have been placed on record as Annexure No.SCA-1 and 2. Investigating agency has concluded in further investigation that petitioner no.1 had not been kidnapped.

14. It has been stated in the counter affidavit in paragraph 15 that although the investigating officer proposes to file a police report in terms of judgement rendered in Smt. Shaheen Parveen's case (supra), however, the court below refused to return the chargesheet. In paragraph 16 of the affidavit, it has specifically been stated that the chargesheet which had earlier been filed needs to be cancelled, however, only photo copy of the chargesheet has been returned by the court concerned and there is a legal impediment in finalising the final report.

15. We have taken note of the law as declared by the Hon'ble Supreme Court of India in ***Rajiv Thapar and others versus Madan Lal Kapoor : (2013)3 SCC 330***. In the said judgement, the following has been held in the relevant portion :-

"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecutions/ complainants case without allowing the prosecution/ complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. ***To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/ complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/ complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.***

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/ complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of

the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

(Emphasised by us)

X X X X X

38. We are persuaded to conclude from the facts and circumstances of the case exhaustively discussed in the foregoing paragraphs, that all the steps delineated in the paragraph 23 above, can be answered in the affirmative, on the basis of the material relied by the accused, more particularly, the post-mortem examination report dated 28.9.1992 conducted by a Medical Board comprising of four doctors, whose integrity has not been questioned by the respondent-complainant; the chemical analysis findings contained in the Central Forensic Science Laboratorys report dated 9.2.1993 which has not been disputed by the respondent-complainant; the inquest report of the SDM, Delhi, dated 6.7.1993, findings whereof have been painstakingly recorded by involving the respondent-complainant; the letter of Rajiv Kapoor (the brother of the deceased) dated 22.9.1992 addressed to Dr. Monica Thapar just four days before her death, the contents and authenticity whereof are not subject matter of challenge at the hands of the respondent-complainant; and finally, the telephone bills produced by the appellants-accused substantiating consistent and regular contact between the rival families, which have not been questioned. We, therefore, have no hesitation in concluding, that the judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellants-accused. We, therefore, hereby quash the aforesaid proceedings.

39. Despite the conclusion recorded hereinabove, we are of the view, that in the facts and circumstances of this case, there should have been no difficulty whatsoever for the High Court to have exercised its judicial conscience for invoking the power vested in it under Section 482 of the Cr.P.C. From the narration of the facts recorded above, it emerges, that even though the respondent-complainant Madan Lal Kapoor, in his complaint dated 6.7.1993, adopted a clear and categoric stance, that his daughter Dr. Monica Thapar had been poisoned to death, before the Additional Sessions Judge, Delhi, the respondent-complainant ventured to suggest, that the appellants-accused had strangulated her. The Additional Sessions Judge, Delhi, summoned two of the doctors who were members of the Medical Board which had conducted the post-mortem examination, and sought clarifications from them. He also recorded the statement of one of the said doctors. The Additional Sessions Judge, thereupon, ruled out the plea of strangulation. When the respondent-complainant himself was uncertain about the manner in which his daughter had allegedly died, the High Court should have viewed the matter keeping in mind the likelihood of the hurt caused to a father who had lost his daughter within one year of her marriage. The matter needed to have been evaluated, on the basis of one of the parameters laid down in State of Haryana & Ors. Vs. Bhajan Lal & Ors., 1992 Supp. (1) SCC 335, namely, whether the criminal proceedings initiated by Madan Lal Kapoor (the respondent-complainant) were actuated by malice and ulterior motive for wreaking vengeance on the accused with a view to spite him due to some private/personal grudge.

40. There is yet another reason emerging from the facts of the case which needed to be kept in mind. Madan Lal Kapoor (the respondent-complainant) had continued to represent before the SDM,

Delhi, that he would produce the mother of the deceased, who knew the facts best of all. Despite that, the mother of the deceased did not appear in the inquest proceedings to record her statement, even though a number of opportunities were afforded to the respondent-complainant to produce her. The permissible inference is that he was himself not privy to the facts. The fact that the mother of the deceased had not appeared to record a statement against the appellants-accused has to have some reason/justification. Would a mother who believes that her daughter had been poisoned/strangulated, restrain herself from recording her statement, despite the persuasion of her husband? Probably not. The instant factual position has been recorded hereinabove, not for the sake of determination of the present controversy. In a factual situation not as clear as the one in hand, facts such as these, could be taken into consideration by a High Court for recording its satisfaction, on the parameters formulated above.

41. For the reasons recorded hereinabove, criminal proceedings against the appellants-accused are hereby set aside. The order of the High Court is accordingly also set aside, but on grounds different from those taken into consideration by the High Court. The instant appeal, accordingly succeeds."

(Emphasised by us)

16. A perusal of the above extracted portion of the judgement would indicate that the High Court can invoke jurisdiction to quash proceedings at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 Cr.P.C. at the stages referred to hereinabove, would have far reaching consequences inasmuch as, it would negate the prosecutions/complainants case, without allowing the prosecution/ complainant to lead evidence.

17. Under the circumstances, we are of the considered opinion that there is no impediment of stage of proceedings at which the High Court can interfere and consider quashing of proceedings if it would prevent abuse of the process of the law and process of the court, and secure the ends of justice.

18. Perusal of the above extracted portion of the judgement rendered in Rajiv Thaper's case (supra) would also indicate that the High Court can take into account the material produced by the accused in his/their defence. The material should be based on sound, reasonable and indubitable facts ; the material should be such as would rule out and displace the assertions contained in the charges levelled against the accused ; the material such as would disprove and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/ complainant.

19. In the case in hand, the relevant evidences have already been collected as noticed above. The plea of kidnappee herself is that she has not been kidnapped. Under the circumstances, we have no hesitation in holding that case of the petitioners is covered by judgement rendered by the Hon'ble Supreme Court of India in ***State of Haryana and others versus Ch. Bhajan Lal and others AIR 1992 SC 604.*** The Hon'ble Supreme Court of India in the said judgement has laid down certain conditions that may be considered by the court for quashing the criminal proceedings. The following has been held in Para 108 :

"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 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."

(Emphasised by us)

20. The facts and circumstances noted above make it evident that the ingredients of Sections 363, 366 I.P.C. are not satisfied. In this regard, at the cost of repetition, we again refer to judgement rendered by

this Court in Shaheen Parveen's case (supra). The case of the petitioners is covered by the judgement rendered in Ch. Bhajan Lal's case (supra), in particular sub paras 3 and 7 which have been emphasised by us in the extracted portion. Investigating officer has also come to the conclusion, though in further investigation, that offence has not been committed.

21. It would be absurd to conclude that petitioner no.1 had been kidnapped, although petitioner no.1 has been repeatedly saying before different forums, including this court, that she had not been kidnapped, rather is married to petitioner no.2.

22. We are of the considered view that continuance of proceedings shall be an exercise in futility. Petitioner no.1 the alleged kidnappee is the best witness and the only victim of the incident of kidnapping. It is the case of petitioner no.1, that she had not been kidnapped, rather had gone with petitioner no.2 of her own accord. In such circumstances, prosecution of the case would result in wastage of precious court time.

23. We are of the view that criminal proceedings have been initiated at the instance of respondent no.4 in malacious prosecution because her daughter petitioner no.1 refused to abide by directions of parents in not getting married to petitioner no.2. It is evident that the impugned proceedings have been initiated in abuse of the process of the law and process of the court. The ends of justice would be secured by putting an end to this lis.

24. Sub Inspector Uttam Singh Rathore of Police Station Bangarmau, District Unnao is present in court and also endorses this fact. Shri Rathore has further informed the court that husband and wife(prosecutrix) are happily living in their matrimonial home.

25. Considering the facts and circumstances of the case in context of the law as noted above, we hereby allow this petition. Impugned F.I.R./Case Crime No.118 of 2016, under Sections 363, 366 I.P.C., Police Station Bangarmau, District Unnao (Annexure No.1) and all consequent proceedings are hereby quashed.

26. Let a copy of this order be forwarded to the Sessions Judge, Unnao for onward transmission to the trial court. Let a copy of this order be also forwarded to Station House Officer, Police Station Bangarmau, District Unnao.

27. Senior Registrar of the Court to ensure compliance.

(2016) 9 ILRA 1613
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Criminal Misc. Writ Petition No.- 19998 Of 2015
&
Criminal Misc. Writ Petition No.- 22245 Of 2015

Anil Kumar (Correct Name is Anil Mehrotra) ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Bajpai

Counsel for the Respondents:
Learned A.G.A.

ACTS AND SECTIONS INVOLVED:
Sections **448, 457, 380, 420 IPC**
Sections **13(2), 13(4), 14, 32** of the **SARFAESI Act, 2002**
Section **156(3) Cr.P.C.**

KEYWORDS:
SARFAESI Act – Protection of secured creditor – Quashing of FIR – Civil dispute – Abuse of criminal process – Bank officials – Good faith action

PROCEDURE:
Petition under Article 226 of the Constitution filed seeking quashing of FIR registered as Case Crime No. 540 of 2015, Police Station Sahibabad, District Ghaziabad, for offences under Sections 448, 457, 380, 420 IPC.

BRIEF FACTS:
The dispute relates to two flats (UG-2 and UG-4) situated in the same premises. The informant (respondent no. 4) purchased Flat No. UG-2 through auction conducted by Oriental Bank of Commerce under the SARFAESI Act and was given possession.
Separately, Union Bank of India sanctioned a housing loan to third parties for Flat No. UG-4. Upon default, the Bank initiated proceedings under the SARFAESI Act and took possession of Flat No. UG-4 through due process, including orders of the District Magistrate and police assistance.
The informant alleged that the petitioners (bank officials) illegally broke open his flat, stole articles, and took possession, leading to lodging of the FIR.
However, prior to the FIR, the informant had already instituted a civil suit seeking possession and injunction regarding Flat No. UG-2.

ISSUE:

Whether criminal proceedings can be sustained against bank officials for acts done in discharge of official duties under the SARFAESI Act, particularly when the dispute is essentially civil in nature.

HEADNOTES:
The dispute between the parties is **purely civil in nature**, arising out of possession and identification of flats.
The petitioners, being bank officials, acted in **official capacity under the SARFAESI Act** while taking possession of Flat No. UG-4.
Protection under **Section 32 of the SARFAESI Act** applies to acts done in good faith by secured creditors and their officers.
The informant had already approached the **civil court**, and the FIR appears to have been lodged **with ulterior motive to pressurize the bank officials**.
The FIR does **not disclose commission of any cognizable offence** against the petitioners.
Reliance placed on *Priyanka Srivastava v. State of U.P.*, (2015) 6 SCC 287.

RATIO DECIDENDI:
Criminal proceedings against bank officials for actions taken in good faith under the SARFAESI Act are liable to be quashed where the dispute is essentially civil in nature and the FIR is lodged to exert pressure, especially in view of statutory protection under Section 32 of the Act.

CONCLUSION:
The impugned FIR is an abuse of the process of law and lacks ingredients of criminal offences. Accordingly, the FIR is **quashed**, and the writ petition is **allowed**, with no order as to costs.

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

1. This petition has been filed by the petitioner with a prayer to quash the F.I.R. dated 19.4.2015 registered as case crime no. 540 of 2015 under sections 448, 457, 380, 420 I.P.C., police station Sahibabad, District Ghaziabad.

2. The prosecution story as mentioned in the F.I.R. is that Oriental Bank of Commerce under the Provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act') requested the District Magistrate, Ghaziabad for taking possession of Flat No. UG-2, situated at Plot No. B-1/154, DLF, Dilshad Extension-2, Bhopura, Ghaziabad. Pursuant thereto under the order of District Magistrate Ghaziabad dated 20.7.2010, the possession of the aforesaid Flat No. UG-2 was made to the Oriental Bank of Commerce with the aid of Senior Superintendent of Police, Ghaziabad. On 1.5.2011, the Oriental Bank of Commerce issued an advertisement in the daily newspaper Amar Ujala/Dainik Jagran by which the aforesaid property was offered to be auctioned pertaining to Iftkhar Ali son of Noor Mohammad and Smt. Farhana wife of Iftkhar Ali. In the aforesaid auction proceeding, the respondent no. 4 was declared to be highest bidder and as such he deposited the requisite amount. On 16.9.2011 when the respondent no. 4 went to inspect the aforesaid Flat No. UG-2, he saw after opening lock of flat that one Raish Ahmad and some other persons were present inside the flat and in this regard when the respondent no. 4 made complaint to the Oriental Bank of Commerce, they asked him to deposit rest of the amount first, thereafter they will ensure the possession to be handed over the respondent no. 4. It is further alleged that pursuant to the aforesaid the respondent no. 4 had deposited the entire amount and the sale has been confirmed and he was put in possession of the aforesaid Flat No. UG-2. On 1.11.2011, the respondent no. 4 stated to have decorated his flat with table,

bed, washing machine, almirah, dressing table, dining table etc. It is further stated that on 15.7.2014, the respondent no. 4 after locking his aforesaid flat went to his native place at Bulandshahar. On 2.8.2014, in absence of the respondent no. 4, the petitioner along with Prem Kumar Rajpal, Ravindra Nath, who are the officers of Union Bank of India in connivance with his associate Raj Bhan Singh, Ex-Manager, Oriental Bank of Commerce, Builder Pawan Kumar Sharma and Raish Ahmad and other, after breaking the lock of the flat of the respondent no. 4 stolen all the articles present in the aforesaid flat and also they have taken illegal possession of the same. When the respondent no. 4 went to Union Bank of India, Raj Nagar Branch, Ghaziabad for taking possession back, they informed him that the flat which was taken into possession by the Union Bank of India is Flat No. UG-4 and not UG-2. All the articles found in the flat are articles of Flat No. UG-4. Therefore, they asked the respondent no. 4 to contact the Oriental Bank of Commerce and threatened him that in case he comes again he will be falsely implicated in case of theft and loot. While the respondent no. 4 was talking with the bank officers at the same time Raish Ahmad, Zahir Ahmad and Pawan Kumar Sharma were suddenly reached there. Thereafter, the respondent no. 4 was said to have contact the Oriental Bank of Commerce where the Manager of Union Bank of India was also present. He narrated the entire story to the Manager of the Oriental Bank of Commerce and he was told by the officers of the Oriental Bank that he will have to contact Union Bank of India, as the work of Oriental Bank of Commerce is over, as they have taken money and given him possession, hence the respondent no. 4 lodged the present F.I.R. against the petitioner and other co-accused persons, who are also employees of the bank.

3. Pleadings have been exchanged between the parties.

4. The respondent no. 4 has not responded to the notice issued to him in the present petition.

5. Heard Sri Anil Kumar Bajpai, learned counsel for the petitioner and Sri Irshad Hussain, learned A.G.A. for the State.

6. Learned counsel for the petitioner submits that in fact one Mr. Binu Nair and Mrs. Geeta Nair moved an application to the Union Bank of India, Raj Nagar Branch, Ghaziabad for grant of housing loan in order to purchase Flat No. UG-4, situated at Plot No. B-1/154, DLF, Dilshad Extension-2, Bhopura, Ghaziabad. The said loan was sanctioned by the Union Bank of India in favour of Mr. Binu Nair and Mrs. Geeta Nair after completing all the formalities on 18.3.2011. Mr. Rais Ahmad stood as guarantor of the said loan for which he has executed a letter of guarantee in favour of the bank on the same day. Mr. Binu Nair and Mrs. Geeta Nair thereafter purchased Flat No. UG-4 with the loan amount through a registered sale deed dated 25.5.2011 and thereafter on 29.9.2011 the memorandum of title deed was prepared containing deposit of title deed specifying the description of the title deed/documents which includes the sale deed in favour of Mr. Binu Nair and Mrs. Geeta Nair on 29.9.2011. He submitted that Mr. Binu Nair and Mrs. Geeta Nair defaulted in payment of EMI and therefore, the Union Bank of India proceeded under the provisions contained under the Act and by invoking the provisions of Section 13 (2) and 13 (4) of the Act, a notice to take possession of Flat No. UG-4 was issued to Mr. Binu Nair and Mrs. Geeta Nair under the signature of authorized officer on 5.10.2013. The notice under sections 13 (2) and 13 (4) of the Act had been served upon the borrower as they failed to make payment and their account has been declared Non Performing Assets, thereafter the Branch Manager, Union Bank of India, Raj Nagar Branch, Ghaziabad requested the District Magistrate, Ghaziabad under section 14 of the Act to secure taking over possession

by the Union Bank of India and pursuant thereto, the District Magistrate vide order dated 15.4.2014 directed the Senior Superintendent of Police, Ghaziabad to provide security after getting the requisite amount deposited by the Bank so that possession may be taken over. In pursuance of the aforesaid order of the District Magistrate, the Union Bank of India has deposited Rs. 27,810/- and the Senior Superintendent of Police Ghazibad vide letter dated 21.7.2014 acknowledged the receipt of payment and directed the Station House Officer, Police station Sahibabad to provide adequate police force so that the Union Bank of India may take possession of Flat No. UG-4. On 2.8.2014, the Bank has taken possession through the police force of local police station in presence of Panchs and police officials and in this regard an inventory was prepared in which no article was found from Flat No. UG-4. Along with inventory a Panchnama was also prepared which was duly signed by the Panch, the authorized officer and authorized officer.

7. It was further pointed out that the informant respondent no. 4 had purchased Flat No. UG-2 in auction from the Oriental Bank of Commerce in his favour through sale certificate dated 26.6.2011 which is situated just above Flat No. UG-4 at Plot No. B-1/154, DLF, Dilshad Extension-2, Bhopura, Ghaziabad. He argued that Flat No. UG-2 has different description which is evident from the sale deed dated 14.7.2008 of UG-2 Flat executed in favour of its buyer/borrower, namely, Smt. Farana wife of Iftikhar Ali, who had taken loan from Oriental Bank of Commerce and defaulted in payment of its installment to Oriental Bank of Commerce. He next argued that the respondent no. 4 due to oblique motive concocted a false story in the F.I.R. to grab Flat No. UG-4 under the pretext that the same is Flat No. UG-2.

8. It was next submitted that the informant prior to lodging of the impugned F.I.R. had filed Original Suit No. 131 of 2015 on 28.1.2015 before the Civil Judge (S.D.), Ghaziabad seeking permanent injunction and possession of Flat No. UG-2, measuring area 69-67 Sq. Meters situated at Plot No. B-1/154, DLF, Dilshad Extension-2, Bhopura, Tehsil Loni, District Ghaziabad. In the aforesaid suit, the Civil Judge (S.D.) Ghaziabad issued summon to the Union Bank of India, Raj Nagar Branch, Ghaziabad through its Branch Manager for appearance on 12.2.2015 fixing 5.4.2015/12.3.2015 for service of summon and filing of written statement respectively by the Bank.

9. He urged that the dispute, if any, between the parties is purely civil in nature and all the act done by the petitioner is under the capacity of Authorized Officer under the Act. He submits that the petitioner enjoys protection under section 32 of the Act, hence the impugned F.I.R. is liable to be quashed on this ground alone. Section 32 of the Act is quoted hereinbelow:-

"32. Protection of action taken in good faith.-

No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act."

10. In support of his contention, learned counsel for the petitioner has placed reliance on the judgment of the Apex Court in the case of ***Priyanka Srivastava & another vs. State of U.P. & others reported in (2015) 6 SCC 287*** wherein it was held by the Apex Court that "borrower of housing loan failing to repay the loan to Bank/FI concerned on action being taken against borrower by Bank authorities

under the Act, borrower, instead of resorting to remedy available under relevant Act, taking recourse to S. 156 (3) Cr.P.C. and getting various FIRs (including the present one) registered against Bank authorities merely to harass them with sole intent to avoid loan by said criminal action, bank authorities compelled to concede to borrower's request for one time settlement. In the facts and circumstances of the case, order passed by Judicial magistrate under section 156 (3) Cr.P.C. directing registration of impugned F.I.R. against the appellant Bank authorities without any application of mind by merely narrating allegations made in application under section 156 (3) Cr.P.C. and ignoring Section 32 of the Act which given protection to a secured creditor or its officers for acts done in good faith under the said Act, held not sustainable in law. The F.I.R. registered pursuant to the said order is liable to be quashed".

11. He submitted that the petitioner Anil Mehrotra, who is presently posted as Chief Manager, petitioner Prem Kumar Rajpal is Senior Managar and petitioner Ram Nath is also official of Union Loan Point, Union Bank of India, Ghaziabad and have performed their official duty. The F.I.R. lodged by respondent no. 4 does not disclose any offence against them, hence the same is liable to be quashed.

12. Learned A.G.A. opposed the prayer for quashing but could not dispute the fact that the respondent no. 4 was auction purchaser of Flat No. UG-2, situated at Plot No. B-1/154, DLF, Dilshad Extension-2, Bhopura, Ghaziabad under the SARFESAI Act and physical possession of the same was handed over to him by the Oriental Bank of Commerce.

13. Considered the submissions advanced by learned counsel for the parties and perused the impugned F.I.R. and relevant material on record. Admittedly, the respondent no. 4 has purchased Flat No. UG-2, situated at Plot No. B-1/154, DLF, Dilshad Extension-2, Bhopura, Ghaziabad in an auction from the Oriental Bank of India for which a sale certificate was issued on 26.6.2011 in his favour by the said Bank and he was given physical possession of the same. He has also filed a civil suit for restoring the possession of the said flat against the Oriental Bank of Commerce and the petitioner Bank prior to lodging of the F.I.R. which is still pending for adjudication. The respondent no. 4 for his ulterior motive has lodged the present F.I.R. against the petitioner and other officials of Union Bank of India, who have performed their official duty and are duly protected under section 32 of "the Act". Moreover, the First Information Report lodged against the petitioner also does not disclose any offence against them. It appears that just to harass them, in order to put pressure on them to compromise in Original Suit No. 131 of 2015 filed by respondent no. 4, the impugned F.I.R. has been lodged by him against the petitioner. Hence the present F.I.R. is liable to be quashed.

14. In view of the foregoing discussion, the impugned F.I.R. is hereby quashed.

15. The petition stands allowed.

16. However, no order as to costs.

(2016) 9 ILRA 1618
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.09.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE RAJAN ROY, J.

Misc. Bench No.- 20575 Of 2016
&
Connected With Other Cases

U.P. Unaided Medical Colleges Welfare Association, Bareilly ...Petitioner
Versus
Union Of India Through Secretary (Medical Education) & Anr. ...Respondents

Counsel for Petitioner:
Ambrish Singh Yadav

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

HEADNOTES: Centralized counselling based on NEET ensuring single window procedure is a valid regulatory measure to ensure merit, transparency and fairness and does not violate rights of private unaided or minority institutions under Articles 19(1)(g) and 30(1) of the Constitution.
Private institutions have no absolute right to conduct independent counselling. State is competent under Entry 25 List III to regulate admission process in larger public interest to prevent malpractices and ensure merit-based selection.
Policy creating 50% subsidized seats funded through enhanced fee on remaining students held arbitrary, irrational and legally unsustainable. State cannot compel one class of students to bear financial burden of subsidy for another class without statutory backing.
Reservation based on residence in private institutions cannot exceed reasonable limits and must not compromise merit reflected in NEET list.
Minority institutions entitled to admit students of their community through centralized counselling from NEET merit list to permissible extent without disturbing inter-se merit.
Impugned orders prescribing centralized counselling upheld, but clauses relating to subsidized seats and consequential fee fixation quashed with liberty to State to frame legally sustainable policy.
Writ petitions partly allowed.

Proceeding:
Petitioners, association of unaided private medical colleges including minority institutions, challenged Government Orders providing **centralized counselling based on NEET-2016** for admission to MBBS/BDS courses in Government, private and minority institutions in Uttar Pradesh. Challenge was also made to Government Order dated 02.09.2016 creating **50% subsidized seats with tuition fee of Rs.36,000/-** limited to residents of U.P. and enhanced fee for remaining seats.

Petitioners contended violation of fundamental rights under **Articles 19(1)(g) and 30(1)** of the Constitution and lack of competence of State Government to impose centralized counselling and fee structure.

Issue:
(i) Whether State Government can mandate **centralized counselling (single window system)** based on NEET for admission in private and minority professional institutions.
(ii) Whether private unaided and minority institutions have a right to conduct **independent counselling** for admission.
(iii) Whether classification of seats into **50% subsidized and 50% non-subsidized seats** with differential fee structure is constitutionally valid.
(iv) Whether reservation based on **residence/domicile in U.P.** for subsidized seats is permissible.
(v) Whether State Government can regulate admission process and fee structure of private professional institutions consistent with **Articles 19(1)(g) and 30(1)**.

Citation:
T.M.A. Pai Foundation v. State of Karnataka
P.A. Inamdar v. State of Maharashtra
Modern Dental College and Research Centre v. State of Madhya Pradesh
Christian Medical College Vellore v. Union of India
Dr. Pradeep Jain v. Union of India
Paramati Educational & Cultural Trust v. Union of India

(Delivered by Hon'ble Mr. Justice Rajan Roy, J.)

1. Heard Shri S.K.kalia, S.C. Misra and Sri Jaideep Narain Mathur Learned senior Advocate along with Sri Sandeep Dixit Learned Avocate for the petitioners and Dr L.P. Misra along with Sri Sanjay Bhasin, Sri Prafull Tewari for the state, Sri S.B.Pandey for the Union of India and Sri Gyanendra Srivastava for the Medical council of India.

2. All these writ petitions involve similar questions of fact and law, therefore, they have been heard together and are being decided by a common judgment.

3. For convenience writ petition No. 20575 (MB) of 2016 has been treated as the leading writ petition.

4. Petitioner of this writ petition is an Association of Un-aided Medical Colleges. The petitioners in other writ petitions are universities/colleges imparting education in medical courses such as MBBS etc., some of which claim to be minority institutions.

Factual Background of the case

5. The facts leading to this writ petition are as follows:-

A common entrance test is held by the Medical Council of India under Regulation 5(5) of the Regulations known as Regulations on Graduate Medical Education, 1997 as amended vide Notification dated 21.12.2010, the vires of which is pending adjudication before the Supreme

Court. This test is known as National Eligibility-cum-Entrance test (for short 'NEET'). It is part of the single window procedure for admission as envisaged in ***T.M.A. Pai Foundation and others vs. State of Karnataka and others*** reported in ***(2002) 8 SCC 481, P.A. Inamdar and others vs. State of Maharashtra and others reported in (2005) 6 SCC 537***. It is applicable to Government as well as Private (aided and unaided) institutions, including minority institutions. It is a centralized test. Based on this test an All India Eligibility-cum-Merit list is prepared. Based on such list firstly, counselling is held for admissions to All India quota, in which the private institutions do no participate. On its completion, counselling is held for State seats. In such counselling the students are called on the basis of their ranking in the NEET list to choose the institution in which they want to take admission for MBBS/BDS first year course, as the case may be. The highest in rank is called to exercise his option first. On such option being exercised the seat and the institution opted for, is locked and is not available for the subsequent candidates in the said counselling. The option/choice is exercised so on and so forth by the students as per their ranking in the NEET list which reflects their merit in the NEET test, accordingly, till the seats are exhausted.

6. Such counselling also entails the verification of original testimonials of the students, their identification based on photograph and Bio-metric data collected by MCI or its agency which conducts NEET. In the present case such data has been provided to the State of U.P. and not to any private institution.

7. The Notification dated 21.12.2010 introducing NEET had earlier been declared ultra-vires the Constitution and the Medical Council Act, 1956, by the Supreme Court in ***Christian Medical College Vellore and others V. Union of India (2014) 2 SCC 305***, but, on a petition being filed for review of the said judgment, the same was recalled on 09.05.2016 and the petitions were restored for a decision afresh, thereby reviving the aforesaid notification as also NEET for Academic Year 2016-17.

8. In the meantime AIPMET and CPMET 2016 had already been held in some States, which stood nullified by the aforesaid developments, consequently the candidates were required to re-appear in NEET 2016 and those who could not for them the date was extended for such appearance in the test held in July, 2016. In the meantime, on 25.04.2016 an Ordinance bearing No. 4 of 2016 was issued amending the Regulations of 1997 and providing an option to the States to opt out of NEET and hold their own tests for the academic year 2016-17 in respect of State seats at the undergraduate level. The State of U.P. Opted to adhere to NEET, consequently, it issued Government orders dated 11.08.2016,20.8.2016, 22.08.2016 and 31.08.2016 prescribing a centralized counselling for admission to MBBS/BDS in all colleges/universities in the State including private colleges as also minority institutions. These decision were modified on 02.09.2016 inter-alia inserting a requirement that the students should be domicile of State of U.P. in respect of 50% of the sanctioned intake of private institutions(excluding minority institutions) after deducting the pool of 15% for All India Quota. These seats have been termed as subsidized seats with only Rs.36,000/- payable as tuition fee. Thus, in addition to seats in Government colleges and Universities for which a student had to be a domicile of State of U.P. This condition was applied to private institution also albeit to the extent of 50% of its seats, as aforesaid.

9. The fee for remaining 50% non-subsidized seats is payable at an enhanced rate, almost double the normal fee which would have to be determined as per clause 1 and 2 of the order dated 02.09.2016 and Section 10 of U.P. Private Professional Educational Institutions (Regulations of Admission and Fixation of Fee) Act, 2006(for short the Act 2006) so as to fund the subsidy for the 50% subsidized seats.

10. Ostensibly, this would not result in loss to the private colleges but they contend that such arbitrary, irrational and discriminatory arrangement would dissuade the students to take admission against non subsidized seats thereby rendering the running of the unaided institutions un-viable, consequently violating their rights under Article 19(1)(g) of the Constitution of India. The students would opt out for better and more economical options in other States leaving the private institutions high and dry.

11. The All India Quota admission process has not yet been completed, consequently, though, some students have been allotted institutions against the centralized counselling held by the State, for the State seats, the same is not yet final. The second round of counselling for filling up remaining seats is yet to take place. The academic session was to start from 3rd September 2016. The last date for joining of the candidates allotted seats in second round of counselling, is 26.09.2016. The last date for admitting the students against vacancies arising due to any reason is 30.09.2016, however, adherence to this time schedule prescribed vide a notification dated 05.08.2016 has been delayed for the aforesaid reason.

12. In the meantime, these petitions have been filed.

In the State of U.P. there are 12 Government colleges, 2 Government Medical Universities. For MBBS courses in these institutions, there are 1544 seats in the first year after deducting 296 of the All India Quota. For BDS, the seats are 51 after deducting 60 for the All India Quota, thus, there are total 1595 seats in Government institutions as State seats.

13. In addition to the above, there are 26 private Medical Colleges and 23 Dental Medical Colleges. For MBBS course in such institutions, there are 3100 seats and for BDS there are 2300 seats in the first year. Thus, the total number of MBBS seats are 4644, whereas BDS seats are 2351. The total combined seats are 6995. Out of these 50% are subsidized seats as per order dated 02.09.2016. In NEET list 2016, sixty two thousand (62000) students found eligible are domiciles of State of U.P. out of which 27537 have applied for centralized counselling by the State Government in pursuance to the advertisement dated 28.08.2016 till the mid-night of 31.08.2016. It is not out of place to mention that 50% was the cut off mark for NEET 2016.

14. A procedure for such counselling has been laid down in these government orders, which, *inter alia*, state that counselling shall take place on the basis of the registration and the merit-list prepared by the Central Board of Secondary Education which held the NEET 2016. A video conferencing of the counselling shall be held in terms of the government order dated

5.7.2011. The counselling shall be held at SGPGI Lucknow, State Medical Colleges at Meerut, Kanpur and Allahabad i.e. at 4 places . 2 rounds of counselling are to be held, followed by a mop-up round counselling for filling up left over seats.

15. **ISSUES**

(i) Whether this counselling should be centralized and should be held by the State or its agency or the association of private institutions is entitled to hold the same in view of their alleged rights under Article 19(1)(g) and/or Article 30(1) of the Constitution of India, is one of the question which falls for consideration in this case along with the validity of the impugned orders in this context.

(ii) The other question raised is regarding competence, permissibility or sustainability of the prescription of 50% subsidized seats with the stipulations and conditions as contained in the order dated 02.09.2016, specially the condition that only a domicile of State of U.P. could be considered for admission against such seats and imposing financial burden of the subsidy upon those admitted against the remaining 50% non-subsidized seats.

(iii) A question has also been raised as regards the applicability of reservation policy of the State as contained in the U.P. Admission to Educational Institutions (Reservation for Scheduled Caste, Scheduled Tribe and other Backward Classes) Act, 2006 which prescribes the application of reservation in favour of scheduled caste, scheduled tribes and other backward classes in admission to educational institutions including private institutions whether aided or unaided, by the State, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution of India on the terms referred therein.

(iv) The application of the impugned decisions for holding centralized counselling for minority institutions and regulation of fee chargeable by them as also the extent of such regulation has also been questioned, more so, in the context of the Integral University which has been constituted under a State Act namely the Integral University Act, 2004 which permits it to provide not more than 50% reservation for the minority community under section 6 of the said Act. Similar benefit is being claimed by one of the petitioners Era Medical College, Lucknow.

16. Contention on behalf of the petitioners is that being private educational institutions imparting professional education, they have a fundamental right under Article19 (1)(g) of the Constitution of India to run their institutions and admit Students of their choice by holding their own counselling, albeit, from the same NEET List 2016, without compromising fairness, transparency and merit. The action of the State Government in issuing orders for holding a combined counselling for the State run universities and medical colleges as well as private colleges, is violative of this right. A similar right exists in favour of the minority educational institutions under Article 30(1) of the Constitution of India, rather a better right than the non-minority Institutions and the impugned orders which prescribe a Combined Counselling even for these Institutions are clearly impermissible. It is further contended that the Medical Council of India

having framed regulations notified on 5th August 2016 with the approval of the Central Government in exercise of its powers under section 33 of the Medical Council Act which is a Central Legislation and as it deals with counselling based on the NEET list for the year 2016-17, therefore, the field being already occupied by the said Regulations which have statutory force, the jurisdiction of the State Government under Entry 25 of the Concurrent List stands ousted, therefore, for this reason also, the impugned orders are not sustainable.

17. The other challenge is to the order dated 2.9.2016, by which seats for admission have been classified into subsidized and non-subsidized seats with the condition that subsidized seats with fee of only Rs.36000/- per student shall be filled only by those students who are domicile of State of U.P., meaning thereby, those higher in rank as per NEET 2016, but, not domicile of U.P., will not be considered against these 50% seats, thereby, compromising merit and violating the dictum of the Supreme Court as also negating the concept of a single window procedure. Furthermore the financial burden of subsidized Seats has been shifted to the remaining 50% students, with the result, they would be reluctant to take admission in such a scenario where they will have to pay not only their fee, but also that of another student, thus, double the fee normally payable, which is quite irrational and constitutionally and legally unsustainable especially in view of the dictum of ***T.M.A. Pai*** (supra) where a somewhat similar arrangement of free and payment seats brought about in ***Unnikrishnana*** has been disapproved. It was contended that it would make the institution economically unviable which would ultimately have to be closed down as they would not be able to bear the expenditure for running the same and would not be able to maintain the standards prescribed by the Medical Council of India.

18. It is not in dispute that a Common Entrance Test has been held by the Medical Council of India through the Central Board of Secondary Education known as National Eligibility-cum-Entrance Test 2016 (for short "NEET 2016') under Clause 5(5) of the Regulations on Graduate Medical Education 1997 (for short "Regulations 1997') made by the Medical Council of India in exercise of powers under section 33 of the Medical Council of India Act 1956 (hereinafter referred as "Act 1956'). None of the petitioners has raised any dispute as regards the said Entrance Examinations. In fact they have admitted to the fact that admissions are to be made on the basis of the Eligibility/Merit list prepared on the basis of NEET 2016 and not otherwise.

Rights of the petitioners, if any, and its scope

19. First and foremost we deem it necessary to consider the alleged right of the petitioners, violation of which is being alleged, as also its scope, in the light of precedents laid down by the Supreme court on the subject. Reference may be made in this regard to the case of **P.A. Inamdar** (supra), wherein, the rights of such un-aided private institutions including the minority institutions, as considered in ***TMA Pai and Islamic Academy***, was considered by a Seven Judge Bench and the law in this disregard was clarified.

20. While considering question No. 2 framed by the Supreme Court, in para 27 it was observed that even in respect of minority un-aided institutions that to admit students being one of

the components of the right to establish and administer any institution the State cannot interfere therewith. Upto the level of undergraduate education the minority unaided educational institutions enjoy total freedom. **However, different considerations would apply for graduate and postgraduate level of education, as also for technical and professional educational institutions. Excellence in education and maintenance of high standards at this level are a must. To fulfill these objectives the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes National wealth.**

21. In paragraph 135 it was observed that in minority institutions, aided or unaided, admissions shall be at the State level. **Transparency and merit shall have to be assured.**

22. Thereafter, while further considering question No. 2 under the heading "Admission procedure of unaided educational institutions' their Lordships categorically supported the holding of a Common Entrance Test for one group of institutions imparting same or similar education. Such institutions situated in more than one State may join together and hold a Common Entrance Test or the State may itself or through its agency arrange for holding such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different Institutions depending on the courses of study offered, the number of seats, the kind of minority to which the Institution belongs and other relevant factors. The observations in para 136 relate not only to non-minority unaided Institutions, but also to minority institutions. Furthermore, the Supreme Court held such an agency conducting the Common Entrance Test must be one enjoying utmost credibility and expertise in the matter. It observed that **this would better ensure the fulfillment of twin objects of transparency and merit. combined entrance test is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation, holding of such Common Entrance Test followed by Centralized counselling, or in other words, a Single Window System regulating admissions does not cause any Dent in the right of minority un-aided educational institutions to admit students of their choice**. Such choice can be exercised from out of the list of successful candidates prepared at Combined Entrance Test without altering the order of merit inter-se of students, so chosen. These observations apply to the minority as well as the minority unaided private educational institutions. The satisfaction of triple test including adherence to merit is also equally applicable to minority institutions, as is evident on a conjoint reading of para 136 and 137 of the said judgment.

23. In para 138 it was categorically mentioned that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices it would be permissible to regulate admissions by providing a centralized and Single Window procedure. Such a procedure, to a large extent, can secure grant of merit based admissions on a transparent basis.

24. Relying upon certain observations made in para 137 of ***P. A. Inamdar*** case (supra) it was contended before the Supreme Court in the subsequent case of ***Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others*** reported in ***(2016) 7 SCC***

353 that the State could hold a Common Entrance Test and counselling only when the admission procedure adopted by a private institution or Group of Institutions fails to satisfy all or any of triple test indicated therein and it is only then that the State can take over by substituting its own procedure, which was repelled by the Supreme Court and it was held that the satisfaction of the triple test and adherence to merit is to be ensured at the initial stage, and not as suggested by the private institutions by way of a post audit scrutiny.

25. Suffice it to say at this stage that the principle laid down in ***P A Inamdar*** was for strict adherence to the triple test of fairness, transparency and non-exploitativeness as also adherence to merit and also that a centralized process of admission and a Single Window procedure be adopted, as, such a procedure to a large extent would secure grant of merit based admissions on a transparent basis. Legislation or Regulations were required to be made in this regard by the State.

26. Now coming to the judgment of the Supreme Court in **Modern Dental College case**. In this case the vires of a legislative enactment by the State legislature of Madhya Pradesh prescribing a common entrance test followed by Centralized counselling to be held by the State, was put to challenge. The challenge therein was on similar lines as in this case, the only difference being that in the said case there was a legislative enactment, the vires of which was assailed, whereas, in the present case what is under challenge are government orders issued by the State Government somewhat on same lines. The Supreme Court considered the rights of un-aided educational institutions including minority institutions. In this context it is relevant to quote para 33 and 34 of the said judgment :

"33. The history of the dispute regarding Government control over the functioning of private medical colleges is quite old now but the tug of war continues. There seems to be some conflict of interest between the State Government and the bodies that establish institutions and impart professional medical education to the youth of this country. While on the one hand the State Governments want to control the institutions for sociopolitical considerations and on the other the people who invest, set up and establish the institutions have a genuine desire to run and exercise functional control over the institution in the best interests of the students, it cannot be disputed that the State does not enjoy monopoly in the field of imparting medical education and the private medical colleges play a very significant role in this regard. The State lacks funds that is imperative to provide best infrastructure and latest facilities to the students so that they emerge as the best in their respective fields.

34. In the modern age, therefore, particularly after the policy of liberalization adopted by the State, educational institutions by private bodies are allowed to be established. There is a paradigm shift over from the era of complete Government control over education (like other economic and commercial activities) to a situation where private players are allowed to mushroom. But at the same time, regulatory mechanism is provided thereby ensuring that such private institutions work within such regulatory regime. When it comes to education, it is expected that unaided private institutions provide quality education and at the same time they are given 'freedom in joints' with minimal Government interference, except what comes under regulatory regime.

Though education is now treated as an 'occupation' and, thus, has become a fundamental right guaranteed Under Article 19(1)(g) of the Constitution, at the same time shackles are put insofar as this particular occupation is concerned which is termed as 'noble'. Therefore, profiteering and commercialization are not permitted and no capitation fee can be charged. The admission of students has to be on merit and not at the whims and fancies of the educational institutions. Merit can be tested by adopting some methodology and few such methods are suggested in ***T.M.A. Pai Foundation***, which includes holding of CET. It is to be ensured that this admission process meets the triple test of transparency, fairness and non-exploitativeness."

27. The observations made above by the Supreme Government leave no doubt that regulatory mechanism to ensure the satisfaction of triple test and adherence to merit are permissible in respect of such institutions, rather they are necessary.

28. The Supreme Court in para 38 while accepting that the right of professional institutions to establish and manage educational institutions, is an occupation, even if there is no element of profit generation (paragraph 25 of ***TMA Pai***), and that this right encompassed a right to admit students; a right to set up a reasonable fee-structure, but, in paragraph 40 in ***Modern Dental College***, while considering the scope of this right it observed that the Supreme Court in ***TMA Pai's*** case was categorical that this activity (occupation) could not be treated as Business or Profession. Education is treated a noble profession on no-profit-no-loss basis. Those who establish and manage educational institutions are not expected to indulge in profiteering or commercializing this noble activity**. Keeping this objective in mind, the court did not give complete freedom to the educational institutions in respect of right to admit the students and also with regard to fixation of fee.** As far as admission of students is concerned, the court was categorical that **such admissions have to be on the basis of merit, when it comes to higher education, particularly in professional institutions**.

29. In paragraph 41 the contention of one of the learned counsel that TMA Pai Foundation expounded on the nature and extent of its control on the basis of level of education was approved by the Supreme Court by observing, **"when it comes to higher education, that too, in professional institutions, merit has to be the sole criteria."** It referred to paragraph 58 of ***TMA Pai*** in this regard which is relevant and is as under:-

"58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions".

30. In paragraph 42 the Supreme Court with reference to the observations in TMA Pai Foundation delved into the question as to how the objective of ensuring the triple test, referred above, could be achieved for determining such merit, it referred to the observation in para 59 thereof that such merit should be determined either by the marks that students obtain at qualifying examinations or at combined entrance test conducted by the Institutions or **in the case of professional colleges by government agencies**. It quoted para 59 of ***TMA Pai*** case wherein for professional colleges Common Entrance Test by government agencies was held to be a methodology for ensuring the satisfaction of triple test including merit. Para 42 of Modern Dental College is quoted hereinbelow:

"42. In order to see that merit is adjudged suitably and appropriately, the Court candidly laid down that procedure for admission should be so devised which satisfies the triple test of being fair, transparent and non-exploitative. The next question was as to how the aforesaid objective could be achieved? For determining such merit, the Court showed the path in paragraph 59 by observing that such merit should be determined either by the marks that students obtained at qualifying examination or at CET conducted by the institutions or in the case of professional colleges, by Government agencies. Paragraph 59 suggesting these modes reads as under:

'59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution**, or in the case of professional colleges, by government agencies.**'

This paragraph very specifically authorises CET to be conducted by Government agencies in the case of professional colleges."

31. We are of the view that the observations, referred hereinabove apply on all its fours to Centralized Counselling also, as, it is part of the admission process wherein also the Triple Test and adherence to merit have to be ensured.

32. The Supreme Court thereafter referred to paragraphs 67 and 68 of TMA Pai and in paragraph 44 of its judgment, it considered the contention that State could not usurp the very function of conducting this admission test by the educational institutions and that such Combined Entrance Test is to be conducted by the educational institutions themselves, whereas the government could only frame regulations to regulate such admission tests to be conducted by the educational institutions and could not take away the functioning of holding Combined Entrance Test, and in paragraph 45 it rejected this contention in view of the unambiguous and categorical interpretation given by the Supreme Court in P.A. Inamdar with respect to certain observations, particularly in para 68 in TMA Pai Foundation.

32A. In para 47 of its judgment the Supreme Court noticed the observations ***in P.A. Inamdar*** case wherein, it was noted that the earlier judgment kept in mind **"the sad reality that there are a number of professional colleges which indulge in profiteering and/or charging**

capitation-fees".It went on to observe that it was impossible to control profiteering/charging of capitation-fees, unless admission was on merit. It was observed that requiring a student to appear at more than one entrance test lead to more hardship as the student has to pay application fee for each institute, arrange and pay for the transport to appear in the individual tests. Thus, the management could select students either on the basis of Combined Entrance test conducted by the state or Association of All Colleges for a Particular Type for example, medical, engineering or technical etc. In this context it is relevant to reiterate and refer to the observations made in ***P.A. Inamdar*** in para 136 and 138 that holding of a Common Entrance Test followed by a Centralized counselling with a Single Window procedure to a large extent ensures adherence to the triple test and merit. Reference may again be made to paragraph 59 of ***T.M.A. Pai*** wherein a single window procedure by Government Agencies was specifically advocated in case of professional colleges as was also done in paragraph 27 in ***P.A.Inamdar's*** case and paragraph 41 of Modern Dental College. Thus, at the level of higher Education specially in professional courses /Institutions the role of the government in providing a single window procedure of admission has been emphasized.

33. It is also relevant to point out that in the present case as far as the leading writ petition is concerned, admittedly, it is an association of only 18 medical colleges including some universities, whereas, the number of such institutions in the State is larger, therefore, it does not represent all the medical colleges/universities in the State.

34. Furthermore, in paragraph 48 their lordships have referred to paragraph 145 of ***P.A. Inamdar (supra)*** wherein it was observed **"unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb."** Based on this, the Supreme Court in Modern Dental College (supra) repelled the contention of the private colleges for post audit checks after the institutions adopted their own admission procedure and fee-structure. It noticed that until the Central Government and State Governments came out with a detailed well thought out legislation setting up a suitable mechanism for regulating admission procedure and fee structure, the committees set up in Islamic Academy were allowed to continue.

34A. It further observed in the context of para 68 in TMA Pai case (supra) as explained in PA Inamdar (supra) that **observation therein permitting the management to reserve certain seats was meant for poorer and backward sections as per local needs. It did not seem to ignore the merit. It was also held that Combined Entrance Test could be held, otherwise merit becomes casualty. There is, thus, no bar to Combined Entrance Test being held by State Agencies when the law so provides.**

35. These observations are equally applicable with the same effectiveness with regard to holding of a Centralized counselling with a Single Window procedure by the State. In paragraph 49 the contention that the private medical colleges had absolute right to make admissions or to fix fee, was held to be inconsistent with the earlier decisions of the court i.e. ***TMA Pai (supra) and P.A. Inamdar.***

36. The right of the State to introduce regulatory measures to ensure the aforesaid requirements was thus re-affirmed and the suggestion of a post audit measure after the merit had been compromised or capitation-fees had been charged by the private institutions, was rejected out-rightly. It was categorically mentioned that control was required at the initial stage itself, i.e. at the stage of Combined Entrance Test and counselling. The best way to ensure this was for the state or its agencies to hold a centralized test and counselling as transparency and accountability can be better secured by it vis a vis private agencies as has also been observed by the Supreme court in paragraph 96 and 97 **in Modern Dental College**.

37. Based on the aforesaid, the Supreme Court opined that though the occupation is a fundamental right, which gives right to the educational institutions to admit students and also fix fee, at the same time, scope of such rights was discussed and limitations imposed thereupon by the judgments in **TMA Pai** and ***P.A. Inamdar*** themselves were reiterated and the nature of limitations on these rights was also explained.

38. Thereafter the Supreme Court in **Modern Dental College** considered the reasonableness of the restrictions/measures imposed by the legislature of the State of Madhya Pradesh and in this context relying upon ***TMA Pai and PA Inamdar*** it was observed in para 55 that **it becomes clear that insofar as such regulatory measures are concerned, the same can be adopted by the State in respect of minority run institutions as well**.

"55. It would be necessary to clarify the position in respect of educational institutions run by minorities. Having regard to the pronouncement in *T.M.A. Pai* Foundation, with lucid clarifications to the said judgment given by this Court in *P.A. Inamdar*, it becomes clear that insofar as such regulatory measures are concerned, the same can be adopted by the State in respect of minority-run institutions as well. Reliance placed by the appellants *in S. Stephen's College V. University of Delhi reported in (1992) 1 SCC 558* may not be of much help as that case did not concern with professional educational institutions.

39. It was further held in para 57 that the right under Article 19(1)(g) is not absolute in terms, but is subject to reasonable restrictions under Clause (6). Larger interest and welfare of student community to promote merit, achieve excellence and curb mal-practices, fee and admissions can certainly be regulated. The court has to strike a just balance between the fundamental rights and the larger interest of the society. The constitution is primarily for the common man. Larger interest and welfare of student community to promote merit, achieve excellence and curb malpractices, fee and admission can certainly be regulated.

40. In paragraph 62 of it observed that it is now almost accepted that there are no absolute constitutional rights and all such rights are related. In para 63 it considered the concept of proportionality as a criteria to strike a balance between the rights and limitations imposed upon such rights. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the

purpose and such measures are necessary. Article 19(6) referring to reasonable restrictions was considered. In paragraphs 67, 68 and 69 their lordships held as under :

"67. Undoubtedly, right to establish and administer educational institutions is treated as a fundamental right as it is termed "*occupation*", which is one of the freedoms guaranteed Under Article 19(1)(g). It was so recognized for the first time in ***T.M.A. Pai Foundation***. Even while doing so, this right came with certain clutches and shackles. The Court made it clear that it is a noble occupation which would not permit commercialization or profiteering and, therefore, such educational institutions are to be run on *"no profit no loss basis"*. While explaining the scope of this right, right to admit students and right to fix fee was accepted as facets of this right, the Court again added caution thereto by mandating that admissions to the educational institutions imparting higher education, and in particular professional education, have to admit the students based on merit. For judging the merit, the Court indicated that there can be a CET. While doing so, it also specifically stated that in case of admission to professional courses such a CET can be conducted by the State. If such a power is exercised by the State assuming the function of CET, this was so recognized in ***T.M.A. Pai*** Foundation itself, as a measure of "reasonable restriction on the said right". Islamic Academy of Education further clarified the contour of such function of the State while interpreting ***T.M.A. Pai Foundation*** itself wherein it was held that there can be Committees constituted to supervise conducting of such CET. This process of interpretative balancing and constitutional balancing was remarkably achieved in ***P.A. Inamdar*** by not only giving its prematur to deholding of CET but it went further to hold that agency conducting the CET must be the one which enjoys the utmost credibility and expertise in the matter to achieve fulfillment of twin objectives of transparency and merit and for that purpose it permitted the State to provide a procedure of holding a CET in the interest of securing fair and merit-based admissions and preventing maladministration.

68. We are of the view that the larger public interest warrants such a measure. Having regard to the malpractices which are noticed in the CET conducted by such private institutions themselves, for which plethora of material is produced, it is, undoubtedly, in the larger interest and welfare of the students community to promote merit, add excellence and curb malpractices. The extent of restriction has to be viewed keeping in view all these factors and, therefore, we feel that the impugned provisions which may amount to "*restrictions*" on the right of the Appellants to carry on their "*occupation*", are clearly "*reasonable*" and satisfied the test of proportionality.

69. Apart from the material placed before the High Court, our attention has also been drawn to a recent report of the Parliamentary Committee to which we will refer in later part of this judgment. The report notes the dismal picture of exploitation in making admissions by charging huge capitation fee and compromising merit. This may not apply to all institutions but if the Legislature which represents the people has come out with a legislation to curb the menace which is generally prevalent, it cannot be held that there is no need for any regulatory measure. "An enactment is an organism in its environment". It is rightly said that the law is not an Eden of concepts but rather an everyday life of needs, interests and the values that a given society seeks to

realise in a given time. The law is a tool which is intended to provide solutions for the problems of human being in a society."

41. Thus, the fundamental right to occupation under Article 19(1)(g) came with certain clutches and shackles as mentioned in the aforesaid paragraphs. Educational institutions are to be run on 'No-Profit-No-Loss' basis. Admissions to the professional courses has to be based strictly on merit. Holding of Combined Entrance Test by a State was not only held to the permissible, but also a measure of reasonable restriction on the aforesaid right under Article 19(1)(g). In paragraphs 68 and 69 the Supreme Court categorically stated that larger Public Interest warrants such a measure as aforesaid. It also noticed the material before it including the report of a Parliamentary Committee providing a dismal picture of exploitation in making admissions or charging huge capitation fee and compromising merit. It also observed that this may not apply to all institutions, but if the legislature which represents the people has come out with a legislation to curb the menace which is generally prevalent, it can not be held that there is no need for any regulatory measure. These were the observations in the majority judgment.

42. In the context of reservation of seats for Scheduled Castes, Scheduled Tribes and other other backward classes the Supreme Court took notice of Article 15(5).Based on the aforesaid provision and also in view of the absence of any serious challenge to the legislation on the aforesaid issue, it repelled the same, especially as the constitutionality of Article 15(5) had already been upheld by a Constitution Bench Judgment in ***Paramati Educational & Cultural Trust v. Union of India, 2014 (8) SCC 1.*** Such reservation in private colleges (except minority institutions) was held to be in consonance with Article 15(5) of the constitution.

43. In paragraphs 96 and 97 the Supreme Court observed about the accountability and transparency in State actions which are relevant in the present case and the same are quoted hereinbelow :

"96. .....The accountability and transparency in State actions is much higher than in private actions. It is needless to say that the incidents of corruption in the State machinery were brought in the public eye immediately and have been addressed expeditiously. The same could never have been done in case of private actions. Even on a keel of comparative efficiency, it is more than evident that the State process is far more transparent and fair than one that is devised by the private colleges which have no mechanism of any checks and balances. The State agencies are subject to the Right to Information Act, Audit, State Legislature, Anti-Corruption agencies, Lokayukta, etc.

97. The very object of setting up institutions for the State is a welfare function, for the purpose of excelling in educational standards. On the other hand, the primary motivation for private parties is profit motive or philanthropy. When the primary motivation for institutions is profit motive, it is natural that many means to achieve the same shall be adopted by the private institutions which leads to a large degree of secrecy and corruption. As such, the mechanism of Regulations as envisaged under the impugned laws is legal, constitutional, fair, transparent and

uphold the primary criteria of merit. The same does not infringe on the fundamental rights of either the minorities or the non-minorities to establish and administer educational institutions and must as such be upheld as valid."

44. Thus, the legislation providing for Common Entrance Test and Centralized counselling to be held by the State was held to be valid and that it did not infringe on the fundamental rights of either the minorities or the non-minorities to establish and administer educational institutions.

45. Justice R. Bhanumati rendering a supplementing judgment in ***Mordern Dental College*** case also delved into the relevant issues and referred to paragraph 144 in P.A. Inamdar (supra), wherein, it was held that the two committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy are, in our view, permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the court for monitoring admission procedure and fee-fixation do not violate a right of minorities under Article 30(1) or the right of minorities and non-minorities under Article 19(1)(g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution. Justice Bhanumati further considered the issue of Common Entrance Test, Single Window system for regulating a private professional educational institution and referring to the judgments in T.M.A. Pai and P.A. Inamdar (supra) held in para 168 that if private un-aided educational institutions are given unfettered right to devise their own admission procedure and fee-structure, it would lead to a situation where it would impinge upon the right to equality of the students who aspire to take admissions in such educational institutions. The prescription of a centralized and Single Window procedure was re-affirmed as being in the larger interest and welfare of the student community. The permissibility of State or its agency to hold such Common Entrance Test with a Single Window procedure **including Centralized counselling** was also re-affirmed and reiterated as ensuring equal opportunity to all meritorious and suitable candidates and also that it did not cause any dent on the fundamental rights of the institutions in running the institutions.

46. Even at the cost of repetition it needs to be emphasized that even in ***P.A. Inamdar***, as noted in the majority judgment in Modern Dental College, as regards professional courses are concerned, the emphasis was on holding of a Common Entrance Test by the State or its agency. The relevant paragraphs have already been referred in the earlier part of this judgment.

47. In view of what has been stated hereinabove it is amply clear that the holding of Centralized counselling with a Single Window procedure based on the NEET 2016 by the State is not only a permissible regulatory measure which imposes reasonable restrictions on the rights of the un-aided private educational institutions, including the minority institutions, but, it also does not in any manner dent their fundamental rights either under Article 19(1)(g) or Article 30(1) of the Constitution of India. Thus, the first contention on behalf of petitioner's that it dented such right, has to be rejected and is accordingly rejected.

48. We also find merit in the contention of Dr Mishra that the counselling, inter alia, involved verification of all the original testimonials, verification of identity of the candidate based on bio-metric test and photographs, details of which had been provided to the State Government by the CBSE and not to the petitioners herein, as such, they cannot hold counselling, as, in the absence of such material it would be difficult to identify as to who is appearing, which would be quiet fatal. In such a scenario and based on past experience, participation of proxy candidates, so called Munna Bhais, so to say, cannot be completely ruled out . The credibility of government agencies in this regard is far greater when compared to private agencies.

49. **Authority of the State to hold a centralised counselling through Government orders**

50. As regard the authority of State which has been questioned, it is now very well settled that under Entry 25 of the VIIth Schedule of the Constitution of India the State Government has the authority to legislate on matters enumerated therein, which includes Medical Education, alongwith the Parliament and in the event the field being covered by an Act of Parliament including subordinate legislation therein, the latter will prevail over the former to the extent of inconsistency in view of Artice 254. The legislation by the State Legislature is subject to Entries 63 to 66 of the Union List. Entry 25 reads as under:

"25- Education including Technical Education, Medical Education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List 1; Vocational and Technical training of labour."

51. Entry 25 is wide enough to cover the field of admission to Universities and colleges imparting medical education.

52. The Parliament has enacted the Act 1956 to provide for the reconstitution of Medical Council of India and maintenance of a medical register for India and for matters connected therewith. Section 32 of the Act 1956 empowers the Central Government to make rules to carry out the purposes of the Act by notification in the official gazette. Section 33 empowers the Council with the previous sanction of the central government to make regulations generally to carry out the purposes of the said Act, and, without prejudice to the generality of this power, such regulations may provide for the subject matters mentioned as (a) to (n) of the said provision. Section 33(l) is relevant which reads as under:

"33(l). The conduct of professional examinations, qualifications of examiners and the conditions of admissions to such examinations."

53. The Medical Council of India has framed regulations in exercise of its powers under section 33, with the approval of the Central Government, which are known as "Medical Council of India Regulations on Graduate Medical Education 1997'. For the purposes of the issues involved

herein it is Chapter II of the said regulations which are relevant as they deal with admission, selection, migration and training. As per the notification published on 21.12.2010 Clause 5(5) of the Regulations 1997 was substituted, thereby providing that there shall be a single-eligibility-cum-entrance examination namely NEET for admission to MBBS course' in each academic year. The overall superintendence, direction and control of the aforesaid test (NEET) vests with the Medical Council of India, however, it, with the previous approval of the Central Government, shall select organizations to conduct the said test. Clause (2) of Regulation 5(5) states that it shall be necessary for a candidate to obtain minimum of 50% marks in each paper of NEET held for the each academic year, however in respect of candidates belonging to Scheduled Caste, Scheduled Tribes and other backward classes the minimum percentage of marks shall be 40% in each paper and in respect of candidates with locomotory disability of lower limbs the minimum percentage of marks shall be 45% in each paper of NEET. The use of the words "respective categories' in the proviso to the said clause is a reference to the categories mentioned in Clause (2) i.e. Scheduled Caste, Scheduled Tribes and other backward classes and candidates with locomotory disability of lower limbs and not to management category or Quota, as was contended by Sri Mathur.

54. As already stated earlier the regulations prescribing "NEET' were put to challenge before the Supreme Court and were struck down in the case of Christian Medical College Vellore vs Union of India 2014 (2) SCC 305, however, on a review petition being filed the said judgment was recalled vide judgment dated 11.4.2016 passed in Review Petition (C) Nos. 2159-2268 of 2013 and connected petitions, Medical Council of India vs Christian Medical College Vellore and others. Consequent to the aforesaid the notification dated 21.12.2010 prescribing "NEET' stood revived.

55. On 5th of August 2016 the Medical Council of India amended the aforesaid regulations of 1997 vide Regulations on Graduate Medical Education 2016. As per the said regulations, in Clause 7(6) of the "Regulations on Graduate Medical Education 1997", after sub-clause 7(6) the following clause was added :

"7(6AA) . There shall be no admission of students in respect of any academic session beyond 30th September under any circumstance. The universities shall not register any student admitted beyond the said date.

The Universities and other authorities concerned for the academic year 2016-17 shall organize admission process in accordance with the time schedule indicated in appendix F."

56. Furthermore, it was provided that in the Regulations on Graduate Medical Education 1997, after Appendix "E' the following shall be added :

"APPENDIX – F

TIME SCHEDULE FOR COMPLETION OF THE ADMISSION
PROCESS FOR FIRST MBBS COURSE
(Academic Session 2016-17)

Schedule for Admission	Seats filled up All India Quota	Seats filled up by the State Govt./Institutions
Conduct of National Eligibility Entrance Test (NEET 2016)	NEET 1 Conduct on 1st May 2016 NEET 2 on 24th July 2016	NEET 1 Conduct on 1st May 2016 NEET 2 on 24th July 2016
Declaration of Result of Qualifying Examination /Entrance Examination	17th August, 2016	17th August, 2016
1st Round of Counseling/Admission	22nd August to 27th August, 2016	3rd September to 5th September, 2016
Last date for joining the allotted college and course	3rd September, 2016	By 8th September, 2016
2nd Round of Counseling/Admission	9th to 14th September, 2016	21st September to 23rd September, 2016
Last date for joining for the candidates allotted seats in 2nd, Round of Counseling	By 20th September, 2016	By 26th September, 2016
Commencement of academic session	3rd September, 2016	3rd September, 2016
Last date up to which students can be admitted against vacancies arising due to any reason	Not applicable	30th September, 2016

SCHEDULE FOR ON LINE COUNSELING (ALLOTMENT PROCESS) FOR ALL INDIA QUOTA UG (MBBS/BDS) SEATS -2016

All India Quota (Online Counseling)			
SI. No.	Event	Duration	Days
1	Main Counseling Registration Choice Filling & Indicative Seat	22nd August to 25th August, 2016 (Registration will be open up to 5:00 PM of 25th August 2016 only)	4 days
2	Exercising of Choices and Locking	25th August, 2016 (up to 05:00 PM of 25th August, 2016	1 Day
3	Process of Seat Allotment-Round 1	26th August, 2016	1 Day
4	Round 1 Result Publish	27th August, 2016	1 Day
5	Reporting at the Allotted Medical/Dental College against 1st	28th August to 3rd September, 2016 (up to 05:00 PM of 3rd	7 Days

	Round	September, 2016)	
6	Exercising of Choices and Locking (Round 2)	9th September 2016 to 10th September 2016	2 Days
7	Process of Seat Allotment- Round 2	11th September, 2016	1 Day
8	Round 2 Result Publish	12th September, 2016	1 Day
9	Reporting at the Allotted Medical /Dental College against Round 2	13th to 20th September, 2016 (up to 05:00 PM of 20th September, 2016	8 Days
10	Transfer of vacant seats to state Quota	20th September, 2016 (After 05:00 PM)	-

(Time 05:00 PM mentioned above is by computer servertime) Commencement of MBBS/BDS first year session-from 13th September, 2016"

57. Much Reliance was placed by the learned Senior Advocates and other counsels appearing for the petitioners to contend that in view of this amendment, which according to them provides for counselling to be held by the Universities and other authorities concerned, the State Government had no authority to hold a combined counselling as Regulations having been made under a Central Legislation which have statutory character and the power of the State Government to legislate in respect of Entry 25 being subject to the power of the Parliament to legislate on the same subject, the State can neither legislate nor prescribe any counselling, much less a combined one. The contention was based on the use of the words "the universities and other authorities concerned ..... shall organize admission process." It was contended that as per said regulations the Universities and other authorities concerned are entitled to hold counselling, albeit, based on NEET 2016. It was further contended that the words "other authorities concerned" referred to the authorities of private medical colleges.

58. When confronted with the judgment of ***P.A. Inamdar (supra),*** which prohibited counselling by individual Institutions and prescribed a Single Window procedure as also Centralized counselling, specially paragraph 136 and 138 thereof, the learned counsel submitted that the words mentioned in clause 7(6AA) have to be understood as referring to the Association of medical Colleges who were permitted to hold a Common Entrance Test as also counselling, but, by no stretch of imagination could it be understood as empowering the state to hold such counselling even for the private colleges, including minority institutions. On the other hand Dr L.P. Mishra, learned Special Counsel appearing for the State, contended that the said regulation did not prescribe holding of a counselling nor as to who is to hold the same. It merely prescribed a time-table/schedule for completion of the admission process and as the admission process starts from the initiation of the process for holding NEET and ends with the actual admission in the colleges/universities, therefore, the reference to Universities and other authorities concerned has to be understood in this context,as, Universities and the authorities are concerned with this admission process at the time of granting admission as ultimately admissions are to be made by such institutions.

59. He also contended that the term "other authorities concerned" includes the State which is empowered to hold a Centralized counselling so as to ensure fairness, transparency, non-exploitativeness and adherence to merit, which, as per experience is easily compromised when private institutions are allowed to hold entrance test or counselling. He contended that in the absence of any legislation by the Parliament as to who should hold the counselling and in view of the recent judgment of the Supreme Court in Modern Dental College and Research Centre vs State of MP, 2016 (7) SCC Page 353, as also the subsequent judgment in the case of ***Sankalp Charitable Trust and another vs Union of India and others, Writ (C) No. 261 of 2016*** and connected petitions and interlocutory applications therein, dated 9th May 2016, the State Government is empowered to hold such counselling. He invited the attention of the court to the aforesaid judgments to demonstrate the interplay of Entry 25 of the Concurrent List and Entry 66 of Union List to buttress the argument that the State was within its jurisdiction to issue the impugned orders prescribing a combined counselling for all medical colleges including the private unaided colleges/universities as also the minority institutions.

60. The Supreme Court in **Modern Dental College** case also considered the competence of the State to legislate on the subject based on Entry 25 of List III and opined that the said entry granted concurrent power to both the Parliament and State legislature to legislate with respect to all the other aspects of Education except that which was specifically covered by List 1 Entry 63 to 66 and relying upon the earlier decisions in ***Gujarat University vs Krishan Raghunath ALR 1963 SC 703; State of Tamil Nadu vs Adhiyamaan Educational and Research Institute, 1995 (4) SCC 104; Preeti Srivastava vs State of Madhya Pradesh 1999 (7) ACC 120;*** and ***state of Maharashtra vs Sant . Shikshan Shashtra Mahavidyalaya, 2006 (9) SCC 1***, it held that entire gamut of education was not covered by List 1 Entry 66. No doubt List III Entry 25 is subject to List 1 Entry 66. It is not possible to exclude the entire gamut of admissions from List III Entry 25, however, exercise of any power under List III Entry 25 has to be subject to a central law referable to entry 25.

61. Based on the aforesaid, the Constitution Bench held that there was no violation of right or autonomy of educational institutions in Combined Entrance Test being conducted by the State or an agency nominated by the State or in fixing fee. The right of a State to do so is subject to a central law. Once the notification under the central statute for conducting Combined Entrance Test on the basis of NEET becomes operative, it will be a matter between the States and union territories which will have to be sorted out on the touchstone of Article 254 of the constitution.

62. Now coming to the regulations of the Medical Counsel of India, specially Regulation 7(6AA), as inserted by the notification dated 5th of August 2016, On a perusal of the same the court finds that though there is a reference to Counselling in the said Regulation, but, it does not provide as to who is to hold the counselling - whether the State, the private colleges or any other agency. Use of the words "universities and other authorities concerned" is only for organizing the admission process for the year 2016-17 in accordance with the time-schedule indicated in "Appendix F'. It cannot be understood or interpreted to mean that the universities and other authorities concerned are entitled to hold the Centralized counselling nor can the words "other authorities concerned" be

understood as referring to the authorities of private universities and colleges, as, it would be against the dictum in ***P.A. Inamdar's*** case (supra) which clearly bar the holding of such entrance test or counselling individually by universities or colleges. The contention of Shri Mathur to the contrary cannot be accepted. His suggestion that the words "universities and other authorities concerned" can be understood as referring to an association of un-aided professional colleges which could hold such a Common Entrance Test or counselling as per the judgment in P.A. Inamdar, can also not be accepted, as, this court cannot read into the said regulations something which is not mentioned therein. The court cannot supply a caussus omissus to Regulation 7 (6AA).

63. Furthermore, as far as the right of Associations of such colleges to hold a Centralized counselling is concerned, if permitted, the Single Window procedure which has been much emphasized by the Seven Judges Bench in P.A. Inamdar's case as also in the Constitution Bench decision in Modern Dental College will have to be given a go by. Furthermore, in view of the observations in Modern Dental College and in P.A. Inamdar which have already been discussed in the earlier part of this judgment, such a procedure would not fully secure the adherence to the triple test and merit in the admission process. In Modern Dental College there is a reference to a report of a parliamentary committee, in this regard, which has also been referred by us earlier, moreover even at the cost of repetition, we would like to emphasize that as far as professional colleges are concerned in T.M.A. Pai (supra), as well as in P.A. Inamdar (supra) and Modern Dental College (supra), it has been held that the Common Entrance Test and a Single Window procedure be adopted by the State or its agency, meaning thereby this should not be left in the hands of private institutions even if they are universities, specially in respect of Professional colleges.

64. We find merit in the contention of Dr. L.P. Mishra that in effect what is provided in Clause 7 (6AA) is a time schedule for completion of the admission process and the reference to universities and other concerned authorities, therein, is a general observation referable to the universities and the other authorities concerned with the admission process as the institutions also have a role to play in adherence to the time-schedule at least at the time of granting admissions, which is also mentioned therein, but, these words cannot be interpreted to confer the power of holding Counselling by an individual institution or by an association of such institutions.

65. On a perusal of the said regulation we have no doubt that it does not deal with the subject as to who is to hold the counselling based on NEET 2016. We have not found any other provision either in the Act 1956 or Regulations 1977 made thereunder, which may contain any such provision, therefore, the conclusion is irresistible that there is no Central Legislation on the question as to who is to hold the Counselling, therefore, the field is open for the State Legislature to legislate on the subject.

66. Now the next question which falls for our consideration is as to whether the state could prescribe such centralized counselling in the form of a single window procedure by issuance of Government orders i.e without any legislation on the subject. We are of the view that it would have been better if the State Legislature had promulgated a legislation in keeping with the observations made in P. A. Inamdar etc., but, having said so, we are not inclined to accept this plea for the reason

firstly, that under Article 162, subject to the provisions of the Constitution, the executive power of the State extends to the matters with respect to which the legislature of the state has power to make laws, subject to the proviso contained therein, which, in the facts of the case is not attracted.

67. We do not find any such exercise of executive power by the Central Government which may preclude the State Government from holding a centralized counselling, rather there is an advisory dated 9.8.2016, that, it may do so. The order impugned herein which has been issued by the Government of India on 9th August 2016 permits the state governments to go for Combined Counselling for admissions to MBBS/BDS Course in all medical/dental colleges including deemed universities. This order has been issued in consultation with the Law Ministry.

68. Another reason which persuades us to repel the contention is the larger Public Interest and the welfare of the Student Community, which, the impugned Government Orders seek to achieve in consonance with the dictum of the Supreme Court in T.M.A. Pai and P A Inamdar and Modern Dental College.

69. In this context we would like to refer to the Act 2006 which was promulgated so as to set into motion the regulatory measures in respect of admission process and fixation of fee after the pronouncement in P.A. Inamdar. Firstly, this Act excludes from its operation the minority institutions, therefore, as far as the minority institutions are concerned, there is no legislation for regulating admission process and fixation of fee in respect to them. Further, on a careful perusal of the said Act, we do not find any provision therein prescribing the agency which is to hold counselling. Section 5 refers to the eligibility for admission to a private aided or unaided professional educational institutions, which shall be such as may be notified by the State Government. Now after the notification dated 21.12.2010 prescribing a National Eligibility Cum Entrance Test. Section 5 of the Act 2006 as also section 7 thereof have virtually been rendered redundant as the field being occupied by a subordinate legislation under a Central Act, the said provisions would have to give way to the former.

70. It is noteworthy that the Act 2006 is absolutely silent on the question of holding of counselling, especially as to who is to hold it. The contention of Shri Mathur that admission being a continuing process, which includes counselling, the same should be read into the Act 2006, accordingly, under Act the private colleges have been entrusted all the responsibility of filling up the seats under the management quota while the remaining have to be filled by the State, therefore, management seats are to be filled by the private colleges by holding their own counselling, is clearly unacceptable, as, this court cannot read into the act something which is not mentioned therein, more so, as it would be contrary to what has been held in **P.A. Inamdar and Modern Dental College**. Shri Mathur endeavored hard to make out a case for the management seats by referring to the words "respective category" used in Regulation 5(5) of the regulations of 1997 made by the Medical Council of India under Section 33 of the Act 1956, by reading it conjointly with the Management, categorically mentioned in Sections 6 and 7 of the Act 2006.

71. We are of the considered view that the term "respective category" used in Regulation 5(5) refers to the categories mentioned in Clause (2) thereof, and not to the Management Category. This contention, therefore, has to be repelled, especially, as after the introduction of a common Entrance Test followed by Centralized Counselling the concept of State quota and Management Quota has melted away rendering the same otiose.

72. It is also a misconception that the state allots the institution, in fact, it is the student who chooses the institution and the State merely communicates it formally to the concerned. It only ensures adherence to a single window procedure and the triple test as also merit in the admission process.

73. In view of the above discussion, The Act of 2006 does not deal with counselling, therefore it can not be said that the impugned Government orders are inconsistent with the same.

74. As far as the competence of the State Government to hold a Centralized Counselling is concerned, in view of the discussions already made, the argument of Sri Mathur, based on jurisdictional incompetence, is repelled. As far as the order of the Central Government dated 09.08.2016 is concerned it has been stated by Sri S.B. Pandey learned Additional Solicitor General and has also been stated in the counter affidavit that the said order is merely an advisory which is not binding. We are also of the view that the said order has not been issued in exercise of statutory powers under the Medical Council of India Act, therefore, it has to be treated as an advisory and nothing more. However, we must add that we do not find any conflict therein with the notification dated 05.08.2016 amending Regulation 7(6AA) for the reasons already mentioned hereinabove.

Validity of G.O.'s dated 11.8.2016, 20.8.16, 22.8.16 and 31.8.16 and the order of the Central Government dated 9.8.16.

75. These Government orders dated 11.08.2016, 20.08.2016, 31.08.2016 prescribe a centralized counselling for admission to MBBS/BDS seats in all colleges/Universities of the State including private unaided colleges and minority institutions. In view of the discussion already made hereinabove, it is clear that in the absence of any central legislation on the subject matter of centralized counselling and specially in view of dictum of **Modern Dental College case and Sankalp Charitable Trus**t case, the State Government is/was competent to prescribe a centralized counselling for such admissions in furtherance of a single window procedure envisaged in ***T.M.A. Pai, P.A. Inamdar*** as further explained and reaffirmed by the constitutional bench in Modern Dental College so as to ensure the satisfaction of triple test mentioned above and adherence to merit in admissions.

76. A single window procedure in the form of Centralized Entrance Test and Centralized Counselling is applicable to minority institutions also as per **P.A. Inamdar** and **Modern Dental College** case, therefore, the said Government orders cannot be faulted on this count specially as, exclusion of minority institution under Section 3(g) read with Section 6 etc. of the Act, 2006, from its purview has become redundant in view of a Centralized Eligibility and Entrance Test being

prescribed by regulation 5(5) as amended vide notification dated 21.12.2010 under Section 33 of the Act, 1956, which is a Central Act and also in view of the judgment of the Supreme Court in **Modern Dental College Case** and **Sankalp Charitable Trust** case, which leave no room for any doubt in this regard. The said orders do not suffer from any error.

Validity of Order dated 2.9.2016

77. On 02.09.2016, a policy decision was taken by the State Government, just a day prior to start of counselling (the petitioners allege that it was issued in the mid-night of 2.9.16). This decision reiterated the centralized/combined counselling for all institutions, vide clause 3, but, clause 1 and 2 thereof, introduced a categorization of seats for admission in private institutions (excluding the minority institutions), as, subsidized and non-subsidized, with the condition that 50% of seats of such institutions shall carry a fee of only Rs.36,000/- per student per annum. The basis of this, as per Dr. L.P. Misra, was that this was the tuition fee payable in Government colleges. These seats are to be filled only by those who are domicile of State of U.P. Thus, this condition which was earlier not applicable to the seats for admission in private institutions was made applicable to the extent of 50% of their seats. These conditions were not applicable to the remaining 50% non-subsidized seats. In fact the students admitted against non-subsidized seats were now to fund the subsidy for the 50% subsidized seats.

78. As regards the remaining 50% non-subsidized seats students admitted against these would have to pay enhanced tuition-fee to be calculated on the basis of the resultant amount arrived at, after deducting the fee realized as against subsidized seats from the total fee receipts based on the fee per student determined by the Fee Regulation Committee. Vide another other dated 03.09.2016 which has been annexed with the connected writ petitions such fee has been determined at double the rate normally paid by the students.

79. As regards clause 1 and 2 referred above, Dr. L.P. Misra sought to justify the same with reference to Article 41 of the Constitution of India and the constitutional objective contained therein coupled with a corresponding obligation upon the State to cater to the need of poor students who according to him are also entitled to study MBBS/BDS course and join the medical profession, but were not able to do so on account of financial constraints, hence, the obligation of the State towards them was being discharged by prescription of subsidized seats for them. According to him the State was empowered to apportion part of the seats for this purpose as also to require the candidate to be a domicile of the State which would largely ensure that after passing out he will serve the people of the State and shall not move out.

80. Without in any manner doubting the intent or object of the State Government in introducing such a clause and also assuming for a moment its permissibility in law, we do not see how this avowed object can be achieved by the said provisions. No income criteria has been prescribed so as to determine the eligibility of a student for admission against subsidized seats. In the absence of a criteria or benchmark to determine who is a poor student it is inexplicable as to how admission of poor students against such seats can be assured. Clause 1 says that the scheme

would be implemented on "first admission", basis, this itself defeats the object. As per Dr. L.P. Misra "First Admission Basis" means the first student as per rank in the NEET List to exercise his option for admission to a seat in a private institution will be entitled for a subsidized seat. Thus, one who is higher ranked in the NEET list will have a preferential advantage of admission against a subsidized seat. On being asked, Dr. Misra categorically stated that if the higher ranked, say, a student who is at serial no.1 in the NEET List, will be entitled to it, even if, he is financially well off, as, it would be in keeping with the requirement of adherence to merit which the impugned decisions also seeks to achieve but then, what he fails to see is, that it would defeat the very object of creating subsidized seats. A financially well off student will get admission against a seat carrying only Rs.36,000/- as tuition fee whereas a poor student, if such seats get exhausted, may be asked to pay double the fee, as, there is no guarantee that all poor students will figure in the zone of merit for 50 percent subsidized seats. This is not what the Cabinet decision, which has been perused by us, envisages. Clause 1 and 2 of order dated 02.09.2016 seem to be founded on a fallacious presumption that all or most of the high ranked students would be poor also. If, most, if not all such students, are financially well off based on the criteria to be fixed by the State and most of the seats get filled by such financially well off students, would it serve the constitutional objective being canvassed before us and whether such a situation can be sustained in the light of the objective sought to be achieved as per the decision of the Cabinet.

81. On the other hand if subsidized seats are filled only by poor students, irrespective of their lower merit, it will compromise the merit consideration, protection of which is paramount , specially as, admission is to a professional medical course which is related to the health and well being of the people. Such admission would also be against the judicial mandate already referred hereinabove, as, less meritorious students would be admitted, whereas, more meritorious shall be ousted considering the extent of subsidy i.e. 50% of the seats. The State has clearly failed to apply its mind appropriately to the relevant aspects of the matter before introducing such a provision.

82. Such a laudable object as is being professed, can be achieved and would be legally permissible, if poverty and merit go hand in hand. The student ranked at sl. no.1 in the NEET list, if he is also poor, for which a rational criteria will have to be laid down, he should be eligible and entitled to admission against a subsidized seat, not otherwise. If he is financially well off or above the criteria referred above, he should be admitted against non subsidized seats, unless the State devises a policy to encourage meritorious students to take up the medical profession and its study, in keeping with the constitutional provisions and principles, which is not the case here. Admission of such students against free seats was disapproved in T.M.A. Pai (para 30 and 45). This would be a reasonable mechanism which would stand the test of constitutional and statutory provisions and would also achieve the object of the State.

83. There is another aspect of the matter regarding competence and admissibility of such action of the State, which requires consideration. Under Section 4 read with section 10 of the Act, 2006 the fee chargeable by an institution is to be determined by a statutory committee constituted thereunder, that too, after taking into consideration the parameters mentioned in Section 10 and giving a right of hearing to the concerned institution, against whose decision a further remedy is

prescribed by way of an appeal under Section 11 thereof. The Act does not empower the State Government to fix such fee nor does it classify the seats into subsidized or non-subsidized, therefore, the competence of the State Government in this regard under the said Act is non-existent. Exercise of such executive power by the State during subsistence of a statutory provision i.e. Section 4 and 10 of the Act, 2006 on the subject, cannot be sustained.

84. Furthermore the order dated 20.9.2016 introduces an entirely new provision or policy in the garb of the power vested in the State under Section 15 (1) of the Act, 2006 which in law, can be exercised, only for removal of any difficulty in the implementation of the said Act. In the present case there is no such difficulty. Section 15(1) does not envisage introduction of a new policy wholly un-related to any difficulty in the implementation of the said Act. Sri Mathur has rightly relied upon the judgment in the case of ***Mahadev Upendra Sinnai Vs. Union of India, (1975)3 SCC 765*** (paragraph 39) in this regard.

85. Dr. Misra relied upon a judgment of the Supreme Court in the case of ***State of Sikkim vs. Dorjee Tshering Bhutia and others reported in (1991) 4 SCC 243*** in support of his contention, which in our view does not apply in the facts of the present case. Assuming for a moment that even independent of Section 15(1), the State has the power to take such a policy decision, the fact is as is evident from the discussion made hereinabove and hereinafter, the policy contained in clause 1 and 2 of the order dated 2.9.16 is apparently unworkable, irrational and arbitrary.

86. During arguments it was contended that funding of subsidy would put great financial burden on the State but while filing the counter affidavit the State has been more cautious in choosing its words. In para 2 it has sought a short time for removing shortcomings in the policy, if some are found. In para 3(iii) it has been stated the cost has to be borne fully by the student and that it had not made budgetary provisions in this regard and at present there was no policy decision of the State Government to subsidize any higher study. The contention far from helping it reveals the casual manner in which the policy has been formulated.

87. Again, assuming for a moment that Section 10 relates to determination of fee of individual institutions and as regards policy matters and on principles an inherent power is vested in the State to meet larger public interest, the question still remains- where is the authority vested in it by law to burden one category of students with the obligation to fund the subsidy extended to another category, rather to compel them to bear the financial burden of such subsidy, which may result in deprivation of an otherwise meritorious students from admission, who may be in a position to bear the cost of his own study but not to bear the cost of another student also, in addition to his own. In present times students or their parents take loan for funding higher studies including in professional courses, now in view of the impugned policy, student will have to take loan of double the amount to fund the subsidy of another student, this could also be in the case of a poor student who may not be so high in the merit list so as to fall in the first 50% seats so as to get the subsidy, which is apparently unreasonable. Article 41 is a guide for the State, subject to its economic capacity, but, it does not permit the imposing of such a burden on others, that too, students, without any legislative backing as none has been shown.

88. It is relevant in this context to discuss the concept of subsidy and the meaning of the said term. The Supreme Court had the occasion to consider it in the case of ***Shri Ambika Mills Ltd. v. Textile Labour Association (1973) 3 SCC 787*** in the context of the payment of Bonus Act 1965 etc. Their Lordships considered various decision of the word subsidy which are as under:-

Webster's New World Dictionary, 1962

.....a grant of money, specifically (a).....(b) a Government grant to a private enterprise considered of benefit to the public.

Shorter Oxford English Dictionary.

Help, aid, assistance.....financial and furnished by a state or a public corporation in furthering of an undertaking or the upkeep of a thing....

Chambers Twentieth Century Dictionary, Revised Edn.

Assistance and in money.....a grant of public money in aid of some enterprise, industry etc., or to keep down the price of a commodity....

The Reader's Digest Great Encyclopaedic Dictionary, Vol. II (M.Z).

Financial aid given by Government towards expenses of an undertaking or institution held to be of public utility; money paid by Government to producers of a commodity so that it can be sold to consumers at a low price...."

Definition given in **"Words and Phrases, Permanent Edition, Vol. 40"** where subsidy is described as follows:

"A subsidy is a grant of funds or property from a Government as of the state or municipal corporation to a private person or company to assist to the establishment or support of an enterprise deemed advantageous to the public; a subvention". Reference is made to 60 Corpus Juris.

Corpus Juris Secundum, Vol. 83, p. 760 gives the following under the beading of subsidy:

"Something, usually money, denoted or given or appropriated by the Government through its proper agencies; a grant of funds or property from a Government, as the state or a municipal corporation to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public; a subvention.

Pecuniary premiums offered by the Government to persons enlisting in the public service, or engaging in particular industries, or performing specified services for the public benefit are treated in Bounties."

89. **The Blacks Law Dictionary** defines subsidy to mean a grant, usually made by the Government to any enterprise whose promotion is considered to be in the public interest. Although Government sometimes make direct payment such as (cash grant) subsidies are usually indirect. They may take the form of research and development supports tax breaks, a provision of raw material at below market prices or low interest loan or low interest export credits guaranteed by a Government agency.

90. **The New Webster's Dictionary of the English Language College Edition**, defines subsidy as a some of money granted by the Government to an organization, institution or industry, specially one benefiting the health and welfare of the country, charity, hospital, or public service; a gift of money; grant; in Britain as an aid and tax formally granted by Parliament to the Crown for special occasion a sum paid by one Government to another usually providing a return certain commercial advantages or other services.

91. Thus, essentially, it is an aid granted by a Government. Assuming that it could the extracted by The Government to fulfills the public need or higher public objective, it can not be done from the students without their consent, without even ascertaining their paying capacity and without there being any constitutional/ statutory backing in this regard nor any rational basis for the same.

92. In fact, such categorization of seats into free and payment seats and admission of wealthy students against free seats in ***Unnikrishanan's case*** was disapproved in ***TMA Pai's*** case (paragraphs 30 to 45).

93. The imposition of such an enhanced fee under NRI quota of 15%, wherever prevalent, stands on a different footing, as, it depends upon undisputed financial capacity of the said category. In the State of U.P. there is no NRI quota. A resident Indian may not have the same economic capacity as a Non-Resident-Indian. Moreover the scheme does not define the rich and the poor. It does not provide any criteria for such distinction. One could understand if the State opted to bear the subsidy or if it came out with a constitutionally and legally sustainable policy, but, not in its present form.

94. Thus, in its present form clause 1 and 2 of order dated 02.09.2016 not only defeat the object of facilitating admission of poor students but also compromises merit in admission to a professional medical course. The policy contained therein is unworkable, impractical, without any rational basis, arbitrary, and legally unsustainable. It is hit by Article 14 and 15 of the Constitution of India.

Reservation based on Residence in the Context of Clause 1 and 2 of order dated 02.09.2016.

95. It is also the grievance of the petitioners that though the earlier Government Orders did not impose any such condition that original residents of the State of U.P., alone would be entitled to admission against sanctioned seats in an unaided private institution but the order dated 02.09.2016, after creating a category of subsidized seats to the extent of 50% of the total sanctioned intake of a private institution puts such a condition vis-a-viz these seats which according to them is not only constitutionally impermissible in view of the judgment of the Supreme Court rendered in the case **Dr. Pradeep Jain and others Vs. Union of India and others** reported in **(1984) 3 SCC 654; Magan Mehrotra and Others Vs. Union of India and Others** reported in **(2003) 11 SCC 186** and **Nikhil Himthani Vs. State of Uttrakhan and Others** reported in **(2013) 10 SCC 237, but** also compromises the merit as reflected in the NEET list 2016, as, 50% of the sanctioned intake in a private institution will be filled by an original resident of the State of U.P., even though, he may be placed lower in the NEET list 2016. This, according to the learned counsel appearing for the petitioners would be a clear violation of merit consideration which has been emphasized by the Supreme Court and is also sought to be professed and achieved by the State itself in issuing the impugned orders.

96. Dr. L.P. Misra appearing for the State on the other hand contended that reservation of certain percentage of seats for residents of the State of U.P. was constitutionally permissible as per the judgment of the Supreme Court in **Dr. Pradeep Jain, and the case of Saurabh Chaudri and Others Vs. Union of India and Others** reported in **(2003) 11 SCC 146**. He contended that there was a rational basis for the said provision that is those who study in the Medical Colleges or Universities of the State against subsidized seats and also belong to the State may serve its people instead of moving out to other places. There was a need for such reservation in the larger interest of the people of the State. He also emphasized that, if at all, this grievance could have been raised by a student who may be prejudiced by such a condition, but, it is surprising that the private institutions had rushed to Court challenging the same, though they are in no way prejudiced by it.

97. Having perused the brochure as also the counter affidavit and the form annexed therewith delineating the meaning of the term 'original resident' as applicable to the admission process in question, we do not find any mention of 'Place of Birth' as one of the criteria for availing the benefit of reservation on the basis of residence, therefore, the prohibition contained in Article 15(1) is not attracted. The word 'Domicile' is a special word indicating the status of a person in relation to a legal or political system, but, it has been loosely used as a synonym for 'residence', as was observed by the Supreme Court in Dr. Pradeep Jain's case, which in fact counselled the States not to misuse the said word in an admission process. Thus, the word 'Domicile' which is not mentioned either in the order dated 02.09.2016 nor in the brochure etc. has no relevance to the present controversy. Institutional reservation is also not an issue here.

98. The issue is, whether original residents of the State of U.P. as mentioned in the brochure etc. could be extended the benefit of reservation on the basis of residence against 50% of

the seats in private unaided institutions in the matter of admission to professional under graduate courses, where, the emphasis is on merit and after introduction of NEET, it is the merit reflected therein, which is to be adhered.

99. On a perusal of the dictum of the Supreme Court in the Dr. Pradeep Jain's case which still holds the field, we find that making of some provision for reservation of certain percentage of seats for residents of the State is not completely barred which is evident from paragraphs no. 8, 9, 10, 13, 14, 15, 16, 19, 20 and 21 of the said judgment. In fact in Paragraph No. 19 it has been observed that even if at some stage it is decided to regulate admissions to the M.B.B.S course on the basis of an All India Entrance Examination, some provision would have to be made for allocation of seats amongst the selected candidates on the basis of residence so as to take into account the local factors mentioned in the said judgment. In Paragraphs No. 20 and 21, while considering the extent of such reservation a complete exclusion of the rest of the Country and wholesale reservation based on residence was clearly ruled out. As regards the exact percentage it was observed that it is not possible to provide a categorical answer to this question as the extent of such reservation would depend on several factors including opportunities for professional education in that particular area, the extent of competition, level of education, development of the area and other relevant factors. Referring to a Medical Education Review Committee's suggestion that the outer limit of reservation based on residence or institutional preference should not exceed 75%, the Supreme Court opined that it would be fair and just to fix the outer limits at 70%. This was done to reconcile the apparently conflicting claims of quality and excellence. It further made it clear that the outer limit fixed by it was subject to any reduction or attenuation which may be made by the Indian Medical Council. It further opined that this outer limit fixed must gradually over the years be progressively reduced but that it was a task to be performed by the Medical Council of India.

100. In view of the aforesaid, the argument advanced by Dr. L.P. Mishra justifying prescription of 50% seats in private institutions to be filled from residents of the States appears worth accepting at first blush. However, we can not loose sight of the fact that when the judgment was pronounced in the **Dr. Pradeep Jain's** case in the year 1984, the phenomenon of private educational institution had not bloomed and it is doubtful as to whether even the sapling had been planted. We can also not ignore the fact that thereafter the Supreme Court considered the criteria and parameters of admission to medical courses at the under Graduate and Post Graduate level, as is evident from the reading of the judgment of the Supreme Court in **T.M.A. Pai** and in **P.A. Inamdar** and the Constitution Bench Decision in **Modern Dental College**. It hardly needs to be emphasized, specially in view of the later judgment in **Modern Dental College**, that adherence to merit is the paramount consideration for admission in professional courses which should not be compromised. It being so, this issue is to be considered from this angle also. No doubt reservation of certain percentage of seats for the residents of the State is constitutionally permissible and may at times be necessary and the reasoning given by Dr Misra that people of the State should have the service of such medical professionals in a State which is lacking in such facilities and services, but, what would be its extent in such a scenario so as not to compromise merit in the admission process, is to be kept in mind.

101. In the present case, out of total of 1840 seats in M.B.B.S. courses in Government Colleges and Universities, 1540 seats are available for being filled as State seats i.e. apart from the All India Quota. All these seats are to be filled by students who are original residents of the State of U.P. In addition to it Clause 1 and 2 of the order dated 02.09.2016 introduces a reservation on the basis of residence in respect of 50% seats in private institutions also. The total seats in M.B.B.S. Courses which are available in private institutions are 3100, out of it, 1550 would be filled from the residents of the State. Thus, as far as the M.B.B.S. State seats are concerned, out of 4650 about 3090 would be reserved for residents of the State. In terms of percentage it comes to 66.45%.

102. If we include the All India Quota seats of M.B.B.S. also, then, the total seats come to 4940 and as, no such condition is prescribed for the All India Quota, therefore, out of the said figure, 3090 seats in total would be reserved for the residents of the State. In terms of percentage, based on total seats including the All India Quota, it comes to 62.55%. Same is the position with regard to the B.D.S. quota.

103. The percentage and figures mentioned hereinabove are on the basis of information given by Dr. L.P. Mishra and learned counsel for the petitioners, therefore, they are subject to any correction or adjustment upon correct calculation, but, they do give a picture as to the extent of reservation on the basis of residence, which, even after lapse of more than 30 years, is still about 62 to 65%, though, the outer limit fixed way back in the year 1984 by the Supreme court was 70%, that too, with the observations that it was subject to reduction and attenuation with passage of time by the Medical Council of India, but, it appears that it has not undertaken any such exercise.

104. The decision of the Cabinet placed before us, as also two counter affidavits filed by the State do not reveal any material or exercise undertaken in this regard to ascertain and fix the extent of such reservation so as to justify the same as a rational action in accordance with the views expressed in ***Dr. Pradeep Jain's case (supra),*** taken after undertaking an exercise with due application of mind, as, this has a bearing on the rights of other meritorious students who are not residents of the State, but, are citizens of this Country, specially, as the conflicting claims of quality and excellence, as observed in ***Dr. Pradeep Jain's case (supra),*** were required to be reconciled by fixing a reasonable percentage.

105. It is also not out of place to mention that the State does not contribute even a penny to the private institutions, therefore, imposition of such a condition in respect of admission in such institutions is a factor which weighs heavily against the reservation of seats to the extent of 62 to 65% in private institutions on the basis of residence, specially, as it can not be doubted that by doing so the merit reflected in the NEET list will be affected at least to some extent, as, if the candidate is a resident of the State, even if lower in merit, he would have a preferential right and would steal a march over a meritorious candidate who is not a resident of U.P., thereby, compromising merit in the admission process which would not be in consonance with the law declared by the Supreme Court as noticed herein above, therefore, balancing conflicting claims in the light of the said decisions and also considering requirement of adherence to merit, we are of the considered view that the prescription of reservation based on residence exceeding 50% total seats

excluding the seats of the All India Quota but including the seats in Government institutions, is unreasonable and unsustainable, therefore, we confine such reservation to the extent of 50% as aforesaid. This would, however, be subject to any further revision keeping in mind the observation made in ***Dr. Pradeep Jain's case (supra).*** Clause 1 and 2 of order dated 02.09.2016 shall stand modified accordingly, so far as the condition of residence is concerned, subject however to the other observations made by us regarding the validity of the said clauses.

Validity of the Order date 3.9.2016

106. As far as order dated 03.09.2016 is concerned, by superseding clause 4 of the order dated 02.09.2016 and restoring Centralized Counselling to minority institutions also as was the case under the earlier Government orders, it does not violate any right of such institutions, as, it is permissible to do so in view of ***P.A. Inamdar*** and ***Modern Dental College*** case, therefore, this order does not suffer from any error of law.

Application of Reservation of seats for Scheduled Caste, Scheduled Tribe and Other Backward Classes etc. in Admission to Private Institutions including minority institution.

107. Even though the State legislature has promulgated an Act known as U.P. Admission to Educational Institution (Reservation of Scheduled Caste, Scheduled Tribe and Other Backward Classes) Act, 2006 Dr L.P. Misra appearing for the State made a categorical statement and the same is also contained in the counter affidavit filed by the State, to the effect that considering the paramount consideration of merit which is not to be compromised in the event of application of such reservation the State has decided not to apply the same in the matter of admission in question. In view of this, the issue does not fall for any further consideration by this Court.

Minority institutions

108. As far as minority institutions are concerned in view of clause 5(5) of the Regulations, 1997 made under Section 33 of the Act, 2006 which prescribes a single Eligibility cum Entrance Test for admission to graduate medical professional courses without making any distinction between minority and non minority institutions and the admissibility of such a regulatory measure by the Supreme Court in ***Modern Dental College case and Sankalp Charitable Trust case*** and as there is no challenge to the holding of such tests in these petitions even by petitioners who are minority institutions, therefore, on the same analogy and for the same reasoning as has been discussed hereinabove in the earlier part of the judgment, a Centralized Counselling for such a minority institution is also permissible and has been approved in Modern Dental College, therefore, the impugned orders in this regard do not suffer from any error. Exclusion of minority institutions from the purview of the Act, 2006 does not invalidate the impugned orders as the said Act does not dealt with centralized counselling. Condition no.4 of notification dated 02.09.2016 was contrary to the dictum of the Supreme as already referred above, therefore, it has rightly been superseded by a subsequent order dated 03.09.2016, reiterating the position under the earlier Government orders

which was in consonance with law. A single window procedure in the form of Centralized Entrance Test and Centralized Counselling is applicable to minority institutions also as per ***P.A. Inamdar*** and ***Modern Dental College case,*** therefore, the impugned Government orders cannot be faulted on this count specially as exclusion of minority institution under Section 3(g) read with Section 6 etc. of the Act, 2006 has become redundant in view of a centralized entrance test being prescribed by regulation 5(5) as amended vide notification dated 21.12.2010 and the judgment of the Supreme Court in ***Modern Dental College case*** and ***Sankalp Charitable Trust case*** which leave no room of doubt in this regard.

109. Considering the mechanism of Common-Entrance-Test and Centralized Counselling from which even the minority institutions cannot escape as they are permissible regulatory measures to be adopted by the State and a reasonable restriction on constitutional rights which, in any case, are not absolute as held in Modern Dental College case and also as the process of admission includes counselling, where, admissions are granted on the basis of the eligibility-cum-merit list based on NEET Test 2016 without any liberty to the private institutions including the minority one's to hold any entrance test or counselling separately for themselves and also considering the fact that it is a students who opts for a particular institution, including a minority institution, and neither the State nor the private institution can have any role in exercise of this choice, the question of minority institutions being allowed to fill up their seats on their own does not arise as any such permission would contrary to the law declared by the Courts and would give room for exploitation of such students as has already been discussed at length in **Modern Dental College** case.

110. However, having held as above, we cannot ignore the fact that after all, the minority institutions by their very character are entitled to cater to the need of the minority albeit within reasonable limits in terms of protection granted to them under Article 30(1), therefore, while considerations of merit in the Common-Entrance-Test and counselling which are regulatory measures is necessarily applicable in respect of minority institutions also, which cannot be compromised, but, a balance is required to be struck in this regard with the rights of minority institutions to admit students of their community, especially, in respect to Integral University established under the State Act i.e. Integral University Act, 2004, Section 6 of which permits it to provide reservation for minorities not exceeding 50% in a year. Needless to say that similar is the position in respect of other minority institutions as these protections are under the constitutional provisions and not on the basis of a statute. These institutions can not hold an Entrance Test or Counselling but they are at liberty to choose, subject to the choice of the student, without deviating from merit of the students belonging to minority community as reflected in the NEET list 2016 and grant admission to them to the extent permissible, in exercise of their minority status and the benefit attached therewith as otherwise their minority status itself would be rendered meaning-less.

111. The dictum of the Supreme Court in this regard is binding on all courts under Article 141 of the Constitution of India and under Article 141 thereof all authorities civil and judicial in the territory of India are obligated to Act in the aid of the Supreme Court.

112. As far as regulation of fee chargeable by them is concerned it is not in dispute that the provisions applicable to other institutions are not being applied by the State in respect to them by the impugned orders, therefore, this issue does not require any consideration.

Objection to the maintainability of the writ petitions.

113. An objection was raised by the State regarding the very maintainability of these writ petitions in view of an order dated 28.04.2016 passed by the Supreme Court in the case of **Sankalp Charitable Trust** by referring to point no.6 therein. The issue involved in the said writ petition is/was regarding holding of NEET examination for admission to MBBS/BDS for academic session 2016-17. The cause of action for filing the present writ petitions has arisen subsequent to the said examination and it is based on the policy decision taken by the State Government regarding a subsequent action i.e. Centralized Counselling and fixation of fee etc. The observation contained at point no. 6 that any difficulty with regard to implementation of the order of this Court the Stake-holder may approach the Supreme Court has to be understood in the context in which it has been made, therefore, for the reasons aforesaid we do not find that the said order creates any bar in entertaining these writ petitions which are based on a subsequent and separate cause of action.

114. Another objection was sought to be raised by the State that none of the students had approached the Court and that it was premature to say that based on the policy of the State Government the requisite number of students would not take admission under 50% non-subsidized seats in private institutions thereby jeopardizing their viability. We are not impressed by this argument. The petitioners are private institutions who have challenged the policy decision of the State Government by which it has decided to hold Centralized Counselling as against their alleged right to hold such counselling as being claimed by these petitioners' institutions, as also the rationality behind creation of subsidized seats; introducing reservation on the basis of residence as against 50% seats in private institutions where the State has no financial stake, thereby, allegedly, compromising merit in violation of the dictum of the Supreme Court and encroaching on their rights. In view of what has been discussed hereinabove as the policy contained in the order dated 02.09.2016 in its present form is clearly unworkable, therefore, to say that petitioners cannot challenge the same is apparently fallacious. This policy is the basis for holding the admission process after issuance of NEET list, therefore, if its validity is not considered at this stage but at a later stage it might result in jeopardizing the admission process irreparably as also the career of the students. No trial and error can be permitted in such matters without there being due application of mind at the initial stage of formulating a policy, as, the triple test and merit consideration are to be ensured at this stage itself.

114A. Sri Gyanendra Srivastava learned counsel appearing for Medical Council of India informed the Court that in view of the dictum of the Supreme Court in **Priya Gupta's** case the time scheduled for such admissions cannot be tinkered by any one. We have perused the judgment in **Priya Gupta's** case and have kept the same in mind. If the illegality is palpable and fundamental which requires rectification while there is still time, we do not see how this could be done without interfering in the matter but of course the time scheduled has to be honoured.

115. As far as interim orders passed by Kerala and Bombay High Courts are concerned and which have been relied upon by the petitioners, as we are deciding the writ petitions finally and interim orders do not constitute binding precedent and also in view of detailed discussions made hereinabove which could not be done at the interim stage in the proceedings pending before the other High Courts as also other proceedings before this Court as a consequence of which earlier relevant aspects could not be considered in these interim orders, therefore, we do not feel that our hands are tied in any manner by those interim orders.

116. Before parting we would like to record our strong disapproval of the casual manner in which the State has proceeded with the matter by issuing the orders one after the other modifying the earlier one till the last moment of registration and thereafter till the very date of commencement of counselling i.e. 03.09.2016, even introducing a major change in the policy vide order dated 02.09.2016 just a day prior to it, thereby creating a state of confusion and uncertainty which should have been avoided. Even the policy relating to admission in private unaided institutions had not taken final shape and was uncertain till the issuance of the brochure which is stated to have been issued on 16.08.2016. The student should have been informed in advance about the Government policy with regard to admission process and fee fixation unambiguously and specifically so as to facilitate the exercise of their choice in respect thereof during the process of counselling.

117. In view of the above discussion we order as under:-

(i) Subject to what has been held hereinabove, the impugned orders prescribing a Centralized Counselling for all institutions for admission to MBBS/BDS medical courses in the State based on NEET 2016, do not suffer from any error.

(ii) Minority institutions shall be allowed to admit the students of their community based on Centralized Counselling held by the State on the basis of NEET 2016, to the extent permissible, but, without deviating from the merit of such students as reflected in the NEET list 2016, so as to sub-serve their minority status under Article 30(1) of the Constitution of India.

(iii) Clause 1 and 2 of the order dated 02.09.2016 shall not be given effect in their present form, however, considering the laudable object behind it, which the State wants to achieve in discharge of its constitutional obligation, if it chooses to prescribe subsidized seats for the poor it may do so, but, subject to following conditions:-

(a) it should fund the subsidy itself unless it is able to devise any other legally and constitutionally permissible means of doing so;

(b) in such an eventuality, it shall ensure that poor students are admitted against subsidized seats without compromising merit i.e. only when such students are within the zone of merit, in the normal course, for exercising his choice during counselling as per NEET list 2016 and not otherwise;

(c) reservation on the basis of residence for the purposes of subsidized seats, if the occasion so arises, shall be restricted to 50% of the seats excluding the All India Quota seats but including the seats in Government institutions and the number/percentage of such seats reserved in private institutions shall be re-fixed accordingly.;

118. The State may if it chooses reformulate its policy as aforesaid. If not, then clause 1 and 2 of the order dated 02.09.2016 shall be treated as inoperative.

(iv)As we have held clause 1 and 2 of the order of the State dated 02.09.2016 to be unsustainable in its present form and as they provide the basic principle and formula of fee fixation, for seats in private institutions, therefore, unless the State reformulates its policy as aforesaid, the orders passed by the fee Committee based thereon, in respect of individual institutions can also not be sustained nor given effect, and are accordingly quashed, therefore, subject to the above, the committee shall refix the fee chargeable by such institutions, accordingly.

It is made clear that we have not considered the other grounds of challenge to the decision of fee committee raised in separate writ petitions by individual petitioners and all such pleas shall be open to the parties, if the occasion so arises.

(v)As a consequence of the above Ist round of counselling, which has not yet been finalized, is required to be held again. It is therefore provided that the same shall be done with expedition and the admission process shall be completed, including the exercise/steps, if any, referred at point no. (iii) hereinabove, with the same expedition, keeping in mind the time schedule in regulation 7(6AA) of the Regulations, 1997 but no later than 25.09.2016.

119. In the end we would like to record our appreciation for the valuable assistance extended by all the learned counsel appearing for the parties which has facilitated the rendering of this judgment today, considering the time crunch.

120. Subject to the above, all the writ petitions are partly allowed.

(2016) 9 ILRA 1654
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

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

Misc. Bench No.- 21017 Of 2016

Ajmal Khan **...Petitioner**

Versus

Election Commission of India Thru. Chief Election Commission **...Respondents**

Counsel for the Petitioner:
Ajmal Khan (In Person)

Counsels for the Respondents:
C.S.C., A.S.G., V.K. Dubey

HEADNOTES:

(A) Election Law – Election Manifesto – False Promises – Corrupt Practice – Scope

Mere promise made in election manifesto, even if subsequently not fulfilled, **does not by itself amount to "corrupt practice"** within the meaning of Section 123(2) of the Representation of the People Act, 1951. Allegation that promises such as distribution of laptops, grant of scheduled caste status to backward Muslim community, and providing solar rickshaws were false inducements, cannot be adjudicated in writ jurisdiction. Question of corrupt practice affecting election results can only be examined by way of **election petition** under the Representation of the People Act, 1951.

(B) Constitutional Law – Article 324 – Power of Election Commission – Reformative Measures – Judicial Direction

High Court under Article 226 of the Constitution can issue direction to the Election Commission of India to consider taking **preventive or reformative measures** for maintaining purity of elections where political promises may mislead voters on matters beyond constitutional competence of State Government. Court cannot frame guidelines where statute already occupies the field, but can require Commission to consider steps to preserve free and fair elections.

(C) Free and Fair Election – Democratic Principles – Voters' Right to Information

Purity of elections is part of basic democratic structure. Election Commission empowered under Article 324 to ensure fairness and transparency in electoral process. Courts may direct Commission to examine issues relating to misleading promises which may affect informed electoral choice of voters.

PROCEDURE:

Public Interest Litigation filed alleging that election manifesto of a political party in 2012 U.P. Assembly Elections contained promises which were beyond constitutional competence of State Government and amounted to corrupt practice and undue influence upon voters. Petitioner sought directions for de-recognition of the political party and issuance of reformative directions by Election Commission of India.

ISSUE:
Whether false or unfulfilled promises in election manifesto constitute **corrupt practice** under Section 123(2) of the Representation of the People Act, 1951?
Whether High Court can issue directions to the **Election Commission of India** under Article 226 of the Constitution to take reformative steps preventing misleading promises in election manifestos?

CITATION:
S. Subramaniam Balaji Vs. State of Tamil Nadu & Ors. (2013) 9 SCC 659
Ramchandra G. Kapse Vs. Haribansh Ramakbal Singh (1996) 1 SCC 206
Union of India Vs. Association for Democratic Reforms & Anr. AIR 2002 SC 2112
Kuldip Nayar Vs. Union of India & Ors. AIR 2006 SC 3127

CONCLUSION:
Writ petition disposed of. Court held that **unfulfilled promises in election manifesto do not constitute corrupt practice per se**, and remedy relating to corrupt practice lies by way of election petition under the Representation of the People Act, 1951. However, liberty granted to petitioner to approach Election Commission of India with suggestions for reformative measures. Election Commission may consider exercising its powers under Article 324 of the Constitution to ensure fairness and purity of elections and prevent constitutionally impermissible promises by political parties.

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

1. Heard Sri Ajmal Khan Advocate in person, Sri V.K. Dubey, learned counsel for the Election Commission of India, Sri S.B. Pandey, learned Assistant Solicitor General of India and Sri Vijai Bahadur Singh, learned Advocate General on behalf of the respondent No.3 State of U.P.

2. It is not necessary to issue notice to the respondent No.4 keeping in view the nature of dispute involved at this stage and in view of the judgment that we are delivering today.

3. The present writ petition has been filed alleging that the election manifesto of the respondent No.4 Samajwadi Party while fielding its candidates for contesting Assembly Elections of the State in 2012 promulgated a manifesto with a view to influence voters and cast their votes in favour of the said said party, declaring false promises knowingly, which amounts to a corrupt practice and even otherwise, such practices in order to be prevented in future, should be taken notice of by the Election Commission of India for issuing necessary directions. He, therefore, submits that this public interest litigation should be entertained and directions be issued for appropriate action.

4. In order to substantiate his submissions, Sri Khan submits that so far as corrupt practice is concerned, any form of undue influence as defined under Section 123 (2) of the Representation of Peoples Act, 1951 would amount to a corrupt practice. The respondent Samajwadi Party on the basis of such false promise particularly with regard to distribution of laptops in the field of education, secondly with regard to giving the status of scheduled caste to the most backward

Muslim minority Community and thirdly, of providing electronically/ solar charged rickshaws to manual rickshaw pullers were all false promises, that were given knowingly and which were not within the capability of the party to extend. This would amount to an inducement of voters resulting in a corrupt practice. He, therefore, submits that such a political party should be de-recognized and deprived of its right and privileges under the Election Symbols (Reservation & Allotment) Order, 1968. Consequently, the Election Commission of India should withhold all such privileges to the Samajwadi Party.

5. Sri Khan further prays that a mandamus be issued directing the Election Commission of India to issue reformative orders to all political parties in order to avoid allurement of voters on false, deceptive and wrong promises for which the Election Commission of India has ample powers under Article 324 of the Constitution of India.

6. Replying to the said submissions, learned counsel for the respondents particularly, Sri Vijai Bahadur Singh, learned Advocate General has invited the attention of the Court to the Apex Court decision in the case of **S. Subramaniam Balaji Vs. State of Tamil Nadu and others: (2013) 9 SCC 659 [paragraph-84]** to submit that any promise made in an election manifesto of a political party, would not fall within the definition of a corrupt practice. Even otherwise, if a corrupt practice has resulted in materially affecting the results of any elections that were held in the year 2012, the same could be made subject matter of an election petition by the aggrieved person of a particular constituency which is not the case here, hence the writ petition for such a relief would not be maintainable.

7. On the second issue of issuing any orders for reformation, Sri Singh has relied on paragraph 79 of the above noted decision to urge that guidelines cannot be framed by the Court in this regard.

8. Countering the said submissions Sri Khan contends that the judgment in the case of S. Subramaniam Balaji (supra) as relied upon by the learned Advocate General is not on the issue so as to prevent this Court from issuing any directions to the Election Commission of India for taking up reformative measures. Sri Khan relies on the judgment in the case of **Union of India Vs. Association for Democratic Reforms and another: AIR 2002 SC 2112 [paragraph-56], and Kuldip Nayar. Vs. Union of India & Ors.: AIR 2006 SC 3127 [paragraph-327],** to contend that if the Election Commission has the power to take reformative steps, then this Court in exercise of jurisdiction under Article 226 of the Constitution of India can issue directions to the Election Commission for taking appropriate steps even if no guidelines can be directly framed by the Court. He, therefore, contends that the judgment relied upon by the learned Advocate General, does not in any way bar this Court to exercise its discretion in issuing a direction to the Election Commission of India for taking reformative steps particularly, in relation to such false promises being made by the political parties that can never be performed by them. Sri Ajmal Khan submits that the power to grant the status of a scheduled caste is nowhere available to the State Government and is exclusively within the domain of the Centre. Thus, a false promise of giving status of a scheduled caste to the extremely backward Muslims minorities was a promise that was knowingly false

beyond the competence of the State and, therefore, the respondent No.4 political party does not deserve to enjoy the privilege of the 1968 Order. It is in this background that he submits that a direction be issued to the Election Commission of India to take appropriate steps.

9. Having given a thoughtful consideration to the submissions raised, we find that the judgment in the case of S. Subramaniam Balaji (supra), squarely covers the field in no uncertain terms in para 84.1 holding that a promise in a manifesto that remains unfulfilled by itself cannot be a corrupt practice. The Apex Court also relied on its earlier decision in the case of **Ramchandra G. Kapse. Vs. Haribansh Ramakbal Singh: (1996) 1 SCC 206.** Thus, the first argument of the petitioner does not hold water. As per the constitutional and legal mandate even otherwise the results of an Assembly Elections can be questioned on the ground of corrupt practice only through an election petition under the Representation of Peoples Act, 1951.

10. The second issue relating to issuing of directions to the Election Commission of India has to be understood in the context of the prayer made in this writ petition. In the case of S. Subramaniam Balaji (supra), while deciding issue No.3, what has been held is that the Court does not enjoy any inherent power to issue guidelines that are already provided under the Representation of Peoples Act, 1951 where Section 123 (2) enumerates a series of acts as falling within the definition of corrupt practices. Thus, in the absence of any legislative vacuum, it was held that the Court will not have any such inherent power.

11. Reiterating the restraint to be exercised by Courts through judicial interference, in para 84.4, of the Balaji case the Hon'ble Supreme Court ruled that unless the action of Government is unconstitutional or contrary to the statutory provisions, an interference should not be made merely on the ground that the action was not wise or that the extent of expenditure is not good for the State.

12. However, the aforesaid ratio of the decision does not prevent the Courts from issuing any appropriate direction for the consideration of any such steps to be taken by the Commission that may be necessary to curb any mal-practice that may be constitutionally not permissible. In the instant case, the petitioner has raised an issue that the promise of giving the status of scheduled caste to extremely backward Muslims was a false promise declared in the manifesto that was done knowingly to deceive the voters who are not well aware of the distinction of doctrine of separation of powers and doctrine of distribution of powers.

13. Admittedly, the status of scheduled caste can be granted by the Central Government during the Presidential Order or by bringing about any alteration in the same which is exclusively in the domain of the Central Government. The State Government in its exercise of authority constitutionally has no decisive role to play in the same. The petitioner, therefore, is not wrong in his submission that such an impression being given to the voters who are not well read to understand the above time distinctions of a working of the Constitution, might have been allured to vote for the respondent No.4 Samajwadi party whereas, no State Government would have power to do so. But the aforesaid impression can also be possibly explained by a political party to mean that the promise was to fight for such a status and not to grant it.

14. It is in this context that the petitioner has prayed for a direction to the Election Commission for bringing about reformative measures. The issue, therefore is, can a direction be issued by this Court to the Election Commission for a consideration of the same.

15. It is no doubt true that a free and fair election is a concept inherent in the democratic values adopted by our polity as has been indicated extensively in the Constitution Bench judgment relied upon by Sri Khan in the case of Kuldip Nayar (supra). It is no longer necessary to extract or repeat the observations made therein vis-a-vis a free and fair election to be ensured by the Commission of India. In this direction, Sri Khan has rightly referred to the Apex Court decision in the case of Union of India Vs. Association for Democratic Reforms and another (supra) where the Apex Court was considering the right of citizens to know about the criminal antecedents and other important steps which were necessary for choosing a candidate of one's choice. Thus, the directions which were issued by the High Court for a candidate to provide information, was found to be a step to maintain purity of elections. Consequently, Hon'ble Supreme Court upheld the exercise of power for issuing necessary directions to the Election Commission of India to invoke Article 324 of the Constitution of India calling upon a candidate to disclose the information about himself at the time of contesting elections. The Court, therefore, did exercise its power by issuing a mandamus to that effect and the argument in this regard as is being advanced by Sri Khan was upheld. The aforesaid judgment therefore, is not in conflict with the decision relied on by the learned Advocate General in the case of S. Subramaniam Balaji (supra). The judgment in the case of Union of India Vs. Association of Democratic Reforms (supra) is a three-Judges decision whereas, the judgment in the case of S. Subramaniam Balaji (supra) is a two-judges pronouncement of the Apex Court.

16. Consequently, we are of the opinion that in order to ensure fairness and purity and streamlining of any procedure, the Election Commission of India can be called upon by this Court to invoke its authority under Article 324 of the Constitution of India to take such preventive or reformative measures that the Commission may find necessary to avoid any such malady and prevent the political parties from deliberately promising something which otherwise, may not be constitutionally permissible for them to do so.

17. We, therefore, give liberty to the petitioner to approach the Election Commission of India for any such redressal along with his suggestions and it shall be open to the Election Commission of India to take any such steps that may fall within its authority under Article 324 of the Constitution of India in order to regulate the activities of the political parties so as to avoid any form of practice that may be necessary to maintain the purity of elections.

18. The petition stands disposed of with the said observations.

(2016) 9 ILRA 1659
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 No.- 26756 Of 2016

Surendra Kumar Gupta & Ors. ...Applicants
Versus
State Of U.P. ...Opposite Party

Counsel for the Applicants:
Sushil Shukla

Counsel for the Opposite Party:
G.A.

HEADNOTES:
High Court held that although Sessions Court and High Court possess jurisdiction to accept surrender and consider bail directly under Section 439 Cr.P.C., such extraordinary power cannot be exercised routinely.
Normal practice requiring surrender before Magistrate is a pragmatic and well established procedure necessary for verification of identity of accused, case status and other formalities before remand. No exceptional or special circumstance was shown by applicants warranting deviation from established procedure.
Conduct of applicants indicated repeated attempts to avoid due process of law despite grant of earlier protective orders. Inherent jurisdiction under Section 482 Cr.P.C. is extraordinary and must be exercised sparingly with circumspection.
Application held devoid of merit and dismissed.

Proceedings:
Application under Section 482 Cr.P.C. seeking direction to Sessions Judge, Rampur to accept direct surrender of the accused-applicants in Criminal Case No.1654 of 2006 arising out of Case Crime No.297 of 2006 under Sections 304 and 201 IPC, P.S. Civil Lines, District Rampur, and thereafter to consider interim and regular bail in light of law laid down in *Sundeep Kumar Bafna vs. State of Maharashtra* (2014) 16 SCC 623, along with prayer for protection against coercive measures.
F.I.R. was lodged regarding a major fire incident in Swati Menthol Factory, Rampur allegedly caused due to gross negligence and lack of adequate safety measures in handling highly inflammable mentha oil, resulting in death and burn injuries to several labourers. Initially charge-sheet was submitted under Sections 304-A, 285 and 287 IPC, however the Chief Judicial Magistrate, upon consideration of material on record, took cognizance under Sections 304 and 201 IPC.
Earlier proceedings were quashed by High Court but the said order was set aside by Hon'ble Supreme Court in Criminal Appeal No.1484 of 2010, restoring criminal proceedings. Non-bailable warrants were thereafter issued. Applicants approached High Court seeking direction permitting direct surrender before Sessions Court instead of Magistrate.

Issue:

Whether inherent powers under Section 482 Cr.P.C. can be exercised to direct Sessions Court to accept direct surrender of accused persons and consider bail application in cases triable exclusively by Court of Sessions, bypassing normal procedure of surrender before Magistrate.

Citation:
Sundeep Kumar Bafna vs. State of Maharashtra and another, (2014) 16 SCC 623.
Concurrent jurisdiction of High Court and Sessions Court under Section 439 Cr.P.C. to accept surrender and consider bail recognized, but such power to be exercised only in exceptional circumstances.

Conclusion:
High Court held that although Sessions Court and High Court possess jurisdiction to accept surrender and consider bail directly under Section 439 Cr.P.C., such extraordinary power cannot be exercised routinely.
Normal practice requiring surrender before Magistrate is a pragmatic and well established procedure necessary for verification of identity of accused, case status and other formalities before remand. No exceptional or special circumstance was shown by applicants warranting deviation from established procedure.

Conduct of applicants indicated repeated attempts to avoid due process of law despite grant of earlier protective orders. Inherent jurisdiction under Section 482 Cr.P.C. is extraordinary and must be exercised sparingly with circumspection.

Application held devoid of merit and dismissed.

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

1. This application u/s 482 of Cr.P.C. has been preferred seeking the direction to learned Sessions Judge, Rampur to accept, directly in his court, surrender of the accused-applicants to judicial custody in connection with Criminal Case No.1654 of 2006 u/s 304, 201 I.P.C., P.S.-Civil Lines, District-Rampur (State vs. Surendra Kumar Gupta and others) as per and in terms of interpretation of law given by the Hon'ble Supreme Court in case of Sundeep Kumar Bafna vs. State of Maharashtra and another-(2014) 16 SCC 623 and thereafter decide interim as well as regular bail plea of the accused-applicants in accordance with various guidelines issued by this Hon'ble Court from time to time on subject matter of consideration by courts below relating to bail and interim bail plea of any accused in any case involving cognizable and non-cognizable offences. It has also been prayed further that no coercive steps be taken against the accused-applicants in connection with aforesaid criminal proceedings pending in the court of learned C.J.M., Rampur.

2. Heard Shri A.C. Srivastava, Advocate holding brief of Shri Sushil Shukla, learned counsel for the applicants and learned A.G.A. and perused the record.

3. It appears from the record that one Har Narain s/o Shri Roshan Lal lodged a F.I.R. dated 15.2.2006 against the applicant no.1 Surendra Kumar Gupta and the Manager of Swati Menthol Factory, Rampur and also the Board of Management, Swati Menthol Factory, Rampur for offence which was registered as Case Crime No.297/2006 u/s 304 and 201 I.P.C., Police Station-Civil Lines, District-Rampur with allegations that the nephew of informant namely Laxmi Narain was working as Generator Operator in Swati Menthol Factory, Rampur. On 15.2.2006 at about 10.30 - 11.00 O'clock in the morning, a terrific fire incident took place in Swati Menthol Factory due to

criminal negligence of its owner Mr. S.K. Gupta, the Managers and the Board of Management. It was further alleged that there was no proper management and arrangement of fire extinguishers and other such instruments in the factory and there was no arrangement for water etc. in order to extinguish the fire, even though the Mentha Oil product is highly inflammable. It was further alleged that several persons have received burn injuries including his nephew and few of them have died and there is no information regarding whereabouts of his nephew.

4. On the basis of this F.I.R., the investigation had proceeded and the charge sheet no.75/2006 dated 20.3.2006 was submitted before the Court of learned Chief Judicial Magistrate, Rampur against five accused persons including the applicants of instant petition for offences u/s 304A, 285, 287 of I.P.C. The Chief Judicial Magistrate, Rampur considered the material available on case diary on 21.3.2006 and found that the conclusion of the Investigating Officer about the commission of offences u/s 304-A, 285 and 287 I.P.C. is erroneous and there is sufficient material available on case diary disclosing the commission of offence u/s 304 and 201 I.P.C. against the accused persons Surendra Kumar Gupta, Sanchit Gupta, Ramendra Kumar Gupta, Nitin Gupta @ Sachin Gupta and Sanjai Agrawal. With such conclusion, the Chief Judicial Magistrate, Rampur took cognizance for the said offences and issued process against present applicants only as the other co-accused Ramendra Kumar Gupta and Sanjai Agrawal were already in jail, and hence, the warrants in respect of these two accused persons were issued u/s 309 of Cr.P.C.

5. It also appears from the record that the present applicants had preferred Criminal Misc. Writ Petition No.2213 of 2006 which was disposed of vide order dated 23.2.2006 refusing to interfere with the criminal case but granting stay of their arrest in criminal case for a period of only four weeks from the date of order. It was further observed that if they appeared or were produced before the court below within this period of four weeks then matter shall be dealt with in accordance with law.

6. It further appears from the record that the present applicants and other co-accused jointly preferred Criminal Misc. Application No.3216 of 2006 (Surendra Kumar Gupta and others vs. State of Uttar Pradesh and another) before this Court which was allowed vide order dated 6.10.2006 and the criminal proceedings of the criminal case and the charge sheet were quashed against those persons. The State of Uttar Pradesh feeling aggrieved with the said order dated 6.10.2006, challenged the same before the Hon'ble Apex Court by way of filing Criminal Appeal No.1484 of 2010 (State of U.P. vs. Surendra Kumar Gupta and others). This appeal was allowed by Hon'ble Apex Court vide order dated 29.7.2015, whereby the judgment and order dated 6.10.2006 passed by this Court in favour of accused was set aside and the trial court was given the liberty to proceed with the matter without being influenced by any of the observations made by the High Court in the said judgment and order. The aforesaid order passed by Hon'ble Apex Court was received by the trial court on 14.6.2016 and the non-bailable warrants were issued against the applicants and co-accused persons.

7. At this juncture, the accused-applicants preferred a Criminal Misc. Application u/s 482 Cr.P.C. No.23470 of 2016 (Surendra Kumar Gupta and two others vs. State of U.P.) against the

said issuance of process of non-bailable warrants. The aforesaid application u/s 482 Cr.P.C. was disposed off by this Court vide order dated 9.8.2016 refusing to interfere with the order whereby non-bailable warrants were issued. However, this Court recorded the submission made by the counsel for the applicants of the said application regarding the desire of accused-applicants to obtain bail after surrendering in the court below and also their request seeking a protective direction to the lower court to decide the proposed bail application. In view of such desire and request of applicants, this court in the said order dated 9.8.2016 considered the peculiar facts and circumstances of the case and granted the protective order to the applicants staying coercive measures for a period of two months with a further observation/direction that in case the applicants after surrendering in the court, move application for bail within said period, the same shall be considered and decided in accordance with law.

8. With the aforesaid background of the facts, the accused-applicants have once again approached this Court by means of this application u/s 482 of Cr.P.C. with a prayer that appropriate direction be issued to the Sessions Judge, Rampur for accepting, directly in its Court, the surrender of the accused-applicants and take them into judicial custody in connection with criminal case in question as per and in terms of interpretation of applicable law given by the Hon'ble Supreme Court in case of ***Sundeep Kumar Bafna vs. State of Maharashtra and another-(2014) 16 SCC 623*** and thereafter decide interim as well as regular bail plea of the accused-applicants in accordance with various guidelines issued by this Hon'ble Court from time to time. Submission of learned counsel for the applicants is that as the prevailing practice in the judgeship of District Rampur in relation to consideration of bail plea in cases involving the offences triable by the court of Sessions is that the accused-applicants will have to surrender first in the court of Chief Judicial Magistrate, thereafter they shall be taken into judicial custody and their bail applications shall be heard by the Chief Judicial Magistrate. But the matter is involving offences u/s 304 and 201 I.P.C., which are triable exclusively by the court of Sessions his bail shall in all likelihood shall get rejected and thereafter the accused-applicants will have to press their bail plea before the Sessions Judge, who alone will eventually consider their bail plea and during this period, the accused-applicants will have to remain in jail. Further submission is that the Hon'ble Apex Court in Sundeep Kumar Bafna's case (supra) has specifically held that the sessions court and the High Court have jurisdiction upon a such matters and accused of offences which are triable by court of sessions their surrender may be taken directly and they may, in fit cases, be released also directly.

9. Learned A.G.A., on the other hand, has vehemently opposed the relief sought by the accused applicants and has submitted that although there is no dispute about the proposition of law laid down in Sundeep Kumar Bafna's case (supra), but there is no good ground in the present case for grant of such relief as is being claimed by the accused-applicants.

10. After considering the rival submissions in the light of record of the case in hand as well as the position of law as it stands, this Court has no hesitation to hold that the High Court as well as the Sessions court have jurisdiction to entertain such petition of accused side seeking acceptance of their surrender before their Court and take or assume the accused in custody so as to further

entertain the regular bail u/s 439 of Code of Criminal Procedure. However, it would be proper to reproduce the conclusion part of Sundeep Kumar Bafna's case (supra), which is as follows:

*"**33**. In conclusion, therefore, we are of the opinion that the learned Single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the appellant before us was concerned. Conceptually, he could have declined to accept the prayer to surrender to the Court's custody, although, we are presently not aware of any reason for this option to be exercised. Once the prayer for surrender is accepted, the appellant before us would come into the custody of the Court within the contemplation of Section 439 Cr.P.C. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant-appellant had shown sufficient reason or grounds for being enlarged on bail."*

11. A careful study of Sundeep Kumar Bafna's case (supra) would go to show that the Hon'ble Apex Court was dealing with an order of learned Single Judge of Bombay High Court, in which relief sought by the accused side, similar to the relief sought in case at hand, was rejected with an opinion that such plea cannot be accepted as the accused is required to be arrested or otherwise he has to surrender before the Court which can send him to remand either to the police custody or to the Magisterial custody and this can only be done u/s 167 of Cr.P.C. by the Magistrate and that order cannot be passed at the High Court level. After considering gamut of case laws, the Hon'ble Apex Court concluded in paragraph 33, as quoted above, that the learned Single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the accused before the Hon'ble Apex Court was concerned. However, while holding this conclusion, the Hon'ble Apex Court has also concluded that conceptually, learned Single Judge could have also declined to accept the prayer to surrender to the Court's custody, although there was nothing on record to show any reason for this option to be exercised.

12. In view of what has been considered and held by the Hon'ble Apex Court in the Sundeep Kumar Bafna's case (supra), the real question in present matter is not whether this Court has or has not the power to take the surrender itself or to direct the court of sessions to take surrender directly. The real question is also not whether this Court in a given case has or has not the power to directly entertain the bail application assuming the notional custody of a particular accused in certain circumstances or not. The High Court has no doubt the power to do so itself and also has the power to direct the court of sessions to do so directly. But the real question is whether this particular case deserves the exercise of any such power or not and whether this particular accused has some such peculiar circumstances that he should be dealt with differently from everybody else. To have the power to do something is different from having the desirable required circumstances under which such a power ought to be exercised. It is a self answering question and does not need any elaboration upon the same that it is wholly unpragmatic to suggest, as has been requested by counsel, that this Court should now directly start taking surrender of all the accused persons and entertain their bail applications directly without letting them go through the process of surrendering in the lower courts. This is also wholly unpragmatic to suggest that in all cases which are triable by the court of sessions, the already overburdened court of sessions should step into the

shoes of Magistrates and undertake upon themselves the staggering burden of taking surrender in hundreds and thousands of cases themselves. What is being done in all district courts is a pragmatic necessity and the practice going on in District Rampur is just the same which is the practice of all the districts all over the province of Uttar Pradesh. There is nothing unusual about it and it is a time honoured practice well countenanced with by Higher Courts. The process of accepting the surrender requires a lot of formalities like identification of the accused, like the availability of material against them, like ascertaining the fact whether the accused persons are really wanted in the case or not and what is the current state of investigation and the charges against them. After the applications of the accused are accepted in the court of Magistrate, the process gets started up and the Public Prosecutor of that court utilizes his resources and ascertains all the above information and submits reports before the Magistrate about the necessary details and it is on the basis of such report that the Magistrate deems it fit to take the judicial custody of a particular accused. In fact there are certain situation in which even a Magistrate can take the bail of an accused even in a matter which is triable by the court of sessions. The sick and infirm and the women are known categories of accused with regard to whom exception has been carved out in the Code of Criminal Procedure itself. Sometimes in a given befitting case even a Magistrate can grant bail to such an accused charged under grave offences punishable even by life imprisonment. Though the Magistrates are not normally supposed to grant bail to the accused in offences triable by the court of sessions but it cannot be presumed as a matter of definite certainty that in no case and in no circumstances a Magistrate can grant bail to such an accused. There may be another eventualities which need not to be elaborated upon here, but even presuming that this case is not a case where the Magistrate would grant bail, this Court does not see any of those exceptional reasons which may justify the exercise of inherent jurisdiction for the purposes of directing the courts of sessions to take the surrender of the accused directly and entertain their bail directly without the accused appearing before the Court of Magistrate and without moving their bail application before the court of Magistrate. This Court also does not see any good reason to undertake any such exercise itself.

13. In fact the entire background of the case in hand is sufficient to indicate that the accused-applicants are wanted in respect of criminal case involving offences u/s 304 and 201 I.P.C. relating to the death of several persons/labourers of Swati Menthol Factory, Rampur which had occurred due to criminal reckless conduct and negligence of grossest level on the part of accused-applicants giving rise to their indictment under aforesaid sections. Due to improper and insufficient safety arrangements in a factory producing highly inflammable product i.e. Mentha Oil so many persons payed the price. The victims of such heart breaking incident of terrific fire were poor labourers, whose voices have been heard or have been left unheard is not known to this Court.

14. This Court also finds from the record that the accused-applicants had obtained protective order of short interim stay of their arrest not only once but twice vide order dated 23.02.2016 passed by the Division Bench of this Court in Criminal Misc. Writ Petition No.2213/2006 and vide order dated 9.8.2016 passed by this Court in application u/s 482 Cr.P.C. No.23470 of 2016. It may be pertinent to mention that in this subsequent petition No.23470/2016, accused had pressed forth their desire to surrender before the court below and to obtain bail and on the basis of such desire, the accused-applicants had obtained protective direction for a further period of two months, during which there was to remain a stay in respect of coercive measures against them. Yet the accused-applicants did not

surrender before the court below and have approached this Court once again on the premise that they have been legally advised to obtain further direction from this Court.

15. Even in a case like this where the charge against the accused is of committing culpable homicide in which many lives got extinguished because of their conduct, it appears that being influential and moneyed persons the accused-applicants have almost been toying with the provisions of law and have been trying to exploit the same to avoid the process of law anyhow. The course of justice has simply been waiting for them for such a long drawn out period of time. Being owner of some factory or being any of its high echelons the accused persons may be having some higher social status or a higher economic status but before the Majesty of law all citizens are equal and they must expect to be treated alike. The applicants' counsel has not been able to show any such exceptional circumstance which may make the applicants' case distinguishable from thousands and thousands of other people who everyday surrender before the court below and submit to the jurisdiction of the court and get justice in due course.

16. As is evident, the accused have already approached this Court and in order to have a safe corridor un-intercepted by police they have also got protective direction obtaining interim stay on issuance of coercive measures against them. But all this magnanimity of the Court has not been taken by the accused in the right spirit, it appears. This court as far as it is practicable does take care to take steps to protect individual liberty of the citizens, but the liberal Majesty of law should not be presumed to be its weakness. The history of the conduct of applicants reflects their propensity for avoiding and fleeing from the course of justice in the name of law. There is difference between the use of law and misuse of the same. The law of the land which we have is man made and not divine. An unscrupulous accused can always find ways and means to defeat justice in the name of law. But the courts have always to be vigilant in order to see and screen through the bonafides of their intention. It appears to be quite audacious on the part of accused not to have surrendered so far in the court below even after the Hon'ble Apex Court set aside the order that was obtained from this Court by the accused in their favour. After Hon'ble Apex Court's order, the accused-applicants approached this Court and once again obtained the interim protective stay of coercive measures for further two months allowing them to appear before the court below in between that period and obtain bail but they have yet not chosen to appear before the court below and have rather insisted upon to be treated differently from everybody else.

17. This court has time and again held that the inherent jurisdiction u/s 482 of Cr.P.C. cannot be permitted to be used as a matter of course in a cavalier fashion. It is an extra-ordinary power and might be used sparingly with great circumspection. With all the deference for the individual rights and liberty and with all the recognition of their value, the facts and circumstances of this particular case do not make out a fit case which may inspire this Court to issue any such direction as has been sought by the accused in this particular case.

18. The application being sans merits stands dismissed.

(2016) 9 ILRA 1666
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 27770 Of 2016

Nyay Prakash **...Applicant**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:
Akash Mishra

Counsel for the Opposite Parties:
G.A., Sri P. Dixit

PROCEDURE:
Application under Section 482 Cr.P.C. filed challenging the order dated 16.08.2016 passed by the trial court whereby the opportunity of the complainant to adduce evidence was closed, and subsequent order dated 31.08.2016 rejecting the recall application (Paper No. 75-Kha). The trial court thereafter proceeded to fix the case for recording statement under Section 313 Cr.P.C.

ISSUE:
Whether the High Court should exercise its inherent jurisdiction under Section 482 Cr.P.C. to quash the order closing the complainant's evidence and grant further opportunity to adduce evidence, despite repeated adjournments and delay attributable to the complainant.

Headnotes:
The High Court refused to interfere and held that:
The applicant/complainant had taken **21 adjournments** and continuously failed to produce evidence.
Even after grant of **last opportunities**, the complainant did not comply and examined only himself as PW-1.
The conduct of the complainant reflected **deliberate delay and misuse of the process of court**.
The trial court rightly exercised its discretion in closing the evidence.
No **illegality, impropriety, or irregularity** was found in the impugned orders.
The inherent powers under Section 482 Cr.P.C. cannot be invoked to **encourage dilatory tactics**.

PRINCIPLES LAID DOWN:

Repeated adjournments without sufficient cause justify closure of evidence.
Inherent jurisdiction under Section 482 Cr.P.C. is not meant to revive opportunities lost due to negligence or misuse of process.
Right to fair trial includes the accused's right to expeditious justice.
Unexplained delay in criminal proceedings amounts to prejudice against the accused.

CITATION:
Nyay Prakash vs State of U.P. & Another, Application U/S 482 No. 27770 of 2016, decided on 15.09.2016 (Allahabad High Court)

CONCLUSION:
The application under Section 482 Cr.P.C. was **dismissed**, holding that the complainant had abused the process of law by repeated delays, and no ground was made out for interference. The trial court was directed to proceed expeditiously and conclude the trial.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Present Sri Akash Mishra, learned counsel for the applicant, learned AGA for opposite party no.-1, Sri P. Dixit, learned counsel for opposite party no.-2. Heard them and perused the records.

2. From perusal of the record, it is found that charges were framed against opposite party no.-2 on 5.5.2012. Thereafter dates in trial of complaint case no. 85 of 2004 (Nyay Prakash Vs. Aditya) were fixed for prosecution of evidences. From perusal of certified copy of the orders, it is found that applicant/ complainant had been not only negligent, but had been apparently and deliberately delayed the proceedings of trial and had not adduced the evidences. Then on 28.10.2015, trial court had passed order mentioning 21 adjournments sought by complainant/applicant and after observing that the next date, i.e., 19.11.2015 would be last opportunity for adducing evidence; but inspite of such directions and warning, no evidence was adduced. Then again trial court had warned for last opportunity of evidence on 1.3.2016. After it, on next date, the complainant had examined himself as PW-1, but after it on several dates he had not adduced any other evidence. On 16.08.2016 applicant/complainant was absent, then trial court had closed the opportunity of complainant's evidence and fixed the date for recording the statement of accused under Section 313 CrPC. On this next date, the applicant/ complainant's side has filed application under Section 75-Kha in court for recalling the order dated 16.8.2016. This application was considered on merit and was rejected on 31.08.2016 by trial court. After it, the date for recording statement of accused under section 313 CrPC was again fixed by trial curt. The proceedings of trial court along with order of closure of complainant's evidence has been challenged through present application u/s 482 CrPC.

3. Learned counsel for the applicant contended that order dated 16.08.2016 of trial court should be quashed so that complainant may get last opportunity to adduce all his evidences. His further submission is that in future no adjournment will be sought by complainant for adducing evidences.

4. Learned counsel for the opposite party no.-2 contended that more than sufficient time had already been afforded to complainant's side; and thereafter in his absence, trial court had closed the opportunity for adducing evidence on 16.8.2016. There is no illegality or impropriety in the aforesaid order and the proceedings carried out by trial court.

5. From perusal of the record, it is found that apparently applicant/ complainant has been misusing the process of court for getting the case adjourned again and again without adducing evidence, for which there appears no satisfactory explanation given; and when on 28.10.2015 the trial court had counted 21 adjournments on behalf of complainant and fixed the date as last opportunity of evidences, then said again this order was also not complied with. Thereafter again warning was given to applicant for adducing evidences and when he was again warned and afforded last opportunity on 1.3.2016, then he had examined only himself and no other witness was examined thereafter on several dates. In these circumstances, there appears no illegality, impropriety or irregularity in the order dated 16.08.2016 passed by trial court or proceedings carried out by the trial court.

6. There has been no satisfactory explanation on the part of applicant/complainant for not adducing all his evidences for such long time. The principle of opportunity of hearing and the principle of natural justice is not only available to applicant/ complainant but is also available to accused who has right to expect expeditious justice. Unnecessary delay in proceedings of criminal trial without satisfactory explanation amounts to denial of legal rights available to accused, when he is being unnecessarily dragged in criminal procedings. In present matter the accused had been harassed for years without any satisfactory explanation in this case that was initiated in the year 2004. There is no reason to accept the contentions of learned counsel for the applicant/complainant and interfere in the impugned order dated 16.8.2016 or proceedings carried out by trial court in exercise of inherent jurisdiction of this Court. In this matter trial court should make all attempt to conclude the trial expeditiously for reaching to its logical end.

7. In view of above, this application is dismissed.

(2016) 9 ILRA 1669
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 28100 Of 2015

Neeraj Prajapati ...Applicant
Versus
State Of U.P. ...Opposite Party

Counsel for the Applicant:
Anil Kumar Mishra

Counsel for the Opposite Party:
Govt. Advocate

HEADNOTES:
Bail – Dowry Death – Sections 498A, 304B IPC and Section 3/4 Dowry Prohibition Act – Death within seven years of marriage – Viscera report showing aluminium phosphide poisoning – Plea of death due to disease (encephalitis) found false – Burden upon husband to explain unnatural death – Gravity of offence – Bail rejected
Where the deceased wife died within seven years of marriage in unnatural circumstances and the viscera report confirmed presence of aluminium phosphide poison, the plea of the husband that death occurred due to encephalitis was found to be contradicted by scientific evidence. Allegations of demand of dowry and cruelty were supported by material on record. The husband, being primarily responsible for the welfare of the deceased, failed to satisfactorily explain the unnatural death. Considering seriousness of offence and evidence indicating dowry death, no ground for grant of bail was made out.
Bail rejected.
PROCEDURE:
Application for bail filed in **Case Crime No. 254 of 2014**, under Sections **498A, 304B IPC** and **Section 3/4 Dowry Prohibition Act**, Police Station Bidhanoo, District Kanpur Nagar. Counter affidavit filed by learned AGA taken on record.
ISSUE:
Whether the applicant, husband of the deceased, is entitled to bail where death of wife occurred within seven years of marriage and viscera report confirms consumption of poison despite defence plea of death due to disease.
CITATION:
Sections 498A, 304B IPC
Section 3/4 Dowry Prohibition Act
Principles relating to dowry death, burden to explain unnatural death of wife, and consideration of viscera report in bail matters.
CONCLUSION:
Considering the gravity of offence, allegations of dowry demand and cruelty, and the confirmatory viscera report establishing death due to poison, the Court held that the applicant failed to make out a case for bail.

Bail application rejected with clarification that observations are limited to disposal of bail application and shall not affect merits of trial.

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

1. Counter affidavit filed by the learned AGA is taken on record.

2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 254 of 2014 u/ss 498A, 304B IPC and Section 3/4 of Dowry Prohibition Act, Police Station- Bidhanoo, District- Kanpur Nagar .

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

4. Submission of learned counsel for the applicant is that actually the deceased had died as a result of encephalitis and she was treated for the same for a long period of time in various hospitals by the applicant. Learned counsel for the applicant has tried to show certain medical papers regarding her treatment. Further submission is that therefore, it does not appear to be a case of dowry death and, therefore, the applicant should be released on bail.

5. Learned AGA has opposed the prayer for bail and has drawn the attention of the Court to the allegations made in the FIR, according to which, the applicant along with other co-accused kept demanding additional dowry and also committed cruelty upon the deceased and there is also allegation that some poisonous substance was administered to the deceased. Learned AGA has also drawn the attention of the Court towards the viscera report of the deceased, according to which, aluminium phosphide has been found in the viscera of the deceased. Further submission is that the Chemical Examiner Report is confirmatory in nature leaving no doubt and actually the deceased died due to consumption of some poison. Further submission is that the death of the deceased occurred within 7 years of the marriage and the death of the deceased was also unnatural. The applicant is the husband of the deceased, who was having principal responsibility to ensure welfare and safety of his wife and is also having onus to explain the unnatural death of his wife for which he has utterly failed. Instead of coming forward with explanation for the unnatural death , false plea appears to have been raised and the plea of death as a result of some disease stands completely rebuffed by the findings of the viscera report which proves consumption of poison. Further submission is that in such circumstances, no liberal view is called for.

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.

(2016) 9 ILRA 1671
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.

Writ A No.- 30313 Of 2016
&
Connected With Other Cases

Abha Tripathi & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsels for the Petitioners:
Sri Ashok Khare, Sr. Advocate, assisted by Sri Siddharth Khare

Counsels for the Respondents:
C.S.C., Sri K.S. Kushwaha

PROCEDURE:
Multiple writ petitions filed challenging denial of participation in interview for the post of Gram Panchayat Adhikari (Advertisement No. 7(3)/2015).
Petitioners had qualified the written examination but were denied interview for non-possession of CCC certificate issued by DOEACC Society.
Petition also challenged validity of Para-8 of the advertisement.
Counter affidavit filed by the Commission defending requirement of CCC certificate based on Government Orders dated 22.11.2011 and 23.11.2012.
All connected writ petitions decided by common order.

ISSUES:
Whether possession of CCC certificate from DOEACC Society is mandatory when not prescribed under statutory Rules, 1978?
Whether candidates possessing higher qualifications in computer can be treated as fulfilling the requirement of CCC certificate?
Whether Government Orders can supplement statutory rules by introducing additional qualifications?
Whether rejection of candidates having higher computer qualifications is arbitrary and violative of Articles 14 & 16?

CASE LAW DISCUSSED:
Jyoti K.K. vs Kerala Public Service Commission, (2010) 15 SCC 596
Chandrakala Trivedi vs State of Rajasthan, (2012) 3 SCC 129
State of Haryana vs Abdul Gaffar Khan, (2006) 11 SCC 156
Dhananjay Malik vs State of Uttaranchal, (2008) 4 SCC 171
Parvaiz Ahmad Parry vs State of J&K, (2016) 1 ESC 54 (SC)
Manjit Singh vs State of Punjab (FB, P&H)
Sanjay Kumar Srivastava vs State of U.P. (DB Allahabad HC)

Alok Kumar Misra vs State of U.P.
Devendra Singh vs State of U.P.

Headnotes:
Rule 8 of the U.P. Gram Panchayat Adhikari Rules, 1978 does not prescribe CCC certificate as an essential qualification.
Government can supplement rules by executive instructions if rules are silent, provided such instructions are not inconsistent with statutory rules.
Requirement of CCC certificate introduced through Government Orders and incorporated in advertisement is valid.
However, **higher qualification in the same field (computer science) which presupposes basic knowledge of CCC cannot be ignored**.
Candidates possessing higher qualifications like B.Tech, BCA, MCA, Diploma, or Computer as a subject must be treated as satisfying CCC requirement.
Denial of consideration to such candidates is arbitrary and violative of equality principles.
Candidates lacking both CCC certificate and any computer qualification are not eligible.
Certificates issued by private institutions or non-DOEACC bodies without recognition cannot be treated as valid.

CONCLUSION:
Writ petition **partly allowed**.
Petitioners possessing higher or equivalent computer qualifications held **eligible** and cannot be denied participation in selection.
Petitioners without any computer qualification or with unrecognized certificates held **ineligible**.
Validity of Para-8 of advertisement upheld.
No order as to costs.

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Since the controversy involved in all the above writ petitions is similar, therefore, the above writ petitions are being decided by this common order.

2. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare for the petitioners, Sri K.S. Kushwaha, learned counsel for the respondent no.4 and Sri Mata Prasad, learned Additional Chief Standing Counsel for the respondents no.1 to 3.

3. Initially writ petition no. 30313 of 2016 (Abha Tripathi and 24 others Vs. State of U.P. and others) was filed by the petitioners for a direction to the respondents to hold interview of the post of Gram Panchayat Adhikari in pursuance of the Gram Panchayat Adhikari Examination-2015 and further to treat them as fully qualified and eligible for the said post without raising any objection with regard to the non-possession of the Computer Concept Course (CCC) certificate awarded by the DOEACC Society. Subsequently, by way of an amendment application which was allowed, the petitioners also challenged para 8 of the Advertisement No. 7(3)/2015.

4. The petitioners of W.P. No. 30313 of 2016 who are 25 in number applied against the advertisement no.7(3)/2015 for the post of Gram Panchayat Adhikari under the Panchayat Raj

Department of the State. They were issued admit cards and they also appeared in the written examination. The result of the written examination was published on 28.4.2016 and all the petitioners were shown to have qualified the written examination. Thereafter, the interviews were commenced from 30.5.2016 and are to continue till October, 2016. The petitioners have also been issued letters by the Uttar Pradesh Subordinate Services Selection Commission, Lucknow-respondent no.4 (hereinafter referred to as 'Commission') to participate in the interview on the date prescribed therein. The petitioners appeared in the interview on various dates but they were not permitted to participate in the interview on an objection raised by the Commission that the petitioners did not possess the CCC certificate awarded by the DOEACC Society.

5. The admitted case of the petitioners is that none of them possess the CCC certificate in computer from the DOEACC Society. The qualification of the petitioners as given in para 13 of the writ petition is as under:-

Sr. no.	Petitioner	Educational Qualification
1	Abha Tripathi	B.Sc. in Information Technology.
2	Amod Chauhan	Bachelor of Computer Application and Master's Degree in Computer Application.
3	Ashish Kumar Srivatava	Bachelor of Technology in Information Technology.
4	Ajay Yadav	High School and Intermediate Examination Certificate with Computer as one of the subjects.
5	Ajeet Pratap Singh	Bachelor of Technology in Computer Science and Engineering.
6	Akhilesh Pal Singh	High School with Computer as one of the subjects and Bachelor of Technology in Mechanical Engineering.
7	Ashok Kumar Singh	Bachelor of Computer Application.
8	Radha Raman Khare	Diploma in Computer Application and Bachelor Degree in Computer Application.
9	Sanjeev Kumar Singh	Bachelor of Science with Mathematics and Computer Science.
10	Pankaj Katiyar	Post-graduate Diploma in Computer Application.
11	Yogesh Tripathi	Bachelor of Technology Degree in Electrical Engineering.
12	Vimal Kumar Sharma	Master of Computer Application.
13	Mohd. Akil Jamal	Bachelor of Arts with Computer as a subject.
14	Vaibhav Rai	Master's Degree in Computer Application.
15	Sandeep Kumar Nayak	Bachelor of Technology Degree in Mechanical Engineering.
16	Vinay Kumar	Bachelor of Technology Degree in Information Technology.
17	Vijay Kumar Misra	Advanced Diploma in Computer Application.
18	Bharat Singh	Intermediate Certificate with Computer Science and

		Bachelor Degree in Computer Application.
19	Gulab Chand	3 year Diploma Course in Computer Science and Engineering.
20	Imran Khan	Master's Degree in Computer Application.
21	Ajit Singh	Bachelor of Technology Degree in Computer Science & Engineering.
22	Ankit Singh Gautam	Bachelor of Technology Degree in Computer Science & Engineering.
23	Pawan Kumar	Master's Degree in Computer Application.
24	Himansu Singh	Bachelor of Technology Degree in Electronics & Communication Engineering.
25	Abhay Pratap Singh	'O' Level Examination Certificate in Computer awarded by DOEACC Society.

6. Sri Ashok Khare, learned Senior Counsel appearing for the petitioners submitted that the requirement of a CCC certificate awarded by the DOEACC Society was not an essential qualification mentioned for the post of Panchayat Raj Adhikari in the Rules, 1978 as amended and therefore, the requirement of this certificate from the DOEACC Society was an importation in the impugned advertisement and was in violation of the provisions of Rule 8 of the Rules, 1978.

7. The second leg of the submission of the learned Senior Counsel is that all the petitioners are intermediate pass and they have obtained higher qualification in the subject of computer, therefore, insistence on a CCC certificate from the DOEACC Society was wholly unwarranted. Reference has been made to the following judgments of the Supreme Court:-

(a) 2010 (15) SCC 596 (Jyoti K.K. And Others Vs Kerala Public Service Commission and others);

(b) 2011(1) 115 (P&H)(FB) (Manjit Singh Vs State of Punjab And Others);

(c) 2012 (3) SCC 129 (Chandrakala Trivedi Vs State of Rajasthan and others);

(d) 2006 (11) SCC 156 (State of Haryana Vs Abdul Gaffar Khan)

8. Reliance has also been placed upon a judgment of the learned Single Judge dated 9.10.2015 passed in ***Writ petition no. 44281 of 2015 (Devendra Singh and Others Vs State of U.P. and another)***.

9. The submission is that the qualifications possessed by the petitioners are much higher than the CCC certificate awarded by the DOEACC Society which is a very basic qualification in the knowledge of computer operation. The contention is that the CCC certificate is an 80 hours course comprising 25 hours of theory studying, 50 hours of practical and 5 hours of tutorials which

can be completed in 10 days. The petitioners also contend that for the post of Junior Assistant/Stenographer, a Government Order was issued on 26.5.2015, Annexure-4 to the writ petition mentioning therein that for the post of Junior Assistant/Stenographer for purposes of equivalence with the CCC certificate issued by the DOEACC Society, if any candidate has a Diploma or Degree in Computer Science, he would be eligible to apply for the post of Junior Assistant/Stenographer. The submission therefore, is that what has been held to be good for the post of Junior Assistant/Stenographer should not be a disqualification for the post of Gram Panchayat Adhikari.

10. Shri Khare also sought to draw a parallel with the post of Gram Vikas Adhikari under the Rural Development Department and submits that the said post is equal in rank and qualification to the post of Gram Panchayat Adhikari under the Panchayat Raj Department and carries the same pay scale and, therefore, in terms of the Government Order dated 26.5.2015, the respondents should not insist upon possession of the CCC certificate issued by the DOEACC Society and the qualifications possessed by the petitioners should suffice for appearing in the selection for the post of Gram Panchayat Adhikari.

11. Shri Khare has drawn the attention of the Court to para 3 of the terms and conditions laid down in the advertisement dated 17.8.2013 relating to the post of Gram Vikas Adhikari and submits that therein it was provided that the candidate must have the eligibility qualification of Intermediate pass (Science Group) or any other qualification declared by the Governor to be equivalent to Intermediate plus he must have the CCC certificate in computer from the DOEACC Society or a qualification higher than that of CCC and therefore, it is submitted that since the petitioners have a much higher qualification than CCC in computer from DOEACC Society, therefore, they cannot be held to be ineligible for the post of Gram Panchayat Adhikari.

12. It is further submitted that even in the selection to the District Courts in Group 'C' clerical cadre, CCC certificate in computer from the DOEACC Society was an essential qualification but later on a circular was issued by the High Court on 6.1.2016 directing that candidates who have higher qualification in Computer Science or equivalent to CCC certificate from a University or any Institute duly recognized by AICTE/UGC/Government of India/State Government with Computer as a subject would also be eligible.

13. A parallel was also sought to be drawn with an advertisement for the clerical post in the U.P. Jal Nigam and therefore, the decision of the Commission in insisting upon a CCC certificate from DOEACC Society has been assailed. The submission of the learned Senior Counsel further is that the Uttar Pradesh Gram Panchayat Adhikari Rules, 1978 (hereinafter referred to as Rules, 1978) which came into effect on 10.11.1981, prescribes the essential qualification for appointment and in Rule 8 lays down the academic qualifications and para 9 thereof specifies the preferential qualification required for the post of Gram Panchayat Adhikari. It is stated that in the Rules, 1978 there is no requirement of a candidate possessing a CCC certificate awarded by the DOEACC Society as an essential qualification for the post of Gram Panchayat Adhikari. The submission,

therefore, is that the condition laid down in para 8 of the impugned advertisement being contrary to the statutory Rules, the same cannot be insisted upon or applied in the case of the petitioners.

14. A counter affidavit has been filed on behalf of the respondent no.4-Commission. Sri K.S. Kushwaha, learned counsel appearing for the Commission submits that the requisition was sent to the Commission by the Director, Panchayati Raj, Lucknow for filling up 3587 posts of Gram Panchayat Adhikari and along with the requisition the Rules governing the service conditions of Gram Panchayat Adhikari known as the Uttar Pradesh Panchayat Sewak Service Rules, 1978 (hereinafter referred to as Rules, 1978) as amended vide Notification dated 27.3.1980 alongwith Government Order dated 22.11.2011 issued by the Finance Department to the Secretary, Panchayati Raj and Government Order dated 23.11.2012 issued by the Special Secretary, Panchayati Raj was also made available. It is stated that the impugned advertisement was issued strictly in terms of the requisition sent by the Panchayati Raj Department.

15. The submission is that as per the terms and conditions of para 8 of the advertisement a candidate is required to have passed the Intermediate examination from the Secondary Education Board or any other examination recognised by the Government and equivalent to the same and also possess the CCC certificate from the DOEACC Society. So far as the possession of CCC certificate from the DOEACC Society is concerned, there is no equivalence clause mentioned in para 8 of the advertisement and therefore, the candidate has no option but to possess the CCC certificate awarded by the DOEACC Society. It is also stated that none of the petitioners are in possession of the CCC certificate awarded by the DOEACC Society.

16. Sri K.S. Kushwaha, learned counsel for the Commission, however raised a preliminary objection that the petitioners in their application form with regard to the column regarding possession of the requisite qualification of CCC certificate awarded by the DOEACC Society had made an express declaration that they indeed possessed the requisite qualification and it is for this reason that they were allowed to appear in the selection. The copies of application form of some of the petitioners has been filed as Annexure-1 to the counter affidavit.

17. Along with the counter affidavit, the application forms of the petitioners have also been filed and it is submitted that the petitioner no.1-Abha Tripathi and the petitioner no.2-Amod Chauhan have in Column No.2 under the head of essential qualification details, with regard to possession of CCC certificate awarded by the DOEACC Society have written 'YES' in their application form. Shri K.S. Kushwaha submits that this is a false declaration since on their own admission in the present writ petition the petitioners are not in possession of the CCC certificate awarded by the DOEACC Society and it is only on the basis of their false declaration that they were allowed to appear in the written test. Therefore, the petitioners cannot claim any benefit by asserting that they have already appeared in the written test, such appearance being on the basis of misleading information.

18. The stand of the respondents in para 21 of their counter affidavit is that the order dated 22.11.2011, Annexure-4 to the counter affidavit was infact a recommendation made by the Finance

Ministry addressed to the Principal Secretary, Panchayati Raj, Government of U.P. laying down the eligibility conditions of CCC certificate in computer from the DOEACC Society in the Grade Pay of Rs.2000/- for the post of Panchayat Raj Adhikari whereas the Government Order dated 23.11.2012, page 52 of the counter affidavit was a letter written by the Government of U.P. to the Director, Panchayati Raj, Lucknow which referred to the letter of the Finance Ministry dated 22.11.2011 but for the post of Gram Panchayat Adhikari it laid down the eligibility qualification of CCC certificate in computer from the DOEACC Society in the Grade Pay of Rs. 2000/- with immediate effect. It is stated that neither the order of the Finance Ministry nor the order of the Government of U.P. dated 23.11.2012 mentions any qualification equivalent to CCC in computer from the DOEACC Society, therefore, the question of treating the qualifications acquired by the petitioners as being equivalent to CCC certificate from DOEACC Society does not arise.

19. The counsel for the Commission has also submitted that the petitioners have not challenged the validity of the Government Order dated 22.11.2011 and 23.11.2012 by which possession of the CCC certificate issued by the DOEACC Society was prescribed as an essential qualification for the post of Gram Panchayat Adhikari. It is also submitted that even if, the Rules are silent with regard to the possession of CCC certificate from the DOEACC Society but since the requirement of such a certificate has been introduced through the Government orders dated 22.11.2011 and 23.11.2012, the same would be an eligibility criteria necessary to be possessed by the petitioners. In support of the above submissions, Sri K.S. Kushwaha has placed reliance upon a judgment of the Supreme Court reported in ***1992 (1) SCC 20 (Comptroller and Auditor General of India Vs Mohan Lal Mehrotra)***. Reliance has also been placed upon the judgment of the Supreme Court reported in ***2008 (4) SCC 171 (Dhananjay Malik & Ors. Vs State of Uttaranchal & Ors.).*** Reference has also been made to a Single Judge judge of Lucknow Bench of the Allahabad High Court in ***Service Single No.6655 of 2016 (Alok Kumar Misra Vs State of U.P. and others)*** along with other connected petitions.

20. Further by way of illustration the submission of the learned counsel for the Commission is that the Rules, 1978 do not lay down the pay scale of the post but that does not in itself mean that the Government cannot determine the pay scale from time to time through Government Orders. He submits that the impugned Advertisement No. 7(3)/2015 itself mentions the pay scale of the post of Gram Panchayat Adhikari as Rs.5200-20200/- in the Grade Pay of Rs.2000/- and therefore, the submission is that likewise the requirement of a CCC certificate awarded by the DOEACC Society as an essential qualification was also prescribed through the Government Orders referred to hereinabove and mentioned in para 8 of the advertisement and the advertisement does not contain any equivalence clause making any other qualification as equivalent to a CCC certificate from the DOEACC Society. The only equivalence referred to is with regard to the intermediate examination held by the Secondary Education Board or any other equivalent Board.

21. Copy of the Uttar Pradesh Gram Panchayat Adhikari Rules, 1978 have been filed alongwith the rejoinder affidavit. Rule 8 thereof reads as under:-

*"**8. Academic Qualification**.- A candidate for direct recruitment to the post of Panchayat Sewak must have passed Intermediate examination of the Board of High School and Intermediate Examination or an examination recognized as equivalent thereto."*

22. From a perusal of Rule 8, it is noticed that "a candidate for direct recruitment to the Panchayat Sewak must have passed Intermediate examination of the Board of High School and Intermediate Examination or an examination recognized as equivalent thereto". Rule 3 (g) defines 'Service' to mean the Uttar Pradesh Gram Panchayat Adhikari Service and therefore, the term Panchayat Sewak must be read as being synonymous with Gram Panchayat Adhikari. It is not disputed by any of the parties that the Rules, 1978 do not provide for acquisition of knowledge of computer or a CCC certificate much less a CCC certificate awarded by the DOEACC Society. The requirement of CCC certificate from DOEACC Society was introduced by the Government Order dated 23.11.2012. The Government Order dated 23.11.2012 itself has not been subjected to any challenge in the present writ petition, however the submission of the learned Senior Counsel for the petitioners is that the petitioners possess a higher qualification in computer which presupposes the basic knowledge of computer as required in the CCC course certificate which is awarded by the DOEACC Society which would imply that the petitioners were otherwise eligible for the post of Gram Panchayat Adhikari.

23. In para 15 of the writ petition, it is stated that the CCC certificate awarded by the DOEACC Society is a basic qualification in the knowledge of computer operations. The said course is an 80 hours course comprising of 25 hours of theory study; 50 hours of practical and 5 hours of tutorial. The said course can also be completed in ten days full time intensive course.

24. In para 11 of the counter affidavit filed by the Commission, the averments of para 15 of the writ petition have not been categorically denied. All that has been stated is that the petitioners do not possess the qualification required by the advertisement and therefore, merely possessing a higher qualification would not mean possessing the requisite qualification.

25. Shri K.S. Kushwaha in support of his submission has referred to a judgment of a learned Single Judge of this Court in Service Single no**. *6655 of 2016 (Alok Kumar Misra Vs State of U.P. and others)*** along with other connected writ petitions decided vide judgment and order dated 2.5.2016. The post in question in that case was of Junior Engineer. The selection was conducted by the Commission. Rule 8 of the Uttar Pradesh Irrigation Department Civil Engineers Subordinate Service Rules, 1992 provided that a candidate for direct recruitment or promotion to a post in the service must possess any of the following qualifications:-

a) Diploma in Civil Engineering awarded by an Institution or University established by law in India.

Or

b) Diploma in Civil Engineering awarded by the Board or Technical Education Uttar Pradesh.

Or

c) National Certificate in Civil Engineering awarded by All India Council of Technical Education.

Or

d) Three years Diploma in Civil and Rural Engineering by the Board of Technical Education Uttar Pradesh.

26. Rule 8 of the Uttar Pradesh Public Works Department Junior Engineer (Civil) (Group-'C') Service Rules, 2014 laid down the eligibility qualifications as under:-

A candidate for direct recruitment to the posts in the service must possess following qualification:-

(i) must have possessed the High School Examination of the Board of High School and intermediate Education, Uttar Pradesh or an Examination recognized by the Government as equivalent thereto.

(ii) Must possess three years Diploma in Civil Engineering from the Board of Technical Education, Uttar Pradesh or a qualification recognized by the Government as equivalent thereto.

27. The petitioners therein were all degree holders in Civil and Mechanical Engineering. The contention of the respondents was that the petitioners did not possess the requisite qualification and therefore, merely possessing a higher qualification of Degree in Engineering would not presuppose possession of lower qualification of Diploma. The learned Single Judge held that the possession of a Degree in Engineering is not the same as possession of a Diploma in Engineering as a candidate is not required to possess a Degree in Engineering in order to possess a Diploma in Engineering.

28. In my opinion the said judgment has no application to the present case as in that case the Junior Engineer (Civil) Group 'C' Service Rules, 2014 clearly mention possession of a Diploma as an essential qualification and the learned Single Judge has not held the Degree qualification to be equivalent to or higher than Diploma qualification.

29. The next judgment relied upon by the respondents is in ***Special Appeal No.829 of 2015 (Sanjay Kumar Srivastava and others Vs State of U.P. and others)***. That was a case relating to

recruitment to the post of Additional Private Secretaries. The Uttar Pradesh Secretariat Personal Assistant Service (First Amendment) Rules, 2005 provided the qualifications in Rule 8 as under:-

(i) must possess Bachelor's degree from a University established by law in India or a qualification recognized by the Government as equivalent thereto;

(ii) must have a minimum speed of eighty words per minute and twenty five words per minute in Hindi shorthand and Hindi typewriting respectively;

(iii) must possess the knowledge of Computer in accordance with-

(a) the course prescribed for the Certificate Course in Computing (CCC) conducted by DOEACC Society,

or

(b) the course conducted by the Board of High School and Intermediate Education, Uttar Pradesh or a course recognized by the Government as equivalent thereto.

30. The contention of the petitioners before the Court was that they should be allowed to participate in the third and final stage of examination comprising of computer test without any objection pertaining to their eligibility with reference to computer knowledge. The Division Bench referring to the provisions of Rule 8 (iii) (a) held that the Rule required that a candidate should have passed either the certificate course in computer conducted by the DOEACC Society or the course conducted by the Board of High School or Intermediate or any course equivalent thereto recognized by the Government. The Court interpreted the provisions of Rule 8 (iii) (a) and (b) together and held that the claim of the petitioners that holding of a computer test by the Commission would render holding of a particular certificate as redundant and the submission that holding of a proficiency certificate in computer or any other prescribed skill from a specific institution is not mandatory because the selecting body is also going to hold an examination in computers was rejected by the Division Bench as unacceptable. The Division Bench further held that it was perfectly open for the Commission which conducts the selection to mandate both the holding of a qualification and the passing of an examination conducted by the Commission. One is not a substitute for the other. When Rule 8 (iii) requires a course prescribed for the Certificate Course in Computing conducted by DOEACC Society, the said certificate is an essential qualification.

31. In my opinion, the said judgment has no application to the facts of the present case since the claim of the petitioners before the Court was for a direction to the respondents to allow them to participate in the third and final stage of examination comprising of computer test without any objection pertaining to their eligibility with reference to computer knowledge. In the case before the Division Bench about 1244 candidates had produced certificates regarding computer qualifications awarded by private institutions which according to the Commission were not in accordance with the advertisement and therefore, the insistence upon a CCC certificate awarded by

the DOEACC Society which was held to be an autonomous scientific society of the Department of Information Technology under the Ministry of Communication and Information Technology, Government of India. The CCC certificate grades a candidate according to his performance in Grade 'A', 'B', 'C' and 'D'. In that case the effect of possession of a higher qualification in Computers or with Computers as a subject was not in issue.

32. The next judgment relied upon by the respondents is a judgment of the Supreme Court in the case of ***Dhananjay Malik & Ors. Vs State of Uttaranchal & Ors. reported in (2008) 4 SCC 171***. The contention of the learned counsel for the Commission is that even if the rules are silent with regard to a particular eligibility qualification, the same can always be introduced through executive/administrative orders as long as they are not in violation of the statutory rules and do not supersede the statutory rules. This principle was reiterated by the Supreme Court in ***Dhananjay Malik (supra).*** In that case, the requisite qualification for the post of Assistant Teacher (Physical Education) was graduation degree in physical education or diploma in physical education from any recognized institution. Subsequently, the rule was clarified by the Government of India, Ministry of Education to the effect that B.P.E. Degree holders should also be treated at par with those who hold B.A./B.Sc./B.Com degree plus a diploma in physical education and should not be required to possess an additional B.A., B.Sc/B.Com. degree for purposes of employment as Directors of Physical Education or on other similar posts. The Supreme Court in para 14 of the judgment referring to a judgment of the Constitution Bench of the Supreme Court in the case of ***Sant Ram Sharma Vs State of Rajasthan, AIR 1967 SC 1910*** held that the Government cannot amend or supersede statutory Rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Paragraph 14 of the said judgment reads as under:

"14. A Constitution Bench of this Court in ***Sant Ram Sharma v. State of Rajasthan, has pointed out at AIR p.1914*** *that the Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."*

33. The proposition of law laid down by the Supreme Court in ***Dhananjay Malik (supra)*** is indisputable. The judgment of the Supreme Court in ***Dhananjay Malik (Supra)*** in my opinion has no application to the facts of the present case. The question here is not whether the qualification possessed by the petitioners has been recognized to be equivalent to a CCC certificate issued by the DOEACC Society but whether the higher qualification possessed by the petitioners includes the basic knowledge of computers imparted through CCC course by the DOEACC Society.

34. Now taking up the case law cited by the learned Senior Counsel for the petitioners, the first judgment referred is ***(2012) 3 SCC 129, Chandrakala Trivedi Vs State of Rajasthan and others,*** para 8 thereof reads as under:-

"8. The word "equivalent" must be given a reasonable meaning. By using the expression "equivalent" one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that, after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence."

35. Thus equivalent means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. The respondents in their counter affidavit have not disputed that the qualifications possessed by the petitioners do not in any way cover the basic knowledge of computer imparted in the certificate course in computing (CCC) conducted by the DOEACC Society. The duration of the CCC course conducted by the DOEACC Society has been mentioned in para 15 of the writ petition which has not been denied by the respondents in para 11 of the counter affidavit except to say that the petitioners do not possess the requisite qualification.

36. In ***Jyoti K.K. And Others Vs Kerala Public Service Commission and Others, (2010) 15 SCC 596***, the Supreme Court has held that higher qualification must clearly indicate or presuppose the acquisition of lower qualification prescribed for that post in order to attract that part of the rules to the effect that such of those higher qualification which presupposes the acquisition of lower qualification prescribed for the post shall also be sufficient for that post. Para 7 and 9 of the judgment read as under:-

"7. It is no doubt true, as stated by the High Court that when a qualification has been set out under the relevant rules, the same cannot be in any manner whittled down and a different qualification cannot be adopted. The High Court is also justified in stating that the higher qualification must clearly indicate or presuppose the acquisition of the lower qualification prescribed for that post in order to attract that part of the rule to the effect that such of those higher qualifications which presuppose the acquisition of the lower qualifications prescribed for the post shall also be sufficient for the post. If a person has acquired higher qualifications in the same faculty, such qualification can certainly be stated to presuppose the acquisition of the lower qualifications prescribed for the post. In this case it may not be necessary to seek far.

8. .....

9. In the event the government is of the view that only diploma holders should have applied to post of sub-engineers but not all those who possess higher qualifications, either this rule should have excluded in respect of candidates who possess higher qualifications or the position should have been made clear that degree holder shall not be eligible to apply for such post. When that position is not clear but on the other hand rules do not disqualify per se the holders of higher qualifications in the same faculty, it becomes clear that the rule could be understood in an appropriate manner as stated above. In that view of the matter the order of the High Court cannot be sustained. In this case we are not concerned with the question whether all those who possess such qualifications could have applied or not. When statutory rules have been published and those

rules are applicable, it presupposes that everyone concerned with such appointments will be aware of such rules or make himself aware of the rules before making appropriate applications. The High Court, therefore, is not justified in holding that recruitment of appellants would amount to fraud on the public.

37. In ***(2006) 11 SCC 153, State of Haryana Vs Abdul Gaffar Khan***, the post in question was of Unani Dispenser. The qualification prescribed was:-

(i) Unani Dispenser from any recognized University/Institution or Board or Faculty of Indian System of Medicine established by law in India or Upvaidya of any recognized University/Institution or Board or Faculty of Indian System of Medicine established by law in India having the knowledge of Urdu;

(ii) Matric or its equivalent.

(iii) Knowledge of Hindi and English upto Matric standard.

38. In that case the respondent-candidates possessed the qualification of Bachelor of Unani Medicine and Surgery from Kanpur University apart from Matric with Hindi and 10+2 with Science. The Supreme Court held that the Haryana Ayurvedic/Homeopathic and Unani Technical Group (C) Service Rules, 1977 do not expressly exclude the degree in Unani Medicine and Surgery for the post of Unani Dispenser and it was held that the respondent-candidate possessed the requisite qualifications from recognized University/Institution or Board and were eligible for appointment on the post of Unani Dispenser. Para 6 of the judgment reads as under:-

"6. Aggrieved against the order passed by the State, the respective respondents filed Writ Petitions in the High Court to quash the action of the State to deny the appointment to them as Unani Dispenser. The High Court by its order dated.11.04.2005 allowed the Writ Petitions filed by the respective respondents and directed the State to offer appointment to both the contesting respondents in these Civil Appeals on the posts of Unani Dispenser within a period of one month from the date of receipt of certified copy of the order. Aggrieved by the said order, the State of Haryana has preferred the above appeals in this Court."

39. The next case relied upon by the learned Senior Counsel for the petitioners is the Full Bench decision of the Punjab and Haryana High Court in ***Manjit Singh Vs State of Punjab and Others reported in 2011(1) ESC 115*** (P&H)(FB). In that case also all the petitioners possessed qualifications higher than the basic and minimum qualification prescribed in the advertisement and they were denied consideration for appointment to the post of Physical Training Instructor. Paragraphs 6,10,23,25,26 and 27 of the said judgment read as under:-

"6. The grievance in all the writ petitions is that all of them possessed qualifications higher than the basic and minimum qualification prescribed in the advertisement and they all being eligible have been arbitrarily and illegally denied the right of consideration for

appointment to the posts. When these matters were being heard by learned Single Judge, two Division Bench judgments of this Court were cited on behalf of the contesting parties. A Division Bench comprising Hon'ble Mr. Justice V.S. Aggarwal and Hon'ble Justice G.S. Singhvi, as their Lordships were at the relevant time vide its judgment rendered in CWP No. 5386 of 1997 titled as Samandeep Singh and others v. State of Punjab and others, decided on 14.1.1998 allowed the writ petition filed on behalf of the candidates whose candidature was rejected, despite having higher qualifications with the following observations.

10. It has been contended on behalf of the petitioners that the rejection of candidature of the petitioners who admittedly possess higher qualification is arbitrary and violative of Articles 14 and 16 of the Constitution of India. Mr. Khosla, learned Additional Advocate General appearing on behalf of the State has attempted to justify the action of the respondents rejecting the candidature of the petitioners having qualifications of M.P.Ed, B.P.Ed and D.P.Ed on the ground that the PTI Teachers are reecruited to impart physical education at the primary level. The targeted class of student being small children, specialized kind of training is required for them. The Curriculum for primary students is different than the curriculum for students of secondary classes who are mature enough and are to be trained in a different manner. He has placed before us a compilation to urge that for primary students, the curriculum includes recreation and yoga, health education and sports psychology which are part of the C.P.Ed curriculum whereas these components and curriculum are not taught at the higher level of Physical Education like B.P.Ed, D.P. Ed, B.P.E., M.P.Ed. etc.

23. The sheet anchor of the State's case is the Division Bench judgment of this Court in the case of Jagjit Singh v. State of Punjab and others, 2009 (1) SCT 744, which has ruled against the eligibility of candidates possessing higher qualification only on the ground of variation in the curriculum. We have carefully gone through the aforesaid judgment. Only one component of the curriculum is noticed by Hon'ble Division Bench i.e. "Recreation" which is said to be studied by students of C.P.Ed. And is not included in the course of studies of B.P.Ed. The Hon'ble Division Bench in the aforesaid case, while referring to courses available at Kurukshetra University, decided not to examine the same in detail. It is also pertinent to note that the judgment in the case of Multan (supra) was not brought to the notice of the Hon'ble Division Bench in the case of Jagjit Singh (supra). It is also relevant to mention that the Hon'ble Division Bench in the case of Jagjit Singh (supra) was persuaded by the judgment of the Hon'ble Supreme Court in the case of Dilip Kumar Ghosh v. Chairman, 2005(7) SCC 567. In the case of Dilip Kumar Ghosh (supra) before the Hon'ble Supreme Court, the issue was whether a person possessing higher qualification is entitled to extra weightage of marks for appointment to the post. In the aforesaid case, candidates possession higher qualification of B.Ed than the minimum prescribed for the post claimed additional weightage for the higher qualification. Rejecting the contention, the Hon'ble Supreme Court observed as under:

"13.(i) In the case of the Junior Basic Training and Primary teachers Training Cetificate the emphasis is on the development of child. The Primary Education is upto IV standard. Thereafter there is middle education and the secondary and higher secondary education. But in the

primary school one has to study the physiology and development of child at tender age. The person who is trained in B.Ed degree may not necessarily equipped to teach a student of primary class because he is not equipped to understand psychology of a child at that early stage...."

24. The above observations were made in the context of awarding extra weightage to the candidates possessing higher qualification. Another judgment relied upon by the Hon'ble Division Bench in the case of Jagjit Singh (supra) is Yogesh Kumar v. Government of NC.T., (2003) 3 SCC 548. In this case again the question whether B.Ed is a higher qualification than the T.T.C. Came to be examined. The Hon'ble Supreme Court made following observations:

"10. We find absolutely no force in the argument advanced by the respondents that B.Ed qualification is a higher qualification than TTC and therefore, the B.Ed candidates should be held to be eligible to compete for the post. On behalf of the applicants, it is pointed out before us that Trained Teacher's Certificate is given to teachers specially trained to teach small children in primary classes whereas for B.Ed degree, the training imparted in to teach students of classes above primary. B.Ed degree holders, therefore cannot necessarily be held to be holding qualification suitable for appointment as teachers in primary schools. Whether for a particular post, the source of recruitment should be from the candidates with TTC qualification or B.Ed qualification, is a matter of recruitment policy. We find sufficient logic and justification in the State prescribing qualification for the post of primary teachers as only TTC and not B.Ed. Whether Bed qualification can also be prescribed for primary teachers is a question to be considered by the authorities concerned but we cannot consider Bed candidates, for the present vacancies advertised as eligible."

25. Arguing on the same line Mr Khosla has strenuously argued that the persons possessing any qualification other than C.P.Ed are not eligible. With a view to appreciate the applicability of the aforesaid judgment, it is deemed appropriate to examine the rule position as prescribed under 1955 rules for the post of P.T.I. From the rule noticed in earlier part of this judgment, it appears that educational qualification like matric or 10+2 is not prescribed therein. Though in the advertisement, Senior Secondary Certificate or Intermediate or its equivalent basic qualification is an essential component for the post. Similarly, for professional qualifications, certificate in Physical Education C.P.Ed of a duration of not less than two years or its equivalent is prescribed. However, by virtue of the Corrigendum dated 24.10.2006, even a candidate with one year duration course of C.P.Ed is made eligible for recruitment in question. Similarly, in the rule, no equivalent qualification of C.P.Ed is referred to, though in the advertisement C.P.Ed or its equivalent qualification is also recognized as professional qualification. It cannot be ignored that the qualification prescribed under the rule and the advertisement is always the minimum qualification. It is not for us to identify any course which can be termed as equivalent to C.P.Ed course. At the same time, the curriculum of B.P.Ed and other higher courses, if include almost all the components of curriculum of C.P.Ed should not be construed to be a totally different and distinct qualification. In the case of Multan (supra), a Division Bench of this Court has clearly observed that D.P.Ed, B.P.Edc and M.P.Ed are higher qualifications in the same line. From the curriculum of courses like C.P.Ed, B.P.Ed, D.P.Ed, it is found that almost all components of

C.P.Ed course of one year or two years are taught in D.P.Ed course in almost all the Universities in the States of Punjab and Haryana. In sum and substance, the controversy revolves around the curriculum of two types of courses, one prescribed in the advertisement i.e. C.P.Ed and higher courses acquired by the petitioners. On facts, we are of the considered opinion that the curriculum of B.P.Ed, B.P.E, D.P.Ed includes the curriculum prescribed for C.P.Ed in major universities in the States of Punjab and Haryana. Higher qualifications being in the same subject and line cannot be ignored and candidates possessing higher qualification cannot be denied consideration for selection.

26. The distinction sought to be created to deny eligibility is arbitrary and illusory. It goes without saying that the higher qualification provides better knowledge, better sense and in sight and equip the person with better understanding of the issues and problems. It cannot be a "bane" but has to be a "boon". The Hon'ble Supreme Court in the case of Mohd. Riazul Usman Gani and others v. District & Sessions Judge, Nagpur, (2000) 2 SCC 606, had the occasion to consider whether the higher qualification than 8th Standard prescribed for the post of Peon renders a candidate ineligible. Examining the issue, it is observed as under:

"21. A criterion which has the effect of denying a candidate his right to be considered for the post on the principle that he is having a higher qualification than prescribed cannot be rational. We have not been able to appreciate as to why those candidates who possessed qualifications equivalent to SSC Examination could also not be considered. We are saying this on the facts of the case in hand and should not be understood as laying down as rule of universal application."

27. From the facts on record and dictum of above noticed judgments, it emerges that the candidate possessing higher qualification in the same line cannot be excluded from consideration for selection. It is a different matter that he/she may not be entitled to any additional weightage for higher qualification, but cannot be denied consideration at par with a candidate possessing minimum prescribed qualification. Denying consideration to a candidate having better and higher qualification in the same line and discipline would definitely result in breach of Articles 14 and 16 of the Constitution of India.

The reference is answered accordingly.

Let the writ petition be placed before the learned Single Judge for decision on merits."

40. The learned Senior Counsel for the petitioners next submitted that the petitioners had already appeared in the selection and if they were not eligible their candidature should have been rejected at the very outset itself. With reference to this submission reliance has been placed upon a decision of a learned Single Judge dated 9.10.2015 passed in ***Writ petition no.44281 of 2015 (Devendra Singh and others Vs State of U.P. and Another)***. In that case the selection was related to the post of Additional Private Secretary and the Court held that if some of the petitioners do not

possess the CCC certificate from the DOEACC Society, the candidature of such candidates should be rejected at the very threshold of the recruitment process and the candidate who lacks the minimum qualification should not be allowed to participate at any stage of the examination. The Court however, acknowledged that the qualification possessed after the last date of submitting the application would not entitle the candidates to participate in the selection and therefore, the matter was disposed of with a direction to the Commission to verify such of the candidates who had obtained their CCC certificate after the last date of submission of the application and if their candidature is rejected on that ground, the Commission shall pay compensation to the candidates.

41. The Supreme Court in the case of ***Parvaiz Ahmad Parry Vs State of J & K and others reported in 2016 (1) ESC 54 (SC)*** held that the requisite qualification under the J & K Forest Service (Gazetted) Recruitment Rules, 1970 lays down the eligibility qualifications for the post of Range Officer Grade-I (Forest) which is B.Sc. Forestry or its equivalent from any University recognized by the Indian Council of Agricultural Research. The petitioner-candidate before the Supreme Court possessed the qualification of B.Sc. with Forestry as one of the major subjects and also Master's degree in Forestry but not B.Sc Forestry. The question was whether the higher qualification would render him eligible for the post of Range Officer Grade-I. The Supreme Court held that in fact acquiring higher qualification in the prescribed subject i.e. Forestry was sufficient to hold that the appellant had possessed the prescribed qualification. Paragraphs 22,23,24,25,26,27 and 28 of the said judgment read as under:-

"22. As would be clear from the undisputed facts mentioned above, the minimum qualification prescribed for applying to the post of J & K Forest Service Range Officers Grade-I was "B.Sc. (Forestry) or equivalent from any University recognized by ICAR". It is not disputed that the appellant was to his credit a qualification of B.Sc. with Forestry as one of the major subjects and Masters in Forestry, i.e. M.Sc.(Forestry), on the date when he applied for the post in question, which satisfied the eligibility criteria so far as the qualification was concerned.

23. We do not agree with the reasoning of the High Court that in order to be an eligible candidate, the appellant should have done B.Sc. in Forestry and since he had not done so, he was not considered as an eligible candidate. This reasoning, in our view, does not stand to any logic and is, therefore, not acceptable insofar as the facts of this case are concerned.

24. In our considered view, firstly, if there was any ambiguity or vagueness noticed in prescribing the qualification in the advertisement, then it should have been clarified by the authority concerned in the advertisement itself. Secondly, if it was not clarified, then benefit should have been given to the candidate rather than to the respondents. Thirdly, even assuming that there was no ambiguity or/and any vagueness yet we find that the appellant was admittedly having B.Sc. degree with Forestry as one of the major subjects in his graduation and further he was also having Masters degree in Forestry, i.e., M.Sc.(Forestry). In the light of these facts, we are of the view that the appellant was possessed of the prescribed qualification to apply for the post in question and his application could not have been rejected treating him to be an ineligible candidate for not possessing prescribed qualification.

25. In our view, if a candidate has done B.Sc. in Forestry as one of the major subjects and has also done Masters in the Forestry, i.e., M.Sc.(Forestry) then in the absence of any clarification on such issue, the candidate possessing such higher qualification has to be held to possess the required qualification to apply for the post. In fact, acquiring higher qualification in the prescribed subject i.e. Forestry was sufficient to hold that the appellant had possessed the prescribed qualification. It was coupled with the fact that Forestry was one of the appellant's major subjects in graduation, due to which he was able to do his Masters in Forestry.

26. Learned counsel for the respondents contended that if the appellant is held eligible on the basis of his qualification, the candidates alike him would be deprived of applying for the said post. The argument, in our view, has no merit.

27. In the first place, no such candidate or/and applied for the post and secondly, the argument being wholly hypothical in nature cannot be accepted.

28. In the light of foregoing discussion, we are not in agreement with the view taken by the High Court when it was held that the appellant did not possess the prescribed qualification. This finding, as held above, is unsustainable and thus cannot be upheld. The appeal thus succeeds and is accordingly allowed. Impugned order is set aside. As a consequence, the writ petition filed by the appellant succeeds and is accordingly allowed. Since the appellant has already cleared the written examination and had appeared in the interview and further one post was directed to be kept reserved for him by the orders of the High Court in the event, the appellant succeeds in this litigation, we consider it appropriate to direct the respondents to issue necessary appointment order in favour of the appellant for the said post after ensuring compliance of the procedural formalities within one month from the date of receipt of this judgment."

42. At this stage, certain facts relating to the petitioners must be noted. Among all the petitioners whose qualifications are already mentioned hereinabove, the **petitioners no.11,15, and 24** do not possess any qualification relating to knowledge of computers and therefore, so far as these petitioners are concerned, in my opinion they neither have the requisite qualification of CCC certificate awarded by the DOEACC Society nor they have any higher qualification in the field of computers and therefore, the writ petition so far as these petitioners are concerned stands **dismissed**. So far as **petitioner no. 17** is concerned though he is shown to have done his Diploma, the same is from a private Institution by the name of Media Institute of Information Technology. This is a registered Society under the Societies Registration Act as mentioned in the Certificate itself and is a purely private Institution not shown to be recognized either by the Central Government or the State Government. Therefore, such Diploma cannot be recognized to be a qualification higher than CCC Certificate of DOEACC Society. Therefore, the writ petition of **petitioner no. 17** is also **dismissed**.

43. So far as the **petitioners no. 4 and 6** are concerned, they are shown to have done their High School and Intermediate with Computer as a subject. In the case of selection for the post of Junior Assistant/Stenographer where the eligibility criteria of CCC Certificate from DOEACC

Society is the requirement, the State Government in its Notification dated 26.5.2015 Annexure-4 to the writ petition, has held that a candidate having computer in his High School and Intermediate Certificate issued by the Board of Secondary Education would also be said to be a valid qualification and it further provides that the persons having done their Diploma and Degree in Computer Science would also be eligible on the basis of equivalence with CCC Certificate issued by the DOEACC Society. In my opinion the question here in the present writ petition is not with regard to fitness for the post of Gram Panchayat Adhikari but with regard to a qualification other than CCC Certificate from DOEACC Society being equivalent to the said Certificate. Once the State Government itself has held High School and Intermediate Certificate with Computer as a subject being equivalent to the CCC Certificate issued by the DOEACC Society and Diploma and Degree to be equivalent to CCC Certificate issued by the DOEACC Society for the post of Junior Assistant/Stenographer it cannot make an arbitrary distinction when it comes to the post of Gram Panchayat Adhikari. The respondents cannot adopt dual standards with regard to CCC certificate issued by the DOEACC Society when it comes to the post of Gram Panchayat Adhikari. Therefore, in my opinion for the post of Gram Panchayat Adhikari if a candidate does not have a CCC Certificate issued by the DOEACC Society but has Computer as a subject in High School or Intermediate or has a Diploma or a Degree as a higher qualification the same would have to be treated as equivalent to CCC Certificate issued by the DOEACC Society. Therefore, the petitioners no. 4 and 6 cannot be non suited only on the ground that they do not possess the Computer Concept Course (CCC) certificate issued by the DOEACC Society.

44. So far as the remaining **petitioners no. 1,2,3,5,7,8,9,10,12,13,14,16,18,19,20,21,22,23, and 25** are concerned, it is noticed that they possess the requisite higher qualification of Diploma or Degree or even Post Graduate Diploma in computers or with computers as a subject from recognised institutions/Universities and therefore, merely because they have not done the basic CCC course from the DOEACC Society it cannot be held that they lack knowledge or essential knowledge of computer. Petitioners with such high qualifications in computers cannot be non suited only on the ground that they do not possess the Computer Concept Course (CCC) certificate issued by the DOEACC Society.

45. So far as the validity of paragraph 8 of the Advertisement No. 7(3)/2015 is concerned I do not find any illegality or infirmity in the same as it is always open for the Government to introduce an additional eligibility qualification not otherwise provided for in the statutory Rules so long as the additional eligibility criteria is not inconsistent with or in abrogation of the criteria laid down in the Rules and does not supplant the Rules.

46. In the totality of the facts and the law laid down, the ***writ petition no. 30313 of 2016 (Abha Tripathi and others Vs. State of U.P. and others)*** stands partly allowed.

47. So far as the ***writ petition no. 36165 of 2016 (Sidh Nath Yadav Vs. State of U.P. and others)*** is concerned, it is noticed that the petitioner therein has stated in paragraph 9 of the writ petition that he has completed CCC Course from Future Soft Technology, which is stated to be accredited to NIELIT (Government of India) but is a private Institute. It is also stated that he has

done his graduation from Deen Dayal Upadhyay University. The fact, however, remains that he does not state that he has done his graduation in computer or that he had computer as subject. He also does not possess the CCC certificate awarded by the DOEACC Society. This was one of the questions which had come up before this Court in the case of ***Sanjay Kumar Srivastava Vs. State of U.P. and another Special Appeal No. 829 of 2015*** relating to the recruitment of Additional Private Secretaries wherein the Rules provided for a CCC certificate conducted by the DOEACC Society. The case of the petitioners therein was that they possessed certificates awarded by private Institutions. This was not accepted by the Division Bench of this Court and the Court held that a candidate who has passed either the Certificate Course in Computing (CCC) conducted by the DOEACC Society or the Course conducted by the Board of High School and Intermediate or any Course equivalent thereto recognized by the Government is eligible.

48. In this view of the matter since the petitioner possesses a Certificate issued by a private Institution regarding CCC Certificate which has not been issued by the DOEACC Society, he cannot be said to be holding the qualification as per the advertisement no.7(3)/2015 for the post of Gram Panchayat Adhikari.

49. The ***writ petition no. 36165 of 2016 (Sidh Nath Yadav Vs. State of U.P. and others)*** lacks merit and is accordingly **dismissed**.

50. So far as writ petition no. ***30314 of 2016 (Ajay Tiwari Vs. State of U.P. and others)*** is concerned, the petitioner claims that he possesses the CCC Certificate issued by the U.P. Development Systems Corporation Ltd, which is stated to be a Government of U.P. undertaking but the fact remains that the advertisement itself requires a CCC certificate awarded by the DOEACC Society. Besides there is nothing in the Rules or advertisement or Government Order stating that the CCC certificate issued by the U.P. Development Systems Corporation Ltd. is equivalent to the Certificate issued by the DOEACC Society.

51. This controversy is no longer res integra having been settled by a Division Bench of this Court in the case of Sanjay Kumar Srivastava (supra) wherein the CCC certificates other than that issued by the DOEACC Society has been declined to be accepted as a valid qualification.

52. In this view of the matter since the petitioner possesses a CCC Certificate though issued by a Government undertaking Institution but the same has not been issued by the DOEACC Society, he cannot be said to be holding the qualification as per the advertisement no.7(3)/2015 for the post of Gram Panchayat Adhikari.

53. The ***writ petition no.30314 of 2016 (Ajay Tiwari Vs. State of U.P. and others)*** lacks merit and is accordingly **dismissed**.

54. There shall be no order as to cost.

(2016) 9 ILRA 1691
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Bail Application No.- 35093 Of 2015

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

Counsel for the Applicant:
Satish Kumar Singh

Counsel for the Opposite Party:
Govt. Advocate

Procedure:
Application for bail moved under Sections **420, 406, 120-B IPC** and **Sections 66-A(c), 66-D of the Information Technology Act**, arising out of Case Crime No. 395 of 2014, Police Station Civil Lines, District Meerut. The applicant was in judicial custody since 13.07.2014. Bail was sought on grounds of false implication, parity with co-accused, and alleged misuse of his bank account.

Issues:
Whether the applicant is entitled to bail in a case involving fraud by impersonation of a sitting High Court Judge.
Whether parity with co-accused granted bail is applicable to the applicant.
Whether the role of the applicant, being beneficiary and account holder, makes him distinguishable from co-accused.

Facts in Brief:
Fraud was committed by impersonating a sitting Judge of the High Court and inducing the Chief Judicial Magistrate, Meerut to transfer ₹90,000/-.
The amount was credited to the applicant's bank account and withdrawn on the same day through ATM transactions and purchase of gold.
The applicant claimed misuse of his account by co-accused and denied involvement in the conspiracy.
Co-accused persons had been granted bail earlier.

Headnotes:
The Court held that the applicant was the **main beneficiary and prima facie mastermind** of the offence.
The manner of withdrawal of money showed **pre-planned and organized execution of fraud**.
The offence involved **serious misconduct by impersonating a High Court Judge and defrauding a judicial officer across State lines**, which aggravated the gravity of the offence.
The applicant's case was found **clearly distinguishable from co-accused**, hence **parity was not applicable**.

Considering the **seriousness of offence, complicity, and conduct of the applicant**, the Court held that it was not a fit case for grant of bail, **Bail Rejected.**

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

1. Heard learned counsel for the applicant, learned A.G.A. and perused the record.

2. Learned counsel for the applicant contended that the applicant has been falsely implicated in the present case; that as per averments made in F.I.R., a phone call was made to Chief Judicial Magistrate, Meerut under the name of the then Sitting Judge of this High Court Justice Imtiyaz Murtaza, asking the Chief Judicial Magistrate, Meerut to ascertain the admission of Ziyaul Haq Khan, in M.B.B.S. in Subharati University after negotiating its Director Atul Krishna and subsequently after a period of 15-20 days on 8.7.2014 again a call was made to C.J.M., Meerut in the name of same sitting Judge by the same mobile no.9934018301 stating emergency and asking the CJM to deposit money in his account and when he did not deposit, the call was repeated on 9.7.2014 followed by an SMS giving details of savings bank account no.33015017403 of S.B.I. by the name of Sanjeet Kumar, the applicant upon which he (the CJM) deposited a sum of Rs.90,000/- as per instructions of the alleged Hon'ble sitting Judge. It has also been stated in the F.I.R. that on 10.7.2014 another call was received by CJM, Meerut from the same number asking him for transferring some more money upon which the CJM, Meerut traced the number of Justice Imtiyaz Murtaza and gathered courage to make a call to him and upon calling him, the above Judge shown total ignorance and surprise and told that neither he made any recommendation for admission of any boy by above mobile number nor called for transferring the money in the given account nor above mobile number belongs to him and he (the CJM) must immediately lodge a F.I.R.; that during investigation on the basis of alleged CCTV footage of three culprits in the Nagar Mal Shiv Narayan and Sons Mall, Bhojpur, Bihar, the applicant and Aakash Kumar were arrested on 13.7.2014 at 4:40 a.m. and 5:30 a.m. Respectively, while the third one Rahul could not be traced; that upon arrest in confessional statement in police custody, the applicant is alleged to have admitted that the amount of Rs.90,000/- was credited in his account on 9.7.2014 and the same day he withdrawn a sum of Rs.40,000/- through 4 ATM transactions and made a purchase of gold worth Rs.50,000/- from Nagar Mal Shiv Narayan and Sons Mall, Bhojpur, Bihar; that the confessional statement of applicant in police custody is not admissible in evidence; that mobile number by which the call was made did not belong to applicant; that upon arrest the applicant had told the Investigating Officer that Aakash and Rahul are his friends and obtained from him his account number of S.B.I. on 9.7.2014 and sent a message whereafter a sum of Rs.90,000/- was credited to his account which was withdrawn and utilised by them for enjoyment and purchasing gold; that during investigation co-accused Rudal Kumar Yadav @ Satyendra Yadav in Patna Jail disclosed that the mobile no.9934018301 belongs to Ranjan Mishra, who was with him in the jail and had told him on phone that his younger brother Avinash Mishra @ Ritu Raj Mishra has provided a mobile number of CJM, Meerut stating that he may be trapped and money may be extracted from him; that the statement of Rudal Yadav and Avinash Mishra @ Ritu Raj Mishra are at Annexures 8 & 9; that during investigation a sum of Rs.30,000/- has been recovered from the possession of co-accused Vivek Upadhyay of Jharkhand; that above co-accused Vivek Upadhyay is alleged to have

conspired with co-accused Akram as has been disclosed by Ziyaul Haq Khan (the person, who got admission in M.B.B.S. on the basis of above recommendation/call); that Ziyaul Haq Khan has stated that with a desire to become a Medical Officer he asked her uncle (Tau) Akram, who told him that co-accused Vivek Upadhyay was with him in District Jail, Badaun and can get his admission done in M.B.B.S. by making recommendations; that co-accused Akram, Vivek Upadhyay, Avinash Mishra and Aakash have been granted bail by other Benches of this Court vide orders dated 2.2.2015, 12.2.2015, 26.3.2015 & 1.2.2016 passed in Criminal Misc. Bail Application Nos.43934 of 2014, 5183 of 2015, 7578 of 2015 & 24625 of 2015, copies collectively filed at Annexure-11; that the applicant is a student of B.A. Honours; that the applicant has not committed any wrong; that the misuse of account of applicant has been made by co-accused Rahul, who has not been traced as yet; that co-accused Ranjan Mishra has also not been arrested as yet; that the copy of statement of account of applicant at page 27-30 of Annexure-3 makes it clear that the amount of Rs.90,000/- was credited in the account of applicant on 9.7.2014 out of which the sum of Rs.10,000/-, Rs.10,000/-, Rs.10,000/-, Rs.9,900/- were withdrawn by him through 4 ATM transactions and Rs.50,000/- were spent in purchasing Gold at Mall making payment through ATM card; that before and after deposit and withdrawal of above amount of Rs.90,000/- only a nominal amount has been in balance in applicant's above account; that the applicant is innocent and committed the only mistake in providing his account number to co-accused Rahul and accompanying him in making withdrawal of amount and in spending it for enjoyment and purchasing Gold through his ATM card at the Mall; that the applicant 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 13.7.2014.

3. Learned AGA vehemently opposed the prayer of bail and contended that the applicant is the main culprit and master mind behind the entire offence wherein, the name of a sitting High Court Judge has been misused; that undisputedly, an amount of Rs.90,000/- has been credited in the account of applicant in S.B.I. at Gidha, Ara, Patna Road, District Bhojpur State of Bihar on 9.7.2014 to which he was not entitled, and moreover was withdrawn in organized and pre-planned manner through five transactions, firstly, by 4 transactions of withdrawal through A.T.M. for Rs.10,000/-, Rs.10,000/-, Rs.10,000/- and Rs.9,900/- and then by making payment on purchase of Gold of Rs.50,000/-, payment through A.T.M., all on the same day i.e. 9.7.2014; that the role of applicant is distinguishable from co-accused Akram, Vivek Upadhyay, Avinash and Akash, who are alleged to be conspirators for the offence; that the offence committed by applicant is of serious nature, in which the applicant sitting at District Bhojpur, Bihar has committed the fraud with the Chief Judicial Magistrate at Meerut (in another State) by making misuse of and putting undue pressure on him, in the name of a sitting Judge of Allahabad High Court; that it is not a case of applicant that he is illiterate and innocently provided the particulars of his bank account to someone, who misused his bank account by getting the money credited, rather it is crystal clear from the facts on record that the applicant is the real culprit and main accused and mastermind of the crime in question and committed fraud by making the phone calls to C.J.M., Meerut through co-accused, got the money credited in his own account, and withdrawn the same through four A.T.M. transactions and one shopping transaction in most cunning and planned manner; that it also pertinent to mention that since the withdrawal of Rs.40,000/- at the most is permitted through

A.T.M., the applicant made withdrawal at four times i.e. Rs.10,000/-, Rs.10,000/-, Rs.10,000/-, and Rs.9,900/-, restricting the fourth transaction of withdrawal to Rs.9,900/- so that it may remain within the limit of Rs.40,000/-and thereafter very cleverly withdrawn the balance Rs.50,000/- by purchasing Gold and making payment through ATM; that the applicant is a very clever person and main beneficiary, who has enjoyed the money credited to his account by purchasing gold and in other manners preferred by him; that the applicant is not entitled for bail on the ground of parity, as his case is clearly distinguishable from co-accused who have been granted bail.

4. Upon hearing learned counsel for the parties, perusal of record and considering the complicity of accused, severity of punishment, allegations of fraud from another State of Bihar on Judicial Officer (CJM), Meerut by making misuse of the name of a sitting Judge of Allahabad High Court 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 **Sanjeet** in case crime nos.395 of 2014, under sections 420, 406, 120-B IPC and 66-A (C), 66-D of the Information and Technology Act, PS. Civil Lines, District Meerut, is **rejected** accordingly.

(2016) 9 ILRA 1695
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 35102 Of 2003

Gorakh Nath Rai **...Petitioner**
Versus
State Of U.P. **...Respondent**

Counsel for the Petitioner:
Sri K.M. Misra

Counsel for the Respondent:
C.S.C.

HEADNOTES:
Service Law — Suspension — Payment of salary for suspension period — Requirement of notice under Fundamental Rule 54-B — Principles of Natural Justice
Denial of full salary for the period of suspension cannot be treated as a punishment under the Civil Services (Classification, Control and Appeal) Rules, 1930 applicable in Uttar Pradesh. Where the competent authority proposes to pay less than full salary for the suspension period, the procedure prescribed under **Fundamental Rule 54-B(3) and (5)** must be followed.
The Rule mandates issuance of a **show cause notice** specifying the quantum proposed to be paid and consideration of representation submitted by the delinquent employee. Failure to follow the mandatory procedure renders the order illegal being violative of **principles of natural justice**.
Where the competent authority denies full salary for suspension period without issuing notice under Fundamental Rule 54-B, such order is liable to be set aside and the matter remitted for fresh decision in accordance with law.
Punishment of **"Censure"** having already been imposed and the employee having retired, the issue relating to punishment becomes infructuous, however denial of salary for suspension period remains subject to compliance of Fundamental Rule 54-B.

ACTS:
Fundamental Rule 54-B
Civil Services (Classification, Control and Appeal) Rules, 1930
Principles of Natural Justice

PROCEDURE:
The petitioner challenged the punishment order whereby he was awarded **censure** and denied full salary for the period of suspension. The petitioner contended that no show cause notice as required under Fundamental Rule 54-B was issued before passing the order denying full salary for suspension period.

Reliance was placed upon the judgment in **Akhilesh Kumar Awasthi vs State of U.P. and others, 2008(8) ADJ 243** and **Uma Shankar Purwar vs Principal Secretary, Food and Civil Supplies, Govt. of U.P.**
The High Court examined the scope of Fundamental Rule 54-B and the requirement of compliance with principles of natural justice before denying full salary for the suspension period.

ISSUE:
Whether full salary for the suspension period can be denied without issuing show cause notice as required under Fundamental Rule 54-B?

CASE LAW DISCUSSED:
Akhilesh Kumar Awasthi Vs. State of U.P. and others, 2008(8) ADJ 243 = 2008(4) ESC 2679
Uma Shankar Purwar Vs. Principal Secretary, Food and Civil Supplies, Govt. of U.P., Writ Petition No. 9519 of 2007 decided on 14.09.2009

HELD:
Denial of full salary for the suspension period entails civil consequences and cannot be imposed without following the procedure prescribed under Fundamental Rule 54-B.
Issuance of show cause notice and consideration of representation is mandatory before determining quantum of salary payable for the suspension period.
Since no notice was issued to the petitioner, the impugned order denying full salary is illegal and liable to be set aside.

CONCLUSION:
Writ petition partly allowed.
Impugned order dated 20.02.2006 is set aside to the extent it denies full salary to the petitioner for the suspension period.
Matter remanded to the competent authority to take fresh decision in accordance with Fundamental Rule 54-B after giving opportunity to the petitioner.
No order as to costs.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri K.M. Misra, learned counsel for petitioner and learned Standing Counsel for respondent.

2. Impugned order of punishment is only of 'Censure' and since petitioner has retired, therefore, to that extent it has rendered infructuous. The next order which is under challenge is dated 20.02.2006 whereby the State Government has denied full salary to petitioner for the period he remained under suspension.

3. It is contended that under Fundamental Rule 54-B the competent authority shall take a decision about the amount to be paid to the Government Servant during the period of suspension (not less than the subsistence allowance already received by him) after giving show cause notice to him with respect to quantum proposed and after considering the representation, if any, made by

him. But in the present case, no such notice was given to petitioner therefore, impugned order is in violation of principles of natural justice.

4. It is contended that denial of full salary during suspension is not one of the punishment provided in the Civil Services (Classification,Control and Appeal) Rules, 1930 as applicable in U.P. (hereinafter referred to as CCA Rules) which were the Rules applicable at the relevant time when the disciplinary proceedings were conducted against the petitioner and as such, full salary could have been denied only in accordance with the procedure prescribed in Fundamental Rule 54-B after following the procedure laid down therein. No show cause notice under Fundamental Rule 54-B was issued and the procedure laid down therein was not followed. Hence, it is contended that the order of punishment insofar as it denies full salary during the period of suspension by forfeiting the same imposing it as a punishment on the petitioner is wholly illegal and without jurisdiction.

5. This submission in our view has substance and deserves sustenance.

6. Fundamental Rule 54-B contemplates a show cause notice separately where disciplinary authority is of the view that the delinquent employee should not be paid full salary for the period he was under suspension. The Fundamental Rule 54-B, relevant extract, reads as under:-

"54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order-

(a) regarding the pay and allowance to be paid to the Government servant or the period of suspension ending with reinstatement or the date of his reinstatement on superannuation as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty

. . . . . .

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule(8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

. . . . . .

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules(8) and (9), be paid such amount (not being the

whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice

. . . . . .

7. A perusal of Sub-rules (3) and (5) of Fundamental Rule 54-B shows that the competent authority shall take a decision about the amount to be paid to the Government Servant during the period of suspension (not less than the subsistence allowance already received by him) after giving notice to him with respect to quantum proposed and after considering the representation, if any, made by him. The scope of the aforesaid decision is entirely different. The question as to whether full salary should be paid to the Government Servant or not, is not a kind of punishment provided under CCA Rules, 1930 as applicable in Uttar Pradesh but it is other than the punishment enumerated therein. However, it cannot be doubted that when disciplinary authority thinks that entire salary should not be paid to Government Servant for the period of suspension, such an order entails into civil consequences to the delinquent employee. Therefore consistent with the principles of natural justice, Fundamental Rule 54-B, Sub Rules (3) and (5), contemplate issuance of a show cause notice and thereafter an order needs be passed by the competent authority after considering representation, if any, of the delinquent employee. It is thus evident that along with order of punishment no decision can be taken by a competent authority to deny full salary to delinquent employee unless procedure prescribed under Fundamental Rule 54-B is observed.

8. It is well settled, when law requires something to be done in a particular way, it has to be done in that manner alone and not otherwise. This Court considered Fundamental Rule 54-B in **Akhilesh Kumar Awasthi Vs. State of U.P. and others, 2008(8) ADJ 243=2008(4) ESC 2679** and said as under:

"A bare perusal of the aforesaid provision makes it clear that before passing an order depriving the Government servant of full salary for the period of suspension or when he was out of employment, a show cause notice has to be issued to the concerned Government servant and only thereafter, the competent authority may pass appropriate order considering various aspects.

Admittedly, no such procedure has been followed, therefore, the impugned order, to the extent the petitioner has been denied arrears of salary for the period of suspension as well as during the period he was out of employment pursuant to the dismissal order, which was modified by the revisional order, is set aside. The writ petition is, accordingly, allowed partly. . . . . ."

9. Following **Akhilesh Kumar Awasthi (Supra)** this Court in **Uma Shankar Purwar Vs. The Principal Secretary, Food and Civil Supplies, Government of U.P., Lucknow and others** (Writ Petition No.9519 of 2007, decided on 14.9.2009) in para 7 held as under:

"7. Admittedly, no such procedure has been followed by the respondents in the case in hand and on the contrary treating as if withholding a salary for the period of suspension can also be imposed as a punishment under the rules though the same is not one of the punishment prescribed under the rules. As a result of departmental inquiry, the authority concerned is empowered to deny full salary during the period of suspension as a consequence of reinstatement but final order can be passed after deciding whether the period of suspension was wholly unjustified or not and then the quantum of amount."

10. Here also, admittedly, the procedure prescribed in Fundamental Rule 54-B has not been followed. Denial of full salary vide impugned order is without affording any opportunity to the petitioner by way of issuing a show cause notice. The impugned order in so far as it denies full salary during the period of suspension without any notice to the petitioner is thus illegal and liable to be set-aside.

11. In the result, the writ petition partly allowed. The impugned order dated 20.02.2006 imposing punishment is set aside only to the extent it denies full salary to the petitioner for the period of suspension. The order of the Tribunal shall stand modified to this extent. The matter is remanded to the respondent competent authority to take a fresh decision on this aspect of the matter in accordance with the procedure prescribed under Fundamental Rule 54-B and the observations made hereinabove.

12. No order as to costs.

(2016) 9 ILRA 1700
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2016

BEFORE

THE HON'BLE RAN VIJAI SINGH, J.

Writ C No.- 44451 Of 2016

Sunil Kumar **...Petitioner**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:
Sri Nipun Singh, Sri Anurag Khanna

Counsel for the Respondents:
Learned Chief Standing Counsel

HEADNOTES:
Indian Stamp Act, 1899 — Section 47-A — Limitation Act, 1963 — Section 5 — Recall/Restoration Application — Delay Condonation — Jurisdiction — Review by Quasi Judicial Authority — Maintainability of Recall — Ex parte Order — Power of Review — Order without Jurisdiction.
Where a recall/restoration application is filed beyond prescribed limitation along with an application under Section 5 of the Limitation Act, the authority cannot decide the recall application on merits unless delay is first condoned. Failure to decide the delay condonation application before allowing restoration renders the order wholly without jurisdiction.
An order passed after hearing both parties cannot subsequently be treated as an ex parte order merely because one party alleges ignorance of the order. In absence of statutory provision conferring power of review, a quasi judicial authority exercising powers under the Indian Stamp Act has no jurisdiction to review or recall its own final order.
An order passed without jurisdiction is a nullity and liable to be quashed.

Held: Paras 8 to 24
Once an application under Section 5 of the Limitation Act had been filed, the recall/restoration application could not have been decided unless delay was first condoned. The authority was under legal obligation either to condone the delay or to record a finding that the application was within limitation before proceeding on merits.
The order dated 23.05.2016 having been passed after hearing both parties, the same could not be treated as an ex parte order and therefore the recall application itself was not maintainable.
The Additional Collector exercising quasi judicial powers under the Indian Stamp Act possesses no power of review in absence of an express statutory provision conferring such jurisdiction.
A quasi judicial authority cannot review its own order unless power of review is expressly conferred by statute.
The impugned order dated 09.09.2016 recalling the earlier order and restoring the proceedings was wholly without jurisdiction and liable to be quashed.
An order passed without jurisdiction is a nullity and no legal consequences can flow from such order.

PROCEDURE:
Petition under Article 226 of the Constitution of India seeking issuance of a writ of certiorari quashing the order dated 09.09.2016 passed by the Additional Collector (Finance and Revenue), Hapur in Case No. D2016117300171 (State Vs. Sunil Kumar), whereby the earlier order dated 23.05.2016 dropping proceedings under Section 47-A of the Indian Stamp Act, 1899 was recalled and the case restored for fresh hearing and evidence.

BRIEF FACTS:
Proceedings under Section 47-A of the Indian Stamp Act, 1899 were initiated against the petitioner alleging deficiency of stamp duty. The petitioner filed objections and after hearing both sides, the Additional Collector (Finance and Revenue), Hapur by order dated 23.05.2016 dropped the proceedings holding that there was no deficiency of stamp duty.
Subsequently, the State respondents filed a recall/restoration application on 29.07.2016 on the ground that counsel for the State had no knowledge regarding passing of the order dated 23.05.2016. Along with the recall application, an application under Section 5 of the Limitation Act for condonation of delay was also filed.
Without deciding the delay condonation application, the Additional Collector allowed the recall application by order dated 09.09.2016 and restored the case to its original number fixing 14.09.2016 for hearing and evidence.
Aggrieved thereby, the petitioner filed the present writ petition.

CASE LAW DISCUSSED:
Noharlal Verma Vs. District Cooperative Central Bank Ltd. Jagdalpur
V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao
Sneh Gupta Vs. Devi Sarup
Ragho Singh Vs. Mohan Singh
Prabhu Vs. Deputy Director of Consolidation
Dr. (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya
Smt. Shivraji Vs. Deputy Director of Consolidation
Syed Madadgar Husain Rizvi Vs. State of U.P.
Managing Director, Army Welfare Housing Organization Vs. Sumangal Services Pvt. Ltd.
Sarup Singh Vs. Union of India

CONCLUSION:
The writ petition was allowed. The impugned order dated 09.09.2016 passed by the Additional Collector (Finance and Revenue), Hapur in Case No. D2016117300171 (State Vs. Sunil Kumar) was quashed. However, the Court clarified that the respondents would be at liberty to proceed in accordance with law.

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri Nipun Singh, learned counsel for the petitioner and learned standing counsel for the State-respondents.

2. Through this writ petition, prayer has been made to issue a writ of certiorari quashing the order dated 9.9.2016 passed by the Additional Collector (Finance and Revenue) Hapur by which the earlier order dated 23.5.2016 passed in Case No. D2016117300171 (State Vs. Sunil Kumar) has been set aside and 14.9.2016 has been fixed for hearing and evidence.

3. While assailing the aforesaid order, learned counsel for the petitioner has made following submissions :-

(i) The order impugned is patently illegal for the reason that the recall application itself was not maintainable as the counsel for the applicant seeking recall was heard, therefore the order was not exparte order.

(ii) Along with the recall application, an application under Section 5 of Limitation Act 1908 was filed on 29.7.2016 but without disposing of the application filed under Section 5 of the Limitation Act, the application seeking recall of the order dated 23.5.2016 has been allowed illegally.

(iii) Since no ground was taken in the application that on 23.5.2016, the counsel for the applicant has not argued the case, therefore the recall could not be sought and in absence of such assertion, recall application could not be allowed.

4. The facts of this case in brief are that the against the petitioner, a proceeding under Section 47-A of Indian Stamp Act,1899 was initiated, which was numbered as Stamp Case No.D2016117300171. The petitioner, herein, has filed his objection and after due deliberation, the Additional Collector (Finance and Revenue, vide order dated 23.5.2016, has dropped the proceeding after hearing both the parties by holding that there is no deficiency of the stamp duty. Thereafter on 29.7.2016, the State respondents through its counsel has filed an application seeking recall of the order dated 23.5.2016 on the ground that he was unaware of the fact that any order was passed on 23.5.2016. Along with the aforesaid application, an application under Section 5 of Limitation Act for condoning the delay was also filed. The Additional Collector (Finance and Revenue) has set aside the order dated 23.5.2016 and restored the case to its original number fixing 14.9.2016 for hearing and evidence.

5. Learned counsel for the applicant contended that the application was barred by time and there was an application for condonation of delay, therefore unless the delay was condoned, the restoration application could not be heard and allowed.

6. I find substance in the submissions of learned counsel for the petitioner as once the application under Section 5 of Limitation Act was filed, the restoration application could not be decided on merit unless the delay was condoned and the application filed under Section 5 of Limitation Act was allowed or the finding was recorded to the effect that there was no need of filing Section 5 application and the application was within time.

7. Here in this case, admittedly, the recall application was barred by time and it was accompanied with an application for condonation of delay, therefore, unless the delay was condoned, the recall application could not have been decided.

8. The view taken by me finds support from the decision of the apex Court in ***Noharlal Verma Vs. District Cooperative Central Bank Ltd. Jagdalpur 2008 14 SCC 445,*** where the Apex Court has held as under :-

1. " 32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub Section (1) of Section 3 of the Limitation Act, 1963 reads as under:

" 3. Bar of Limitation.- (1) Subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not be set up as a defence."

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in the absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

9. In ***V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and another 2005 Volume 4 SCC 613,*** following observation has been made by the Apex Court.

20 " The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."

10. In the case of ***Sneh Gupta Vs. Devi Sarup and others, (2009)6 SCC 194, in paragraph 70***, the Apex Court has held that *in absence of any application for condonation of delay, the court has no jurisdiction in terms of S. 3, Limitation Act, 1963 to entertain the application filed for setting aside of decree after expiry of period of limitation.*

11. In ***2001 (9) SCC 717, Ragho Singh Vs. Mohan Singh***, the Apex Court has held as under:-

(6) " We have heard learned counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under Section 5 of the Limitation Act was not filed for condonation of delay, there was no jurisdiction in the Additional Collector to allow that appeal. The appeal was liable to be dismissed on the ground of limitation. The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay shall be deemed to have been condoned. This is patently erroneous. In this situation, the High Court was right in setting aside the judgment of the

Additional Collector as also of the Board of Revenue. We find no infirmity in the impugned judgment. The appeal is dismissed. No costs."

12. The same view has been reiterated by this Court in ***Prabhu and Another Vs. Deputy Director of Consolidation and others 2013 (118) RD 48,*** wherein this Court has observed as under :-

(i) When the statute provides limitation for approaching the Court and a person approaches the Court after the expiry of the period of limitation, then he has to approach the Court along with an application under Section 5 of the Limitation Act praying extension of period of limitation or to condone the delay in approaching the Court.

(ii) Once the application under Section 5 of the Limitation Act is filed and unless the delay is condoned, no order can be passed on merit.

(iii) The delay cannot be condoned without having the version of otherside and for that, otherside is required to be noticed and heard.

13. Here in this case, both the things are missing as neither the application filed under Section 5 was decided nor any finding has been recorded that the application was within time.

14. Learned counsel for the petitioner further contended that in the restoration application, it was not the case of the respondents that the State was not heard on 23.5.2016 and unless it was the case that the order impugned dated 23.5.2016 is ex parte one, recall application was not maintainable.Here too, I find substance in the submissions of learned counsel for the petitioners that once the order was passed after hearing both the sides, the recall application was not maintainable and the order could not be treated as an exparte order. Otherwise also, the Additional Collector (Finance and Revenue) has no power to review his own order as there is no provision of review under the Indian Stamp Act while deciding such cases.

15. It can not be disputed that the impugned order has been passed by a quasi judicial authority and such authority cannot review its order in absence of power of Review conferred under the Statute.

16. The power of review of quasi judicial authority in absence of specific provision under the statute has been dealt with in several cases of this Court as well as by the Apex Court. The Apex Court in the case of ***Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P. and Ors. reported in (1987) 4 Supreme Court Cases 525*** has held that unless power of Review is expressly conferred on the authority by any statute under which it derives its' jurisdiction, the authority concerned has no power to Review its' earlier order. In Para-11 of the aforesaid judgment following observations has been made:

17. A quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissed of the Principal, acts as a quasi-judicial authority. The provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice- Chancellor. In the circumstances, it must be held that the Vice- Chancellor

acted wholly without jurisdiction in reviewing, his/her earlier order. The review order of the Vice-Chancellor was, therefore, a nullity.

18. In the case of ***G. Srinivas v. Govt. of A.P. and Ors. reported in MANU/SC/0634/2005 : AIR2005SC4455*** . Hon'ble Apex Court has observed:

An order passed by mistake and ignorance of the relevant facts indisputably can be reviewed, if inter alia it is found that a fraud was practiced or there was willful suppression on the part of the appellant.

19. The Full Bench of this Court reported in ***1997 (31) A.L.R. 680 (Smt. Shvraji and Ors. v. Dy. Director of Consolidation, Allahabad and Ors.)*** has held:

36. Coming to the provisions of the U.P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy Director of Consolidation while deciding a revision petition exercises judicial or quasi judicial power and, therefore his order is final subject to any power of appeal or revision vested in superior authority under the Act. The consolidation authorities, particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot reopen any proceeding and cannot review or revise his earlier order. However, as a judicial or quasi judicial authority he has the power to correct any clerical mistake/arithmetical error, manifest error in his order in exercise of his inherent power as a tribunal.

20. In the case of ***Syed Madadgar Husain Rizvi and Anr. v. State of U.P. and Ors. reported in 2007 (9) ADJ 581 (DB)*** this Court has held:

A quasi judicial authority is not permitted to review its order unless it is so expressly conferred by the Statute itself.

21. In view of foregoing discussions, I am of the considered opinion that the impugned order dated 9.9.2016 is without jurisdiction and it cannot be sustained in the eyes of law. It is well settled that an order without jurisdiction is a nullity and no legal consequences can flow such orders. Reference may be made to the decisons of the Apex Court in ***Managing Director, Army Welfare Housing Organization vs. Sumangal Services Pvt. Ltd. (2004)9 SCC 619,Sarup Singh and Anr. vs. Union of India and Anr. (2011) 11 SCC 198*** and a Division Bench decision of this Court in the case of ***Committee of Management Shri Jawahar Inter College and Anr. vs. State of U.P. and Ors. in Special Appeal No. 164 of 2012 decided on 25.1.2012*** in which it has been held that the order without jurisdiction is a nullity.

22. In the result, the writ petition succeeds and is allowed. The impugned order dated dated 9.9.2016 passed by the Additional Collector (Finance and Revenue) Hapur in Case No. D2016117300171 (State Vs. Sunil Kumar) is hereby quashed. However allowing of this writ petition will not preclude the respondents to proceed in accordance with law.

(2016) 9 ILRA 1706
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Testamentary Case No.- 25 Of 2015

In The Matter Of Late Smt. Kalawati & Anr. ...Petitioners

Versus

Nagar Nigam, Jalaun ...Respondent

Counsel for Petitioners:
Narendra Mohan

Counsel for Respondent:
Rajeev Kumar Mishra

Indian Succession Act, 1925 -- Section 278 -- Grant of Letters of Administration -- Caveat -- Locus Standi of Caveator to Oppose -- Petitioner applied under Section 278 for grant of Letters of Administration in respect of the estate of the deceased on the basis of her registered Will dated 19.11.1984 -- Nagar Nigam, Jalaun entered a caveat contending that the properties mentioned in the schedule to the petition belonged to it and not to the deceased, that petitioner was not the heir and legal representative of the deceased, and that the death certificate filed was fictitious -- filing of a caveat renders the proceedings for grant of Letters of Administration contentious, making it necessary to examine the locus standi of the caveator before he is permitted to contest -- **Held:** only a person having an interest in the estate of the deceased, claiming title through the deceased and not independently of him, is entitled to lodge a caveat and oppose the grant of Letters of Administration -- a person disputing the testator's right to deal with the property as his own, or claiming the property adversely to or independently of the testator, has no locus standi to oppose the grant -- Nagar Nigam, Jalaun having claimed the scheduled properties independently of the deceased and not through her, held to have no caveatable interest -- caveat discharged. (Paras 4-8)

Indian Succession Act, 1925 -- Grant of Letters of Administration -- Scope of Enquiry -- Title to Properties not to be Adjudicated -- Held: in proceedings for grant of Letters of Administration, the title of the properties referred to either in the petition or in the Will of the deceased is not to be adjudicated upon at all; the Court is only concerned with the genuineness of the Will, its authenticity, its due execution in accordance with law, and the entitlement of the petitioner to administer the properties of the deceased -- the Court has no jurisdiction to adjudicate the title of the testator over such properties or even their existence. (Paras 9-10)

Caveat Discharged -- Nagar Nigam, Jalaun held to have no caveatable interest in the estate of the deceased Kalawati -- caveat filed by it in Testamentary Case No. 25 of 2015 discharged. (Para 11)

Case Law Discussed:-
1. Goods of Mrs Lydia and others, AIR 1952 Allahabad 543
2. D.S. Sriramiah Setty v. Smt. D. Kanthamma, AIR 1971 Mysore 148

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

1. The petitioner Arvind Kumar Dixit has applied under Section 278 of the Indian Succession Act, 1925 for the grant of Letters of Administration to him in respect of the estate of the deceased Kalawati W/o late Sri Brahmdeen, R/o Mohalla Chaudharana, Kasba and District Jalaun, on the basis of her registered Will dated 19.11.1984, annexed with the petition.

2. The Nagar Nigam, Jalaun has entered into a caveat and has filed counter to the petition seeking grant of Letters of Administration.

3. Sri R.K. Mishra, learned counsel appearing for the Nagar Nigam argues that the properties mentioned in the schedule of the properties with the petition for grant of Letters of Administration were not the properties of the deceased rather that of the Nagar Nigam, Jalaun. The petitioner is not the heir and legal representative of the deceased and the death certificate enclosed with the petition is fictitious.

4. The filing of a caveat has the effect of making proceedings for the grant of Letters of Administration contentuous matter, therefore, locus standi of a person lodging a caveat so as to oppose the grant is necessary to be looked into before he is allowed to contest the proceedings.

5. It is only a person who has interest in the estate of the deceased is entitle to lodge a caveat and to oppose the grant of Letters of Administration. Such a person must claim title in the property through the deceased and not independently of him. A person disputing the right of the testator to deal with the property as his own is not a person entitle to oppose the grant of Letters of Administration.

6. In **the Goods of Mrs Lydia and others, AIR 1952 Allahabad 543**, the Court was called upon to decide the locus of the person lodging the caveat to the grant of probate. His Lordship of this Court held that a caveator, who says that the property does not form part of the estate of the deceased is not a person claiming an interest in that estate and as such has no locus standi to oppose the grant of the probate of the Will.

7. The grant of probate of a Will or Letters of Administration of the estate with the Will annexed stand on the same footing in so far as the principle behind the lodging of a caveat.

8. The Nagar Nigam, Jalaun is not claiming right in the properties mentioned in the schedule to the petition through the deceased rather independently of her. It therefore, has no locus to file caveat and to contest the grant of Letters of Administration to the petitioner.

9. In the proceedings for the grant of Letters of Administration, the title of the properties referred to either in the petition or in the Will of the deceased is not to be adjudicated upon at all. In such proceedings, the genuineness of the Will or its authenticity or its due execution in accordance with law or the entitlement of the petitioner to administer the properties of the deceased alone is to

be considered. The Court has no jurisdiction to adjudicate about the title of testator on the said properties as even about the existence of any of them.

10. In ***D.S. Sriramiah Setty Vs. Smt. D. Kanthamma, AIR 1971 Mysore 148***, it was held that a person, who claims the property by paramount title or adversely to the testator or disputes, the testator's right to deal with the property sought to be disposed of by the Will, has no right to enter a caveat. The only question, which arises for decision in such an application for grant of Letters of Administration is whether the Will propounded was the Will made by the testator while he was of a sound disposing state of mind.

11. In view of the aforesaid facts and circumstances of the case, I am of the opinion that the Nagar Nigam, Jalaun has no caveatable interest in the matter and as such, the caveat filed by it is **discharged**.

(2016) 9 ILRA 1709
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.09.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VINOD KUMAR SRIVASTAVA-III, J.

Criminal Appeal No.- 77 Of 2008
&
Connected With Other Cases

Karan Aarakh **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for Appellant:
Sri Shiv Shanker Sen, Sri Ajai Kumar Agnihotri, Sri Ashok Kumar Singh, Sri H.K. Bhatt, Sri Rama Kant Jaiswal, Sri Sunil Kumar Singh (for Karan Aarakh); Sri R.N. Gupta, Sri Ashok Kumar Singh (for Shiv Kumar Singh); Sri Servesh Kumar Shukla, Sri Ashok Kumar Singh, Sri Avinash Srivastava (for Vikram Singh @ Puttaney); Sri Servesh Kumar Shukla, Sri Ashok Kumar Singh, Sri Rishad Murtaza (for Dinesh Yadav); Sri Shiv Kumar Yadav, Sri Ashok Kumar Singh, Sri Vinay Mishra (for Manoj Yadav); Sri Vishambhar Singh Yadav, Sri Abhay Kumar, Sri Krishna Kumar Singh, Sri Sunil Kumar Singh (for Shri Pal and Another)

Counsel for Respondent:
Government Advocate

Criminal Procedure -- Section 364A I.P.C. -- Kidnapping for Ransom -- Ingredients -- Held: relying on Suman Sood alias Kamaljeet Kaur v. State of Rajasthan, before Section 364A I.P.C. is attracted and a person convicted, the prosecution must prove that the accused kidnapped, abducted or detained a person, kept such person under custody or detention, and that such kidnapping, abduction or detention was for ransom. (Para 25)

Evidence -- Testimony of Rescued Abductee -- Reliability -- Detailed and Consistent Narration -- Abductee was kept in custody of the kidnappers for nine days and had ample opportunity to recognise them by name and face, having travelled and been confined with them throughout -- he specifically described the role of each appellant, including the appellant driving the vehicle used in the kidnapping -- Held: where the narration of the abductee is natural, consistent and free from material contradiction on cross-examination, and there is no discernible motive for false implication given absence of any prior acquaintance or enmity between the complainant's family and the accused, such testimony is wholly reliable and can safely found conviction. (Paras 33-38)

Evidence -- Maxim 'Falsus in Uno, Falsus in Omnibus' -- Inapplicability in India -- Acquittal on Connected Charges Not Fatal to Conviction under Section 364A I.P.C. -- Some of the appellants were separately tried and acquitted of charges under Sections 147, 148, 149, 307 I.P.C. and the Arms Act arising from an alleged exchange of fire at the time of their arrest, the evidence in that regard having been found unreliable -- Held: relying on Ramesh Harijan v. State of Uttar Pradesh, the maxim 'falsus in uno, falsus in

omnibus' has no application in India and is merely a rule of caution -- even where a major portion of the evidence of a witness is found deficient, if the residue is sufficient to prove the guilt of the accused it is the duty of the court to separate the grain from the chaff -- acquittal in respect of the firing/arms charges, being based on a distinct and independent set of facts, does not affect the reliability of the evidence establishing the offence of kidnapping for ransom. (Paras 42-44)

Criminal Procedure -- Organised Crime -- Role of Driver of Vehicle Used in Kidnapping -- Constructive Involvement -- Held: in an offence of kidnapping for ransom committed by an organised gang, each member has an assigned role, and a member need not be directly visible or participate in every overt act to be held involved -- the appellant who drove the vehicle used to transport the abductee both on the first and last day of the offence, and who was apprehended along with the other accused and the abductee, cannot escape liability merely because no firearm was recovered from him and he did not participate in the firing upon the police party at the time of arrest. (Paras 45-46)

Evidence -- Identification of Absconding Accused Through Confessional Statement of Co-Accused -- Corroboration by Direct Testimony of Abductee -- Held: absconding accused whose names surfaced only through the confessional statement of co-accused, and who were not arrested along with the others, cannot be absolved merely on that ground where the abductee has, in his direct testimony, specifically described their role and the place, being a field belonging to one such accused, where he was confined for several days -- plea of false implication on account of alleged prior enmity, unsupported by corroborative evidence, is not acceptable in the face of such direct testimony. (Paras 47-48)

Criminal Appeals Dismissed -- Judgment and order dated 14.12.2007 passed by the Additional Sessions Judge/F.T.C.-III, Hardoi in S.T. No. 839 of 2005 connected with S.T. No. 370 of 2006, arising out of Case Crime No. 429 of 2005, Police Station Kotwali City, District Hardoi, convicting and sentencing appellants Karan Aarakh, Shiv Kumar Singh, Vikram Singh alias Puttaney, Dinesh Yadav, Manoj Yadav, Shri Pal and Satya Kumar under Section 364A I.P.C. for life imprisonment with fine, upheld -- appeals dismissed -- appellants on bail directed to be taken into custody forthwith to serve out the sentence; appellants already in jail to continue serving the sentence. (Paras 50-53)

Case Law Discussed:
1. Suman Sood alias Kamaljeet Kaur v. State of Rajasthan, (2007) 5 SCC 634
2. Sucha Singh v. State of Punjab, AIR 2003 SC 3617
3. Ramesh Harijan v. State of Uttar Pradesh, (2012) 5 SCC 777

(Delivered by Hon'ble Vinod Kumar Srivastava-III, J.)

1. All the aforesaid criminal appeals have been preferred against the judgment and order dated 14.12.2007 passed by the Additional Sessions Judge/F.T.C.-III Hardoi in S.T. No. 839 of 2005 (State Vs. Dinesh Yadav and others) connected with S.T. No. 370 of 2006 (State Vs. Shri Pal and another) arising out of case crime no. 429 of 2005 whereby all the appellants Karan Aarakh, Shiv Kumar, Vikram Singh alias Puttaney, Dinesh Yadav, Manoj Yadav, Shri Pal and Satpal have been convicted for the offence under section 364-A I.P.C. and sentenced to undergo for life imprisonment with fine of Rs. 10,000/- and in default further to undergo for a period six months imprisonment.

2. As all the above mentioned six criminal appeals have been preferred against the common judgment and order hence same are being decided together by a common judgement.

Brief Facts of the case:

3. The prosecution story in brief is that complainant Ravindra Kumar Srivastava (P.W.1) lodged a First Information Report on 29.5.2005 with P.S. Kotwali City District Hardoi in respect of the incident allegedly occurred on 22.5.2005 at about 6.30 P.M. alleging therein that his younger brother Awadesh Kumar (P.W. 2) had gone to Kannauj by boarding in D.C.M. Vehicle. Thereafter his whereabouts could not be known, therefore, a missing report was lodged on 24.5.2005. A telephonic message came on 27.5.2005 from unknown person at the complainant's home that his brother is present with him and was told to meet the miscreants on the same day at 2.00 P.M. at the temple of Kakrahiya Devi along with another person. The complainant sent his younger brother Mahesh Chandra Srivastava (P.W.3) along with one Manoj Tripathi, who reached at 2.30 P.M. at the said place, where three persons met them. When the complainant's brother said to them that he would talk to them after relying that Awadesh Kumar is with them then, they took the Nokia Mobile of Mahesh Chandra Srivastava (complainant's brother) and said that through this mobile Awadesh will call to you, then come as told by them. On 29.5.2005, in the morning a phone call came at complainant's home and his brother only told his name on phone, thereafter phone was taken away by another person, who told to meet on 30.5.2008 at 2.00 P.M. at same temple and threaten that if he would not come his brother would be killed by them.

4 On the basis of written report Ex. Ka-1 of complainant Ravindra Kumar Srivastava (P.W.1) First Information Report was lodged initially under section 364 I.P.C. against three unknown persons.

5. During investigation of the case, on 31.5.2005, the police party led by S.I. Bhagwant Singh got the information through a Mukhbir Khas that a gang having the accused persons along with the alleged abductee Awadhesh Kumar was moving in a Marshal vehicle no. U.P. 30-B 7616,relying upon the information, police force came to the place of incident. When the police party intercepted the said vehicle firing was made by the miscreants towards police party due to which constable Kajjan Khan (P.W.7) and constable Harvasav Rao received some injury. However ultimately police party successfully apprehended six miscreants , namely Dinesh Yadav, Shiv Kumar, Vikaram alias Puttaney, Rajeev Yadav, and Manoj Yadav from whose possession illegal firearms were also recovered and Karan Aarakh who was driving the vehicle along with abductee Awadesh Kumar. The name of the miscreants Sripal and Satya Kumar were also disclosed by them, who successfully escaped from the place of incident. Thereafter recovered illegal firearms were kept under seal cover and relevant recovery memo (Ex.Ka-2) was prepared in accordance with the rule. On the basis of recovery memo(Ex. Ka-2), a First information Report was lodged against all the accused persons under sections 147, 148, 149, 307 I.P.C. and 7 Criminal Law Amendment Act and Section 3/25 of Arms Act and 2/3 U.P. Gangsters Act at different crime numbers on 31.5.2005 with P.S. Arwal, District Hardoi.

6. After completion of investigation, charge sheet against all the appellants-accused persons was filed under section 364-A I.P.C in case crime no. 429 of 2005 and separate charge sheets were also filed in case crime no. 48 of 2005 under sections 147, 148,307 read with 149 I.P.C. and in case crime nos. 49 of 2005, 50 of 2005, 51 of 2005, 52 of 2005 and 53 of 2005 under section 3/25 Arms Act

7. It is pertinent to mention that one co-accused, Rajiv Yadav was also charge sheeted along with accused-appellants but he was declared juvenile and his trial was separated.

8. After committal proceedings charges were framed against all the accused-appellants Dinesh Yadav, Shiv Kumar, Vikaram Singh alias Puttaney, Manoj Yadav, Karan Aarakh, Sripal and Satya Kumar under Section 364-A I.P.C. in case crime no. 429 of 2005 S.T. No. 839 of 2005 (State Vs. Dinesh Yadav and others) connected with S.T. No. 370 of 2006(State Vs. Shripal and another).

9. It is also relevant to note here that accused-appellants Dinesh Yadav, Shiv Kumar, Vikram Singh alias Puttaney, Manoj Yadav, Karan Aarakh, Sripal and Satya Kumar were also charged for the offence under sections 147, 148, 307 read with section 149 I.P.C. in case crime no. 48 of 2005 in separate S.T. No. 716 of 2005(State Vs. Dinesh Yadav and others) connected with S.T. No. 388 of 2006 (State Vs. Shripal and another). Further accused-appellants Dinesh Yadav, Shiv Kumar, Vikaram Singh alias Puttaney and Manoj Yadav were also separately charged under Section 25 Arms Act in case crime no. 49 of 2005 S.T. no. 717 of 2005 (State Vs. Dinesh Yadav) case crime no. 50 of 2005, S.T. No. 718 of 2005 (State Vs. Shiv Kumar), case crime no. 51 of 2005, S.T. No. 719 of 2005 (State Vs. Vikaram Singh alias Puttaney) and case crime no. 53 of 2005, S.T. No. 721 of 2005 (State Vs. Manoj Yadav); respectively, but all the accused-appellants have been acquitted for the aforesaid charges by the trial court.

10. These present appeals have been filed by all the accused-appellants against their conviction for the offence charged under section 364-A I.P.C.

11. The prosecution has examined as many as 12 witnesses in support of its case. Out of which P.W.1- Ravindra Kumar Srivastava, P.W.2- Awadesh Kumar Srivastava and P.W.3- Mahesh Chandra Srivastava are the witnesses of fact, in respect of the case of alleged kidnapping in case crime no. 429 of 2005 under section 364-A I.P.C.

12. P.W.8 constable-Santu Lal is a formal witness, who has proved chik F.I.R. of the case crime no. 429 of 2005, under section 364-A I.P.C. dated 29.5.2005 as (Ex. Ka-3) and carbon copy of the G.D. entry thereof as Ex- Ka 4.

13. P.W.12- Ram Naresh Chaudhary, investigating officer of the case crime no. 429 of 2005, under section 364-A I.P.C has proved the site plan of the spot of occurrence of kidnapping as Ex. ka -24,charge sheet no. 140 of 2005 against accused-appellants Dinesh Yadav, Shiv Kumar, Vikram Singh alias Puttaney, Manoj Yadav and Karan Aarakh as Ex. Ka- 25 and has also proved as

secondary evidence, the charge sheet no. 140-A of 2006 against the appellant-accused Shri Pal and Satya Kumar as Ex. Ka- 26.

14. The statements of all the accused-appellants were recorded under section 313 Cr.P.C. and all the incriminating materials and circumstances were put to them one by one. They denied the prosecution story and stated that they have been falsely implicated.

15. The accused-appellant Dinesh Yadav has stated in his statement under section 313 Cr.P.C. that Police of District Hardoi has falsely implicated him due to enmity with police personnel of Fatehgarh and village party bandi. He has further stated that on 30.5.2005 at noon, when he was going to his home from Fatehgarh, police personnel's arrested him and took to him Hardoi and falsely implicated in the case showing fake encounter. His brother Umesh had informed to S.P. Hardoi on 31.5.2005 through telegram regarding the incident.

16. D.W.1-Umesh Yadav brother of accused-appellant Dinesh Yadav has stated that on 30.5.2005 when accused-appellant Dinesh Yadav and Vikram Singh alias Puttaney were going to their village Paramnagar police personnels of Hardoi and Fathegarh took them away on jeep and falsely implicated showing fake encounter regarding which he sent a telegram to S.P. Hardoi on 31.5.2005. The certified copy of the said telegram has been proved as Ex. Kha-1 . He has also proved the certified copy of the telegram dated 31.5.2005 sent by one Pushkar, brother of the accused-appellant Vikaram Singh alias Puttaney as Ex. Kha-2

17. The accused appellant Vikaram Singh alias Puttaney has reiterated the same statement under section 313 Cr.P.C. as given by co-accused Dinesh Yadav.

18. The accused-appellants Shiv Kumar, Manoj Yadav and Karan Aarakh have simply denied the allegations levelled against them and stated that they have been falsely implicated in the case.

19. The accused-appellant Sri Pal has stated in his statement under section 313 Cr.P.C. that he and his brother Satya Kumar have been falsely implicated on the basis of the statement of co-accused. They had enmity with co-accused and his family members prior to this incident and his brother Satya Kumar (accused appellant) had lodged the First Information Report at case crime no. 199 of 2001 against Kali Charan and Ram Tirath, who are family members of the co-accused Dinesh Yadav .He has also stated that he had filed an application for identification of himself and his brother Satya Kumar but no test identification parade was conducted.

20. The accused-appellant Satya Kumar has also approved the statement of appellant-accused Shri Pal in his statement under section 313 Cr.P.C.

21. Learned trial court after appreciation of all the evidence and submissions made by the public prosecutor and defence counsel convicted and sentenced all the accused-appellants for the offence under section 364-A I.P.C. as has been referred to herein above.

22. Aggrieved by the same, the appellants have filed these criminal appeals.

23. We have heard the submissions made by Shri Ashok Kumar Singh, learned counsel for the appellants and Shri M.Y Ansari learned A.G.A,. for the State and perused the record of the case.

24. In view of the rival submissions made by the learned counsel for the parties,the point for determination arises that whether all the accused-appellants allegedly kidnapped the victim Awadesh Kumar Srivastava for ransom.

Submissions and conclusions

25. Before proceeding to examine the ocular evidence adduced by the prosecution in support of its case, it may be noted that in order to prove the offence under section 364-A I.P.C. Hon'ble Supreme Court in case of **Suman Sood alias Kamaljeet Kaur Vs. State of Rajasthan (2007) 5 SCC 634** had laiddown in paragraph-57 as under

"57. Before the above section is attracted and a person is convicted, the prosecution must prove the following ingredients;

(1) The accused must have kidnapped, abducted or detained any person;
(2) He must have kept such person under custody or detention; and (3) Kidnapping, abduction or detention must have been for ransom."

26. In the light of the aforesaid settled legal position, the evidence of the present case is required to be considered.

27. In support of the charge under section 364-A I.P.C. against the accused-appellants prosecution has examined three witnesses of fact namely P.W.1- Ravindra Kumar Srivastava (complainant), P.W.2- Awadesh Kumar (victim) and P.W.3- Mahesh Chandra Srivastava(brother of the victim) and two formal witnesses namely P.W.8- Constable Santu Lal, and P.W. 12- Ram Naresh Chawdhary(I.O.).

28. It may be noted that rest of prosecution witnesses namely P.W.4- Ritesh Bajpai, P.W.5- S.I. Satyanarayan Yadav, P.W.6- S.H.O. Murrari Lal Chadhaury, P.W.7- constable Kajjan Khan, P.W.9- constable Ram Lal and P.W.10- Inspector Sahab Singh Yadav (I.O.) and P.W.11- Goverdhan Lal Yadav (Chief Pharmacist) are related to the offence under section 147, 148, 149, 307 I.P.C. and under section 25 arms Act, registered at different case crime numbers and Sessions Trial Numbers, from which accused-appellants have been acquitted by the trial court,therefore, their evidence need not to be considered in the present appeals, which is only against the judgment and conviction order for the offence under section 364-A I.P.C., case crime no. 429 of 2005 as has been referred to herein above.

29. P.W.1- Ravindra Kumar Srivastava, is the informant and brother of the abductee Awadhesh Kumar Srivastava (P.W.2) has proved the First Information Report Ex.Ka-1 and reiterated the allegations made in the First Information Report. He has stated in his evidence that his younger brother Awadhesh Kumar had gone to Kannauj by boarding in D.C.M. Vehicle. Thereafter when his whereabouts could not be known, he lodged a missing report at Kotwali Shahar on 24.5.2005. A telephonic message came on 27.5.2005 at his home from unknown person that his brother is present with him and was told to meet on same day at 2 P.M. at the temple Kakrahiya Devi along with another person having red strip on right arms. He sent his younger brother Mahesh Chandra and one Manoj Tripathi at the said temple, who reached there at about 2.30 P.M. then three persons met them. When his brother Mahesh told them that first bring his brother Awadhesh Kumar before him and after relying on them he would talk to them, then they took mobile set of Mahesh and said that through this mobile his brother will call to you and thereafter come as told by them. On 29.5.2005 in the morning phone call came at his home and his brother only told his name, thereafter phone was taken by some other person who told to meet on 30.5.2005 at 2 P.M. at the same temple and threatened that if he would not come, his brother would be killed. On 29.5.2005 he gave a written report Ex.Ka 1 at P.S. Kotwail Sahar and lodged the First Information Report.

30. P.W.3- Mahesh Chandra Srivastava, is the brother of the abdcutee Awadhesh Kumar Srivastava (P.W.2) and has supported the prosecution case as alleged in the First Information Report and corroborated the statement of P.W.1-Ravindra Kumar Srivastava (complainant). P.W.3-Mahesh Chandra Srivastava has stated that his brother Awadhesh Kumar Srivastava had gone to Kannauj by boarding in D.C.M. vehicle on 22.5.2005 at 6.30 P.M., but thereafter his whereabouts could not be known, then his brother Ravindra Kumar Srivastava lodged missing report at P.S. Kotwali Sahar District Hardoi. On 27.5.2005 a telephonic message of unknown person came at his home that his brother is in his custody and Rs. five lacs was demanded as ransom . When he reached at the place as told by them along with one Manoj Kumar Tripathi three persons met him there .They took him to outside the temple and said that his brother is in their custody and demanded Rs. Five lacs. When he said that show me, his brother then they took his mobile phone and said that your brother will talk through this mobile. Thereafter phone call came and his brother told his name on phone.

31. On 29.5.2005 phone call of kidnappers came and it was said that if you can not arrange Rs. Five lacs then come with Rs. One lac at the same place otherwise they will kill his brother. On 30.5.2005 he went with police at the said temple but nobody met there.

32. P.W.3- Mahesh Chandra Srivastava has further stated that on 31.5.2005 he along with Ritesh Bajpai went with Hardoi Police to search Awadhesh Kumar. When they were going on Baramu Tera Road police personnel phoned to P.S. Arawal and S.I. and constable of P.S. Arawal reached there. After a while a Marshal bearing no. U.P. 30B-7616 came and police party intercepted the vehicle, miscreants got down from the vehicle and started firing on the police force. Due to firing by the miscreants constable Kajjan Khan and constable Harvasav Rao have received simple injury. Six miscreants were arrested on the spot at about 5.30 P.M., while two fled away . The arrested miscreants told their names as Dinesh Yadav, Shiv Kumar, Vikaram Singh alias

Puttaney, Manoj Yadav,Rajeev and Karan Aarakh and they told the name of absconded miscreants as Sripal Kachhi and Satya Kumar Kachhi.The illegal firearms were also recovered from the possession of all the arrested miscreants except Karan Aarakh. His brother was sitting in the said vehicle. Police personnels inquired to him and he told all about the incident. Thereafter recovered illegal firearms were kept under sealed cover and Fard was prepared and he put his signature on it which is Ex. Ka-2 . Police party took him and his brother and recovered articles to P.S. Arwal where his brother Awadhesh Kumar was given in his custody.

33. P.W.-2- Awadhesh Kumar Srivastava (abductee) has stated that on 22.5.2005 at about 6.30 P.M., he was going to Kannauj by boarding in D.C.M. vehicle. When the vehicle reached at Bilgram crossing at 7.30 P.M., D.C.M. vehicle got some defect at Bilgram crossing. Therefore he left the D.C.M. vehicle and reached at Kannauj road by walking on foot and was standing there in waiting for bus. At that time a 'Marshal' vehicle bearing no. U.P. 30B-7616 came and stop there, calling passengers for Kannauj. Eight persons were sitting in the vehicle. He along with two other persons sat on the said vehicle. Two passengers got down from the said vehicle after traveling 3-4 Km., then after traveling 6-7 Km. the vehicle left the Kannauj road and turned to the right hand towards forest. When he protested, the sitting persons in the vehicle whipped out Tamancha and threatened to keep quiet otherwise they will shoot him. Thereafter they covered his eyes with a piece of cloth (Angauchha). After two hours of running of vehicle, they got him down and vehicle went back. When vehicle stopped the strip of the eyes was removed and he identified all the accused-persons. They all were talking each other by their name in the vehicle. The name of the driver of the vehicle was Karan. Dinesh was sitting on the front seat and Shiv Kumar, Vikaram alias Puttaney, Manoj, Rajeev, Shripal and Staya Kumar were sitting in the vehicle and talking to each other. Thereafter, they took him in the forest, in a field of sugarcane. There was a hut in the field of sugarcane, that field of sugarcane was of Shripal. They tied his legs and when he requested to release him, they said that he will be released after payment of money. They kept him there for six days and thereafter kept him for three days in the field of 'Beshram'. On 29.5.2005 he talked to his brother on mobile.

34. P.W.-2 Awadhesh Kumar Srivastava has further deposed that on 31.5.2005 same 'Marshal' vehicle came, they consulted to each other and after consultation, in order to keep him at some other place, they boarded him in the vehicle. They were talking to go to Mirjapur Katan. After running of 2 ½ -3 km. Police force surrounded the jeep, then they started firing . Due to firing of the kidnappers some police personnel's received injuries. This incident took place at 5-5.30 P.M. on 31.5.2005. Shripal and Satya Kumar fled away from the spot and rest of six accused persons were arrested, who disclosed their names before the police personnels as Dinesh, Shiv Kumar, Vikaram alias Puttaney, Manoj Yadav, Rajeev Yadav and Karan driver. On their personal search illegal firearms were recovered from the possession of all the arrested accused persons except Karan. At the time of the incident, his brother Mahesh and Ritesh Bajpai were also with the police force on the spot. The police personnels took the accused persons in custody, recovered articles were kept in sealed cover and 'fard'(memo) was prepared on the spot, on which he also put his signature, which is Ex. Ka-2.Thereafter he was released from the possession of the kidnappers by the police force.

35. P.W.-2 Awadhesh Kumar Srivastava is the abductee and main witness of the alleged offence of kidnapping for ransom, as he was in the custody of the kidnappers for nine days and has suffered mental torture during that period. Since the abductee Awadhesh Kumar Srivastava (P.W.2) was in the custody of the kidnappers for nine days,therefore, he had opportunity to recognize them by their name and face. He has narrated all the story of kidnapping from beginning to the end in a quite natural manner. There appears no exaggeration or embellishment in his statement and his testimony is reliable and dependable.

36. P.W-2- Awadhesh Kumar Srivastava has categorically described the role and involvement of all the accused-appellants and has specifically stated that the appellant Karan Aarakh was the driver of the same Marashal vehicle, which was used on first day of the kidnapping on 22.5.2005 and last day at the time of arrest on 31.5.2005. He has also stated that for six days he was kept in a hut made in the field of sugarcane, which was of Shripal, appellant. There is no any material contradiction in his cross examination to disbelieve his statement. Therefore his evidence cannot be disbelieved.

37. It is evident from the record that complainant P.W.-1-Ravindra Kumar Srivastava and his brothers P.W.-2-Awadhesh Kumar Srivastava and P.W.-3, Mahesh Chandra Srivastava are the resident of Harodi City, district Hardoi, while the accused-appellants Dinesh Yadav, Vikaram Singh alias Puttaney, Shripal and Satya Kumar are resident of district Farrukhabad and the appellants Karan Aarakh, Manoj Yadav and Shiv Kumar are resident of different villages of district Hardoi. The complainant and his brothers were not familiar to the appellants prior to the incident and there was no enmity between them. Therefore there was no motive or occasion to the complainant and his brothers to falsely implicate the appellants, thus theory of false implication is baseless and not acceptable at all.

38. The prosecution witnesses P.W.-1-Ravindra Kumar Srivastava (complainant), P.W-2-Awadhesh Kumar Srivastava (abdcutee) and P.W.3, Mahesh Chandra Srivastava have been cross examined at length, but inspite of lengthy cross examination, learned counsel for the appellants has failed to point out nothing, which could make out that prosecution witnesses were stating against the appellants due to enmity and revengeful attitude.

39. The accused-appellants have also not produced any credible evidence on record to show that the incident took place in any other manner,therefore, the case of false implication of accused-appellants on the basis of enmity and partybandi is not established and the defence plea has no substance.

40. The learned counsel for the accused- appellants submitted that accused-appellants Dinesh Yadav, Shiv Kumar, Vikaram Singh alias Pattenney, Manoj Yadav, Karan Arakh were allegedly arrested by the police force on 31.5.2005 and at the time of their arrest they made fire on the police party with illegal firearms, and illegal firearms were recovered from their possession, while accused-appellants Sripal and Staya Kumar had run away from the spot at the time of the said occurrence. Regarding this incident S.O. Bhagwant Singh had lodged the First Information Report against all the accused-appellants on 31.5.2005 with P.S. Arwal District Hardoi under sections 147, 148, 149, 307 I.P.C. and 7 Criminal Law Amendment Act at case crime no. 48 of 2005 and also under section 3/25 Arms Act at case crime no. 49 of 2005, 50 of 2005 , 51 of 2005 and 53 of 2005 against the accused appellants Dinesh Yadav, Shiv Kumar, Vikaram Singh alias Pattenney and Manoj Yadav; respectively. All the accused appellants were also tried

for the aforesaid offences along with alleged offence under section 364-A I.P.C. at case crime no. 429 of 2005, but the prosecution could not prove the aforesaid allegations with credible evidence and trial court after appreciating the evidence of the prosecution witnesses have reached at the conclusion that the testimony of the prosecution witnesses was not reliable in connection with the alleged firing at the police personnel's by the accused-appellants at the time of their arrest on 31.5.2005 and the alleged recovery of illegal firearms from their possession and prosecution has failed to prove the alleged offences charged under sections 147, 148, 149, 307 I.P.C. and section 25 Arms Act beyond reasonable doubt. Therefore all the accused-appellants have been acquitted by the learned trial court for the aforesaid offences but on the other hand learned trial court has convicted the accused-appellants for the offences under section 364-A I.P.C. relying on the evidence of same prosecution witnesses and as such learned trial court has not appreciated the evidence of the prosecution witnesses in the right perspective and erred in convicting the accused-appellants.

41. The prosecution case runs in two parts. The first part is related to the offence of kidnapping for ransom under section 364-A I.P.C. at case crime no. 429 of 2005 for which all the accused- appellants have been convicted and the present appeals have been filed. The second part relates to the incident of 31.5.2005 when some of the accused-appellants, namely, Yadav Dinesh, Shiv Kumar, Vikaram Singh alias Pattenney, Manoj Yadav and Karan Arakh were arrested on the spot by the police force and during their arrest, they made fire on the police personnel and illegal firearms were recovered from their possession,regarding which separate First Information Report was lodged by S.O. Bhagwant Singh under sections 147, 148, 149, 307 I.P.C. and 7 Criminal Law Amendment Act at case crime no. 48 of 2005 and also under section 3/25 Arms Act at different crime numbers. All the accused- appellants were tried together for all the aforesaid offences but since the prosecution could not prove the alleged incident of firing on police personnels at the time of their arrest and recovery of illegal firearms from their possession by sufficient reliable evidence, therefore, trial court have acquitted them for the said offence and convicted only for the offence of kidnapping for ransom under section 364-A I.P.C. having found prosecution evidence reliable for the said offence.

42. It is pertinent to mention here that Hon'ble Supreme Court has time and again laid down that Maxim "Falsus in uno, Falsus in omnibus" is not applicable in India. It is merely a rule of caution. Thus even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove the guilt of the accused, conviction can be maintained. A witness may be speaking untruth in some respect and it has to be appraised in each case, as to what extent the evidence is worthy of acceptance and merely because in some respect the court considers the same to be insufficient for placing reliance on the testimony of a witness,it does not necessarily follow as a matter of law that it must be disregard in all respects as well. Falsity of particular material witness on a material particular would not ruin it from beginning to end.

43. Hon'ble Supreme Court in case of **Ramesh Harijan Vs. State of Uttar Pradesh(2012) 5 SCC 777** has laid down in paragraph-29 as follows:-

"29.In Sucha Singh v. State of Punjab, AIR 2003 SC 3617, this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in

case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."

44. In view of the above, the aforesaid submission of the learned counsel for the appellants appears to be baseless and not acceptable, when the evidence of prosecution witnesses have been found reliable in respect of the offence of kidnapping for ransom under section 364-A I.P.C.

45. Learned counsel for the appellants also submitted that as per prosecution story itself it is alleged that on 31.5.2005, when accused-appellants were allegedly arrested by the police personnel after the short encounter, the accused-appellant Karan Arakh was only driving the said vehicle on which the other accused-appellants along with abductee Awadehs Kumar Srivastava were sitting and he did not take part in firing and admittedly no illegal firearm was recovered from his possession. Therefore, he cannot be said to be involved in the alleged kidnapping along with other accused-appellants.

46. It may be noted that the offence of kidnapping for ransom is committed by the organized gang and each member of the gang has their assigned role in commission of the crime. Some members of the gang may be directly involved and may be visible, while some members of the gang remain behind the curtain and may not be visible to others, but they are completely involved in the commission of crime of kidnapping. Therefore we are of the opinion that accused appellant Karan Arkah being the driver of the vehicle carrying other accused-appellants along with abductee and arrested by the police force shows that he was playing the role of driver of the vehicle which was being used in kidnapping by the gang and as per evidence of P.W.2, Awadhesh Kumar Srivastava, abductee, his involvement in commission of crime along with other accused appellants cannot be discarded, only on the ground that he did not participate along with other accused-appellants in alleged firing on police personnels at the time of arrest.

47. It is further submitted by the learned counsel for the appellants that accused- appellant Shripal and Satya Kumar have not been arrested on 31.5.2005 at the spot alongwith other accused-appellants and their name have come into light only on the basis of confessional statement made by the arrested accused therefore, their case is distinguishable from other accused-appellants and their participation in commission of the alleged offence of kidnapping along with other accused appellants cannot be presumed, hence learned trial court has erred in convicting the accused-appellants Sripal and Satya Kumar.

48. Though the accused-appellant Sripal has stated in his statement under section 313 Cr.P.C. that he and his brother Satya Kumar(appellant) have been falsely implicated on the basis of statement of co-accused . They have enmity with co-accused and his family members prior to this incident and accused-

appellant Satya Kumar had lodged the First Information Report at crime no. 199 of 2001 against Kalicharan and Ram Tirath, who are family members of the co-accused Dinesh Yadav, therefore, he has falsely implicated them in his confessional statement. But the said facts have not been proved by any reliable corroborative evidence, hence mere on the basis of statement it cannot be presumed that Kalicharan and Ram Tirath against whom the said First Information Report was lodged by the accused appellant Satya Kumar were the family members of the accused-appellant Dinesh Yadav having good family relation to each other and due to that accused-appellant Dinesh Yadav was having enmity with accused-appellant Sripal and Satya Kumar. Therefore,the aforesaid submissions of the learned counsel for the appellants have no substance, especially when P.W.2 Awadhesh Kumar Srivastava, abductee has stated their involvement in commission of alleged kidnapping along with other accused-appellants.

49. In view of the above oral evidence and circumstances and other relevant materials available on record, we find the testimonies of P.W.-1- Ravindra Kumar Srivastava(complainant), P.W-2-Awadhesh Kumar Srivastava (abdcutee) and P.W.3- Mahesh Chandra Srivastava are wholly reliable and see no reason, not to accept the same. Therefore, we are of the view that on the basis of evidence of aforesaid prosecution witnesses, it is established that accused-appellants namely Dinesh Yadav, Vikaram Singh alias Puttaney, Shiv Kumar, Manoj Yadav, karan Aarakh, Shripal and Satya Kumar were equally involved in committing the offence of kidnapping for ransom of Awadhesh Kumar Srivastava(P.W.2) and prosecution has proved their involvement and complicity for the offence charged under section 364-A I.P.C.

Final Order

50. In light of the the above discussion, we are of the opinion that trial court have meticulously considered the facts and circumstances and evidence produced by the prosecution, thereafter passed the judgement and order of conviction of the appellants dated 14.12.2007. The judgement and order of the Additional Sessions Judge/F.T.C. III, Hardoi is based on evidence and conclusion reached by the trial court is not erroneous. Therefore, no interference is required.

51. We find no merit in the appeals, the appeals are hereby dismissed.

52. The appellants Karan Aarakh, Shripal and Satya Kumar are on bail. Their bail bonds and sureties bonds are cancelled and sureties are discharged. They shall be taken into custody forthwith to serve out the sentence awarded by the trial court.The rest of the four appellants, namely, Shiv Kumar Singh,Vikram Singh alias Puttaney,Dinesh Yadav and Manoj Yadav are stated to be already in jail since 31.5.2005, they shall serve out the sentence awarded by the trial court.

53. Let a copy of this judgement be sent to the Sessions Judge, Hardoi for ensuring compliance.

(2016) 9 ILRA 1721
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

S.C.C. Revision No.- 80 Of 2016

Mohd. Israil & Anr. ...Revisionists
Versus
Nausaba A Sabari & Ors. ...Opposite Parties

Counsel for Revisionists:
Shiv Sagar Singh, Jahangir Jamshed Munir, Ramesh Kumar Pandey

Counsel for Opposite Parties:
Pankaj Agarwal

Provincial Small Cause Courts Act, 1887 -- Section 17, Proviso -- Deposit of Decretal Amount -- Application to Set Aside Ex-Parte Decree -- Mandatory Nature -- Defendant-revisionists, substituted legal heirs of the original tenant, filed application under Order 9 Rule 13 C.P.C. for setting aside the ex-parte decree dated 16.2.2004 passed in SCC Suit No. 20 of 2002 for arrears of rent and eviction -- at the time of presenting the application they deposited Rs.76,918.44 as against the decretal amount of Rs.86,016.32, leaving a shortfall of Rs.9,097.88 -- trial court rejected the application for non-compliance with the proviso to Section 17 -- **Held:** the language of the proviso to Section 17 is plain and unambiguous and is couched in mandatory form through use of the word 'shall' -- deposit of the amount due under the decree, or furnishing of security in lieu thereof with the leave of the Court, at the time of presenting the application under Order 9 Rule 13 C.P.C., is a mandatory condition precedent, non-compliance whereof entails dismissal of the application -- a provision casting an obligation on a private party, as distinguished from a public functionary, to act within a specified manner is ordinarily mandatory in nature. (Paras 5-13)

Maxim 'De Minimis Non Curat Lex' -- Applicability to Shortfall in Deposit under Section 17 -- Held: the maxim 'de minimis non curat lex', meaning that the law does not concern itself with trifles, can be invoked to overlook a negligible shortfall in the deposit made under Section 17, the extent of negligibility depending on the facts of each case -- broadly speaking, a shortfall of about 1-2 percent of the amount required to be deposited may in some cases be regarded as trivial, but not more -- shortfall of Rs.9,098/-, being about 10% of the decretal amount of Rs.86,016/-, held not to be negligible, and the maxim held inapplicable. (Paras 14-20)

S.C.C. Revision Dismissed -- Order dated 28.1.2016 rejecting application under Order 9 Rule 13 C.P.C. for setting aside ex-parte decree dated 16.2.2004 passed in SCC Suit No. 20 of 2002, for non-compliance with the mandatory proviso to Section 17(1) of the Provincial Small Cause Courts Act, 1887, upheld -- revision dismissed with costs. (Para 21)

Case Law Discussed:-
1. Kedarnath v. Mohan Lal Kesarwani and others, 2002 (1) ARC 186 : 2002 (2) SCC 16
2. Amar Nath Agarwal v. Ist Additional District Judge and others, 1982 ARC 734
3. Raj Kumar Makhija and others v. M/s. S.K. and Co. and others, 2012 (9) ADJ 337 (DB)

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

1. The defendant-revisionists have preferred this revision under Section 25 of the Provincial Small Cause Courts Act, 1887 against the order dated 28.1.2016 rejecting their application under Order 9 Rule 13 C.P.C. for setting aside the alleged ex-parte order dated 16.2.2004 and the consequent decree passed in SCC Suit No.20 of 2002.

2. The two sons and a daughter of late Anwar Ahmad Sabari instituted Suit No.20 of 2002 against Ismail Khan for arrears of rent and eviction. Ismail Khan expired after the institution of the suit leaving behind as alleged his widow, four sons and a daughter. On his death, his two sons Mohd. Israil and Atula were substituted and the suit proceeded against them. The notice of the suit could not be served upon them. Therefore, recourse to substituted service was taken and the notice was published in the news-paper. Thereafter the suit was decreed ex-parte on 16.2.2004 in their absence.

3. The aforesaid two defendants in the suit on 30.5.2014 filed an application under Order 9 Rule 13 C.P.C. contending that they had no knowledge of the aforesaid ex-parte decree. They came to know about it in May, 2014 when the same was put in execution. Accordingly, after inspection of the record on 29.5.2014 they have moved the above application.

4. Section 17 of the Act provides for application of the Code of Civil Procedure in suits cognizable by Small Cause Courts but lays down that in order to set-aside a decree passed ex-parte the applicant at the time of presenting his application has to either deposit the amount due under the decree or furnish security for its performance as the Court may direct on a previous application made in that behalf. Thus, the aforesaid defendants were supposed to deposit the amount due to them under the ex-parte decree at the time of presenting the application for setting aside the same.

5. There is no dispute that according the decree they were supposed to deposit `.86,016.32 at the time of presenting the application under Order 9 Rule 13 C.P.C. The defendants deposited only `.76,918.44 for the purposes of setting aside the ex-parte decree in compliance of Section 17 of the Act. Thus there was a shortage of `.9097.88 (`.9098 in round figure).

6. In view of the above, the application of the defendants for setting aside ex-parte decree was rejected by the impugned order dated 28.1.2016 as they failed to make the deposit of the entire amount due under the decree at the time of presentation of the application.

7. I have heard Sri J.J. Munir, learned counsel for the defendant-revisionists and Sri Pankaj Agarwal, learned counsel appearing for the respondents (landlords).

8. Sri Munir had argued that the defendants had no intention to disobey the mandate of Section 17 of the Act. They had bonafidely deposited the full amount which turned out to be short. The shortage was not substantial and looking to the small shortage, it ought to have been ignored and the tenants should not have been deprived of their valuable right to get their application filed under Order 9 Rule 13 C.P.C. adjudicated.

9. Sri Pankaj Agarwal has countered the submission by emphasising that the provisions of Section 17 of the Act are of mandatory nature and that there has to be strict compliance of the said provisions. Any delay or shortage in complying with the provisions of Section 17 of the Act dis-entitles the party to get the ex-parte order/decree set aside.

10. In view of the aforesaid facts and circumstances and the respective arguments of both the sides the only question which crops up for consideration is whether the shortage of `.9098/- in complying with the proviso to Section 17 of the Act can be regarded as negligible and ignored so as to enable the Court to consider the application under Order 9 Rule 13 C.P.C. on its merit.

11. In ***Kedarnath Vs. Mohan Lal Kesarwani and others 2002 (1) ARC 186 : 2002 (2) SCC 16*** the Apex Court in considering the provisions of Section 17 of the Act laid down that a bare reading of it shows that the legislature have chosen to couch the language of the proviso in a mandatory form and there is no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes must be accompanied by a deposit in the Court of the amount due from the applicant under the decree or in pursuance of the judgment. In the end, agreeing with the various pronouncements of the Allahabad High Court on the point, except for one, the Apex Court held that the provisions of Section 17 of the Act are mandatory and non compliance therewith would entail dismissal of the application for setting the ex-parte decree.

12. It may be relevant to state that the language of the proviso to Section 17 of the Act is plain and clear which leaves no ambiguity. The use of word 'shall' therein makes the provision mandatory in nature. It is settled in law that where the statutory provisions are plain and unambiguous, the Court shall not interpret the same in a different manner for the reason that the consequence therefrom may be harsh.

13. It is also well settled principle that if a statute requires an act to be performed by a private person within a specified time, the same would ordinarily be mandatory but the same is not the position when the duty to act is cast upon a public functionary in which case the provision would be directory in nature unless the consequence thereof are specified.

14. In view of the above principle also the provisions of Sections 17 of the Act which casts an obligation to deposit the amount under the decree upon a private party is certainly mandatory in nature. Accordingly, the deposit of the amount at the time of the presentation of the application under the decree sought to be set-aside is mandatory unless the Court otherwise directs for furnishing security.

15. In ***Amar Nath Agarwal Vs. Ist Additional District Judge and others, 1982 ARC 734*** a Division Bench of this Court has held that if the deposit made by the tenant falls short of amount required to be deposited, the tenant will be deprived of the benefit, even if shortfall in such deposit was because of tenant's ignorance or without any mala fide intention. It means if there is any shortfall in the deposit, the tenant will be cease of his right to press the application on merits.

16. In view of the above mandatory provision the argument of substantial compliance may not be available to the defendants but for the maxim of "***de minimis non curat lex".***

17. The principle of "***de minimis non curat lex***" means that "the law does not concern itself about trifles". Thus, the question is if the shortage in deposit can be ignored by applying the said principle.

18. The aforesaid maxim in relation to Section 17 of the Act came up for consideration before a Division Bench of this Court in ***Raj Kumar Makhija and others Vs. M/s. S.K. and Co. and others 2012 (9) ADJ 337 (DB)***. The Division Bench explaining the principle observed that where the shortfall in deposit is of a negligible amount the aforesaid principle can be applied and the shortfall may be ignored. What would be a negligible amount would depend upon the facts of each case. In the above case before the Division Bench the tenants were required to deposit pendente lite and future damages at the rate of `.1,000/- per month but they deposited only at the rate of `.700/- per month. The Court refused to apply the above principle as the shortfall was not held to be of trivial amount.

19. The Court therein distinguished the case with those cases where the shortfall was held to be of no consequence, inasmuch as in those cases the mistake was in calculation on the part of the Court and those decisions were rendered in different factual background. Ultimately the Court held that on the basis of the above principle the Court can ignore shortfall in deposit of a negligible amount only, otherwise there has to be a strict compliance.

20. In one case referred by the Division Bench the amount required to be deposited was `.1,944/- and there was deficiency of `.104/-, the shortage was not held to be negligible to attract the principle.

21. In the case in hand admittedly the amount required to be deposited was `.86,016/- whereas the deposit made was of only `.76,918/- and there was a shortfall of `.9,018/-. The aforesaid shortfall, if examined in the light of the above two illustrations and percentage-wise keeping in mind the amount required to be deposited, it is around 10% of the amount. The shortage of 10% is not negligible to attract the principle of "***de minimis non curat lex***".

22. There cannot be any hard and fast rule as to the percentage which may be regarded as negligible in such cases but broadly speaking shortfall of about 1-2 percent of the total amount required to be deposited may in some cases be regarded trivial so as to apply the principle of "de minimis non curat lex" but not more. Accordingly, the shortage of `.9,098/- in deposit the amount under the decree is not trivial to be ignored.

23. In view of the aforesaid facts and circumstances, the court below has not committed any error of law in rejecting the application of the defendants filed under Order 9 Rule 13 C.P.C. for non compliance of the mandatory provision of proviso to Section 17(1) of the Act.

24. The revision has no merit and is dismissed with costs upon the parties.

(2016) 9 ILRA 1725
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.09.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VINOD KUMAR SRIVASTAVA-III, J.

Criminal Appeal No.- 121 Of 2011
&
Connected With Other Cases

Mohan Sharma **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Jail Appeal (G.A.), Sri Ambrish Verma, Sri Anil Singh, Sri D.K. Singh Somvanshi, Sri Shachindra Dwivedi (for Mohan Sharma); Jail Appeal (G.A.), Sri Anil Kumar Pandey, Sri Anil Kumar Rai, Sri Anil Singh, Sri Bhup Chandra Singh, Sri D.K. Singh Sombansi (for Sohan Sharma); Sri Shiwa Kant Tiwari, Sri Ramanjeet Singh Johar, Sri Vivek Kumar Rai (for Rajesh Joshi)

Counsel for Respondent:
Government Advocate

Criminal Procedure -- Sections 364A, 342, 394 I.P.C. -- Kidnapping for Ransom -- Recovery of Abductee -- Some Accused Arrested at Spot, Others Absconding -- Missing report of minor abductee converted into F.I.R. registered as Case Crime No. 91 of 2006 on receipt of ransom call demanding Rs. 30 lacs -- on information of an informer, police party along with informant raided the house of accused Rajesh Joshi -- three persons, namely Raj Kumar Sharma, Ravindra Sharma and Sonu alias Amit, were found present with the chained abductee and arrested on the spot, while appellants Mohan Sharma, Sohan Sharma and Rajesh Joshi are alleged to have fled from the place of occurrence and were named by the informant -- fard recovery memo prepared and signed by the accused arrested on the spot -- charge-sheet submitted against those arrested, and a supplementary charge-sheet against the appellants -- trial court convicted all three appellants under Section 364A I.P.C. for life imprisonment, under Section 342 I.P.C. and under Section 394 I.P.C. (Paras 1-18)

Evidence -- Informant and Abductee Turning Hostile Qua Co-Accused Who Were Their Own Real Sons/Grandson -- Family Property Dispute -- Effect on Credibility -- Held: PW1 (informant/father) and PW2 (abductee) did not support the prosecution case against the accused arrested on the spot, namely Raj Kumar Sharma, Ravindra Sharma and Sonu alias Amit, who were the informant's own sons and grandson, and were declared hostile qua them, while deposing only against the appellants who were the informant's nephews -- it emerged that there was a family dispute regarding shares in property between the children of the informant's first wife and his second wife, of whom the abductee was a son -- PW1's explanation that the police had falsely implicated his sons and grandson on account of refusal to pay a bribe does not inspire confidence and is contrary to the contemporaneous fard recovery memo which records their presence with the

chained abductee -- evidence of PW1, PW2 and PW3 cannot be said to be wholly reliable in these circumstances. (Paras 21-34)

Criminal Appeal -- Conviction of Accused Neither Arrested at the Spot Nor Subject of Any Recovery -- Reliance on Evidence of Interested and Hostile Witnesses -- Held: the two accused arrested on the spot along with the abductee who were sons of the informant died during trial and their appeal abated, while the third person so arrested, being grandson of the informant, was acquitted by the trial court since PW1 to PW3 did not support the case against him -- the appellants, by contrast, were neither arrested at the spot nor was any recovery effected from them, and their conviction rests solely on the evidence of witnesses shown to be motivated by desire to shield their own family members -- conviction of the appellants, including Rajesh Joshi from whose house the abductee was recovered, on the basis of such unreliable evidence is wholly unsafe and unsustainable. (Paras 32-35)

Criminal Appeals Allowed -- Impugned judgment and order dated 21.12.2010 passed by the Additional Sessions Judge, Fast Track Court No. 7, Lucknow in Sessions Trial No. 95B of 2007 and S.T. No. 95C of 2011, arising out of Case Crime No. 91 of 2006, under Sections 364A, 342, 394 I.P.C., Police Station Tal Katora, District Lucknow, convicting and sentencing appellants Mohan Sharma, Sohan Sharma and Rajesh Joshi, set aside -- appellants acquitted of all charges and directed to be released forthwith unless wanted in any other case. (Paras 36-39)

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

1. The present criminal appeals have been preferred by the appellants against the judgment and order dated 21.12.2010 passed by the learned Additional Sessions Judge, Fast Track Court No.7, Lucknow in Sessions Trial No.95B of 2007 & S.T. No.95C of 2011,arising out of Case Crime No.91 of 2006, under Sections 364A, 342, 394 I.P.C., Police Station-Tal Katora, District Lucknow by which the appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi have been convicted and sentenced for the offence under Section 364A I.P.C. for life imprisonment with fine of Rs. 5,000/- each, under Section 342 I.P.C. for one year R.I. and for the offence under Section 394 I.P.C. for 10 years R.I. with fine of Rs.5,000/- each and all the sentences were directed to run concurrently.

2. The prosecution case in brief is that, on 17.4.2006 a missing report was lodged by the informant, namely, Shiv Kumar Sharma at Police Station Tal Katora, District Lucknow stating therein that on 16.4.2006 the informant's son, namely, Rohit Kumar Sharma alias Vikki aged about 16 years is missing since 6 P.M. who while leaving the house had informed his mother that he was going in a birthday party of his friend. The informant after great search could not trace out the whereabouts of his son, hence, on 27.4.2006 he again submitted another written report to the concerned police station that on 17.4.2006 he had lodged a missing report of his son, namely, Rohit Kumar Sharma alias Vikki at the concerned police station and he has been continuously searching his son and he has come to know on a information received on phone that his son Rohit Kumar Sharma alias Vikki is in custody of some person and he has been asked to make an arrangement of Rs.30 lacs at once for which he would be given another phone call and would be informed that where to deliver the said money and whose behest the same has to be brought and to be given and if any information is given to the police about the same or he is unable to arrange the said money, his

son would be killed. The informant on receiving the said information was very much worried and after much thinking over the matter he had given the said report to the police under the belief that his son would be rescued.

3. On 27.4.2006, the police had received an information by an informer that the abudctee had been kept in the house of one Rajesh Joshi and on believing on the said information, the police party along with the informant, namely, Shiv Kumar Sharma raided the house of Rajesh Joshi and three persons were seen fleeing from the place of occurrence. It was informed by the informant, namely, Shiv Kumar Sharma that two persons who had fled away were the Mohan Sharma and Sohan Sharma respectively and the third person was not known to him. Thereafter, the police entered into the house of Rajesh Joshi and on search being made it was found that three other persons, namely, Raj Kumar Sharma, Ravindra Kumar Sharma and Sonu alias Amit were present there along with the abudctee Rohit Kumar Sharma alias Vikki in the said house, who was chained by the accused persons. The said three accused persons, namely, Raj Kumar Sharma, Ravindra Kumar Sharma and Sonu alias Amit were arrested by the police and the abductee Rohit Kumar Sharma alias Vikki was rescued by them. A recovery memo of the abductee child was prepared by the Station Officer, namely, Sanjay Maurya of Police Station Tal Katora, District Lucknow on 27.4.2006 at 13.10 hours. The fard recovery memo which was prepared, was signed by the said three accused persons, namely, Raj Kumar Sharma, Ravindra Kumar Sharma and Sonu alias Amit and thereafter an FIR was lodged as Case Crime No.91 of 2006, under Sections 364A, 394 & 342 I.P.C., Police Station-Tal Katora, District Lucknow.

4. The accused persons have further stated before the police that they had abducted the Rohit Kumar Sharma alias Vikki only on account to grab the ancestral property and further demanded Rs.30 lacs as a ransom and had kept the abductee in their custody.

5. A mobile phone was recovered from the accused persons which was used in the crime in question and the same was sealed. A chain was also recovered which was also sealed.

6. The investigating Officer of the case after investigation submitted the charge sheet against the three accused persons, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu alias Amit being Charge Sheet No.65 of 2016 in the Court on 15.5.2006 and subsequently a supplementary charge sheet was also submitted being Charge Sheet No.65A on 5.7.2006 against the appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi for the offence under Sections 364A, 394, 342 I.P.C.

7. The charges were framed by the trial Court against all the six accused persons on 26.4.2007 for the offence under Sections 364A, 342, 394 I.P.C.. All the accused have denied the prosecution case and claimed their trial.

8. The prosecution in support of its case has examined PW1-Shiv Kumar Sharma, PW2-Rohit Sharma alias Vikki (abductee), PW3-Smt. Leela Sharma, PW4-Dr. Pawan Kumar, PW5-Ram Niwas, PW6-S.I. Sajeevan Lal and PW7-S.I. Sanjay Kumar Maurya.

9. During the course of the trial, the accused, namely, Raj Kumar Sharma and Ravindra Kumar Sharma had died. Hence, the S.T.No.95A of 2007 which was registered against them was abated and was ordered to be consigned to record by the Court's order dated 30.11.2009.

10. So far as Sessions Trial being S.T. No.95 of 2007 pertaining to the co-accused Sonu alias Amit is concerned, the same was separated from the Sessions Trial of the present appellants as they were confined in another Case Crime No.688 of 2005, under Section 307 I.P.C., Police Station Gomti Nagar, Lucknow and accused Sonu alias Amit was acquitted by the trial Court on 1.11.2010.

11. The prosecution in support of its case has relied upon the documentary evidence, such as Ex. Ka.-1 written report dated 27.4.2016, Ex.Ka.-2 medical report, Ex. Ka.-3 G.D. regarding registration of the case, Ex. Ka.-4 recovery memo of abductee-Rohit Kumar Sharma alias Vikki and accused, Ex. Ka.-5 & 6 site plan of the place of recovery and occurrence, Ex. Ka.-7 & 8 two charge sheets, Ex. Ka.-9 missing report of the informant dated 17.4.2006.

12. PW1-Shiv Kumar Sharma (informant of the case and father of the abudctee) has deposed before the trial Court and proved his missing report Ex. Ka.-1 and Ex. Ka.-9, report dated 27.4.2006. He has reiterated the prosecution case as alleged in his written report Ex. Ka.-1 dated 17.4.2006 and further the averments made by him in his subsequent report dated 27.4.2006, i.e., Ex. Ka.-9 that he received an information on his phone regarding custody of his son by some of the accused who had asked him to arrange Rs. 30 lacs for release of his son and he would further be informed about the place where the money is to be delivered and to whom. He has further stated that when he had accompanied the police party for recovery of his son, then on an information received by the police informer, they reached at the house of accused-appellant, namely, Rajesh Joshi and the accused appellants seeing the police party had fled away from the place of occurrence and while the said persons were fleeing, he identified the appellants, namely, Mohan Sharma, Sohan Sharma and the third persons who had fled away from the place of occurrence could not be identified by him. He further stated that his son was found in the said house and he was chained by the accused persons. So far as the participation of the co-accused, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu alias Amit in the crime in question is concerned, he did not support the prosecution case against them and turned hostile and he only deposed against the accused appellants.

13. PW2-Rohit Sharma alias Vikki (the abductee) has deposed before the trial Court that he was taken away by the accused Mohan Sharma who took him to the place where the other accused persons, namely, Sohan Sharma and Rajesh Joshi were present and when he told Mohan Sharma to drop him at his house, then he did not allow him to go and further threatened him for dire consequences of life and informed that unless his father paid the ransom amount which was demanded by the accused appellants, he would not be released. He further stated that the accused demanded the money in his presence. He further submitted that the accused had put a cloth on his eye and tied it and also put cloth in his mouth and he was asked to lie down. Thereafter, after some time he found himself to be in a room which was locked. He further stated that his one golden ring, two silver rings, mobile phone and a watch was also snatched by the accused persons. He further

stated that in the room a pit was dug and he was asked to perform nature call in the said pit and he was kept in the said room for about eleven days and he was given food once in a day sometimes either by Mohan Sharma or sometimes by Sohan Sharma and Rajesh Joshi. He stated that after eleven days his father along with police team and Ravindra Sharma, Raj Kumar Kumar Sharma and Sonu Sharma alias Amit rescued him. He was also given Hemp (Bhang) and was also assaulted by them. He further deposed that he knew the accused appellants, namely, Mohan Sharma and Sohan Sharma from his childhood. He deposed that prior to the incident, accused appellant Mohan Sharma, Sohan Sharma and Sonu alias Amit used to come to his house. So far as participation of accused persons, namely, Rajesh Kumar Sharma, Ravindra Sharma and Sonu alias Amit were concerned, he did not support the prosecution case against them and also turned hostile and only deposed and gave evidence against the accused appellants.

14. PW3-Leela Sharma who is mother of the abductee and wife of PW1 has stated that her husband accompanied the police party for recovery of his son. She further stated that in the evening a call was received by the informant from the accused persons who were demanding Rs.30 lacs as a ransom, failing which her son would be killed and further asked/threatened not to inform the police about the same. She stated that police informed that her son was in custody of the accused appellants.

15. PW4- Dr. Pawan Kumar has deposed before the trial Court that on 27.4.2006 he was posted as Medical Officer at Rani Luxmi Bai Hospital in District Lucknow and he had medically examined the abductee Rohit Sharma alias Vikki who was brought by the police constable. He further submitted that the abductee was conscious and there was no external injury found on his person and there was multiple small rashes all over the body except head, face and neck and he was complaining about itching in the area of rashes and proved the said medical report as Ex. Ka.-2.

16. PW5-Ram Niwas has deposed before the trial Court that he was domestic servant in the house of PW1 Shiv Kumar Sharma. He further deposed that Sohan Sharma and Mohan Sharma were the real nephew of informant PW1-Shiv Kumar Sharma. He further stated that Mohan Sharma used to come at the house of PW1 and the accused Sonu Sharma alias Amit was grand-son of PW1 and was known to him. He further deposed that at the time of the incident he had gone to purchase some vegetable from the market. He came to know about the missing of the abductee, namely, Rohit Sharma alias Vikki at 10 P.M. in the night when he returned and abductee was being searched by his parents. When Rohit had returned back to his house, he did not have any conversation with him nor his parents had told him that as to who had taken him. So far as participation of the accused Sonu alias Amit was concerned, he did not support the prosecution case against him and was declared hostile. He further deposed that it is correct that PW1 and his wife had informed the police that their family members have abducted their son and have demanded a ransom then he heard the said conversation. This witness has further stated that Sohan Sharma, Mohan Sharma, Sonu Sharma, Ravindra Kumar Sharma, Raj Kumar Sharma and Rohit Sharma belong to the family of PW1-Shiv Kumar Sharma. After the police had gone, he heard the parents of Rohit Sharma alias Vikki having conversation that Rohit Sharma alias Vikki was abducted and a ransom was demanded by Sohan Sharma, Mohan Sharma, Sonu Sharma, Ravindra Kumar Sharma

and Raj Kumar Sharma and the said fact was not disclosed by him to the police as he had personal knowledge about the same. This witness was declared hostile by the trial Court.

17. PW6-S.I. Sajeevan Lal has deposed that he was posted at Police Station-Tal Katora, District Lucknow and on 17.4.2006 a missing report was lodged by PW1-Shiv Kumar Sharma in which an inquiry was being made and during the course of inquiry on 27.4.2006, the informant had given another written report, on the basis of which an FIR was registered as Case Crime No.91 of 2006, under Section 364 I.P.C. which was also endorsed in the G.D. of the concerned police station and he has proved the G.D. as Ex.Ka.-3. He further stated that on 27.4.2006 he along with Police Constables and Station Officer Sanjay Maurya had started search of the abductee and on an information received by an informer that the abductee can be recovered from the house of one Rajesh Joshi, thereafter the police party reached there and recovered the abductee and arrested the accused persons, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma on the spot and three other accused, namely, Mohan Shama, Sohan Sharma and Rajesh Joshi had fled away from the place of occurrence who were identified by the PW1 who is informant of the case. The abductee Rohit Sharma alias Vikki was found in a room and was tied by a chain. The abductee was rescued and a fard recovery memo was prepared by the Station Officer and the same was signed by him also along with the accused persons arrested and the said recovery memo was also read over to the accused arrested. He further has deposed that Mohan Sharma, Sohan Sharma and Rajesh Joshi were not found at the spot and about Mohan Sharma and Sohan Sharma the informant had informed him and the name of Rajesh Joshi was disclosed by the three accused who were arrested on the spot.

18. PW7-S.I. Sanjay Maurya has deposed before the trial Court that he was posted at Police Station Tal Katora, Lucknow as Station Officer and on 17.4.2006 a missing report was lodged by PW1-Shiv Kumar Sharma stating that since 16.4.2006 at about 6 P.M. his son Rohit Kumar Sharma alias Vikki was missing. He inquired about the missing report and ordered for inquiry about the missing by H.C.P. Sajeevan Lal and on 27.4.2006 another report was lodged by PW1, on the basis of which an FIR was registered as Case Crime No.91 of 2006, under Section 364 I.P.C. and missing report was converted into an FIR and investigation was started. He further deposed that he had taken the statements of witnesses including of the accused Raj Kumar Sharma, Ravindra Kumar Sharma and Sonu and prepared the site plan of the place and recovery at the instance of the abductee, namely, Rohit Sharma alias Vikki and proved the same as Ex. Ka.5 and further recorded the statement of the witnesses including the abductee. He after investigation submitted charge sheet against the accused, namely, Raj Kumar Sharma, Ravindra Kumar Sharma and Sonu alias Amit Sharma being Charge Sheet No.65 of 2006, Case Crime No.91 of 2006, under Section 364A, 394, 342 I.P.C. dated 15.5.2006 which was marked as Ex. Ka.-7. He further deposed that a supplementary charge sheet was also submitted being Charge Sheet No.65A of 2006, under Sections 364A, 394, 342 I.P.C. against accused Mohan Sharma, Sohan Sharma and Rajesh Joshi and proved the same as Ex. Ka.-8. This witness has also reiterated the recovery of the abductee made by him along with the police party and informant, namely, Shiv Kumar Sharma from the house of Rajesh Joshi. He has also proved the fard recovery memo of the abductee as Ex. Ka.-4 under his hand writing and H.C.P. Sajeevan Lal.

19. Heard Sri Anil Singh and Vivek Rai, learned counsel for the appellants and Sri Umesh Chandra, learned AGA for the State and perused the record.

20. It has been argued by learned counsel for the appellants that though the present two appeals have been preferred by Mohan Sharma and Sohan Sharma from jail and they have engaged a counsel of their own choice, i.e., Sri Anil Singh who has appeared on behalf of the said appellants and argued the case on their behalf and the third appellant, namely, Rajesh Joshi has been represented by Sri Vivek Rai, Advocate.

21. Learned counsel for the appellants submitted that PW1, namely, Shiv Kumar Sharma had two wives and Raj Kumar Shama and Ravindra Sharma and Ashok Kumar Sharma were his sons from the first wife and further he has three daughters, namely, Sudha, Manju and Madhvi from the first wife, whereas from the second wife he has one son, i.e., Rohit Sharma alias Vikki (abuctee) and one daughter, namely, Monika were born and there was a family dispute between them regarding shares in the property of the informant, namely, Shiv Kumar. The children of the first wife of the informant conspired to kidnap the son of the second wife, namely, Rohit Sharma alias Vikki and they demanded Rs. 30 lacs from their father PW1- Shiv Kumar Sharma for release of the abductee-Rohit Sharma Sharma alias Vikki. It was further argued that as per the recovery memo of the abductee dated 27.4.2006, it is evident that the abductee was confined in the house of one appellants, namely, Rajesh Joshi and when the police had raided at the said house, the two sons of the informant-PW1 from the first wife, namely, Raj Kumar Sharma and Ravindra Sharma and one grand son, namely, Sonu Sharma alias Amit who was the son of third son of PW1, namely Ashok Kumar Sharma were arrested on the spot by the police along with the abductee and the accused appellants are said to have fled from the place of occurrence and the PW1 who was accompanying the police party identified the two appellants, namely, Mohan Shama and Sohan Sharma but he could not identified the third accused. It is was further pointed out that the charge sheet was submitted against the accused Raj Kumar Sharma, Ravindra Sharma and Sonu alias Amit for the offence under Section 364A, 394, 342 I.P.C. by the Investigating Officer on 15.5.2006 being Charge Sheet No. 65 of 2006.

22. It was further submitted that though the two sons, namely, Ravindra Sharma and Raj Kumar Sharma and one grand-son, namely, Sonu Sharma alias Amit of the informant PW1 were arrested on the spot with the abductee and he turned hostile before the trial Court and did not give any evidnce against them. Moreover, he stated that he along with his two sons, namely, Raj Kumar Sharma, Ravindra Sharma and grand-son, namely, Sonu Sharma alias Amit had accompanied the police party for recovery of the abductee and when the abductee was recovered, his three sons along with him and abductee detained to the police station and the PW1 along with his sons and abductee were asked to go from the police station to have bath etc. on the pretext that two sons and grand son statements is to be recorded by the police and thereafter they would be left but the Station Officer had demanded Rs. 1 lacs from him and the informant refused to pay the same, on account of which his two sons and grand-son were implicated in the present case and were sent to jail. Thereafter, the abductee was called again at the police station and PW1 reached along with the abductee at 10.30 P.M. and they were sent by the police constable for medical examination. He argued that PW1 in

order to save his two sons and grand- son has changed the version, hence, prosecution declared him hostile with respect to accused, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma alias Amit, on which prosecution sought for his cross-examination but he denied the allegation against the said accused persons and submitted that there were cordial relationship between all the persons of his family and all his sons were living happily and they had a common kitchen and there was no ill-will or bad blood between them, but he deposed against the two appellants who were also his nephew, namely, Mohan Sharma and Sohan Sarma who were his real nephews.

23. Similarly, PW2 the abductee Rohit Shama alias Vikki has also turned hostile with respect to the accused persons, namely, Raj Kumar Sharma and Ravindra Sharma and Sonu alias Amit and only supported the case against the accused appellants and stated that his father and three real brother had come along with the police party to rescue him from the accused appellants who had fled away from the place of occurrence.

24. Similarly, PW3 Leela Sharma mother of the abductee and wife of PW1 has also denied the allegation against the accused appellants, namely, Raj Kumar Sharma and Ravindra Sharma and Sonu alias Amit and supported the case against appellants Mohan Sharma and Sohan Shrma.

25. It has been further argued that the trial Court acquitted the accused appellant namely, Sonu Sharma alias Amit as PW1, PW2 & PW3 have turned hostile against him and supported the prosecution case against the accused appellants by misleading their evidence, hence, conviction of the appellants is against the evidence on record and their conviction be set aside and they be acquitted by the charges.

26. Learned counsel for the appellants has further urged that the appellants, namely, Mohan Sharma and Sohan Sharma are in jail in since 28.1.2010 and appellant, namely, Rajesh Joshi in jail since 22.2.2011 respectively. He further pointed that the case of the appellants, namely, Mohan Sharma and Sohan Sharma could not be argued before the trial Court because there was no lawyer on their behalf as they could not engage a counsel of their choice and further on the question of sentence an Amicus Curiae was appointed by the Court who pleaded their case on the question of sentence only. He further submitted that so far as accused Rajesh Joshi is concerned, he could not appear before the trial Court on the date of the judgment due to some miscommunication of date by his counsel for delivery of judgment but he has surrendered on 22.2.2011 and as on date he is in jail.

27. Learned AGA opposed the prayer for quashing of the impugned order and submitted that the abductee, namely, Rohit Sharma alias Vikki was recovered from the house of accused appellant, namely, Rajesh Joshi and PW1 informant of the case, PW2 abductee and PW3 have supported the prosecution case against the accused appellants but he could not dispute the fact that three accused persons, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma alias Amit who were arrested on the spot and charge sheeted, out of whom two accused, namely, Ravindra Sharma and Raj Kumar Sharma died during trial and their appeal was abated vide Court's order

dated 30.11.2009 and third accused, i.e., Sonu Sharma alias Amit has been acquitted by the trial Court who happens to be grand-son of the PW1 and PW3.

28. Having considered the submissions advanced by learned counsel for the parties and perused the record.

29. It appears from the record that the abductee, namely, Rohit Sharma alias Vikki who was son of PW1 had left his house alone on 16.4.2006 at 6 P.M. in the evening and on the pretext that he is going attend a birthday party of his friend but when he did not return, then a search was made by his father and mother, i.e., PW1 and PW3 and a missing report was lodged on 17.4.2006 at police station-Tal Kotara, District Lucknow, Ex.Ka.1 and on 27.4.2006 another report was lodged by PW1 at the concerned police station stating that he received an information on phone that his son has been abducted by some persons and he has been asked to arrange Rs. 30 lacs for rescue of his son, failing which his son would be killed. On the basis of the same, the said report was converted into an FIR for the offence under Section 364 I.P.C. which was registered as Case Crime No. 91 of 2006. On 27.4.2006, PW7 Sanjay Maurya the Station Officer of the concerned Police Station along with the police party started search of the abductee and on an information received through an informer that the abductee was confined in the house of accused appellant Rajesh Joshi, the police party along with PW1 reached at the house of Rajesh Joshi and on seeing the police party, the accused appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi had fled away from the place of occurrence and while they were fleeing they were identified to be Mohan Sharma, Sohan Sharma and the third person could not be identified by the informant. The police party entered in the house of Rajesh Joshi and found that the accused Raj Kumr Sharma, Ravindra Sharma and Sonu Sharma alias Amit was present along with the abductee who was chained by them and the abductee was rescued. Thereafter a fard recovery memo Ex.Ka.-4 was prepared by the police which was read over to said accused who were arrested and their signatures were also taken on the said fard recovery memo along with the signature of PW6 Sajeevan Lal, HCP and other police constables who were the part of the raiding team. The accused who were arrested and sent to jail and after investigation the Investigating Officer-PW7 submitted charge sheet against accused persons who were arrested on the spot being Charge Sheet No.65 of 2006, Case Crime No.91 of 2006, under Section 364A, 394, 342 I.P.C and also a supplementary charge sheet being Charge Sheet No.65A of 2006, under Sections 364A, 394, 342 I.P.C. was also submitted against accused appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi.

30. The two accused who were arrested on the spot, namely, Ravindra Sharma and Raj Kumar Sharma who happens to be real sons of PW1 have died during the course of the trial and the other accused, namely Sonu Sharma alias Amit who happens to be grand-son of PW1 was acquitted by the trial Court on 1.11.2010 in S.T.No.95 of 2006 as the PW1, PW2 and PW3 have turned hostile and did not support the prosecution case against him but they supported the prosecution case against the accused appellants.

31. PW2- Rohit Sharma alias Vikki (the abductee) has given evidence against the accused appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi and further deposed that they

had abducted him and confined him in a room in the house of Rajesh Joshi and he further stated that he was being assaulted by them and also chained them and was asked to attain the nature call in the room where a pit was dug. He was offered meal once in a day and further a demand of ransom of Rs.30 lacs was made by them in his presence from this father. But he has stated that co-accused, namely, Ravindra Sharma, Raj Kumar Sharma and Sonu Sharma alias Amit along with his father had come with the police party and rescued him, hence, he was declared hostile by the trial Court against accused, namely, Ravindra Sharma,Raj Kumar Sharma and Sonu Sharma alias Amit.

32. The evidence of PW1 against the accused who were arrested on the spot, namely Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma who happens to be his sons and grand-son respectively from whose custody the abductee was rescued after eleven days, he changed his stand before the trial Court to save them and stated that the police has falsely implicated them in the present case only on account of the fact that the when the Station Officer of Police Station-Tal Katora, District Lucknow had demanded Rs.1 lac by him and when he refused to pay the same, then the police implicated the Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma in the present case though they had also accompanied the police at the time of recovery of abductee. Thus, the evidence of PW1 does not appears to be a reliable one as it is evident from the fard recovery memo dated 27.4.2006 Ex. Ka.5 which was prepared by the police from which it is evident that the three accused namely, Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma who were arrested on the spot with the abductee whereas the accused appellants are said to have fled away from the place of occurrence. From the accused persons who were arrested, a mobile phone was also recovered from their possession and they had further confessed before the police that they had abducted the abductee Rohit Sharma alias Vikki due to family dispute between them and further demanded Rs. 30 lacs from PW1 who was father of the two accused, namely, Raj Kumar Sharma and Ravindra Sharma and grand-father of Sonu Sharma alias Amit.

33. In this respect statement of PW5, Head Constable Sanjeevan Lal and PW7 Sanjay Maurya is also be noteworthy that they have supported the fard recovery memo and further stated that accused, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma alias Amit were arrested on the spot and accused appellants had escaped, hence a charge sheet was submitted against the said accused persons, namely, Raj Kumar Sharma, Ravindra Sharma and Sonu Sharma being Charge Sheet No.65 of 2006 and a supplementary charge sheet being Charge Sheet No.65A of 2006, under Sections 364A, 394, 342 I.P.C. was also submitted against accused Mohan Sharma, Sohan Sharma and Rajesh Joshi.

34. The contention of learned counsel for the appellants that PW1 had two wives and two accused, namely, Raj Kumar Sharma and Ravindra Sharma were his son and accused Sonu Sharma alias Amit was his grand-son, who was son of Ashok Kumar Sharma who was the son of PW1 from the first wife and there was family dispute of property of PW1 between them, on account of which abductee, namely, Rohit Sharma alias Vikki was abducted and PW1 and PW2 have not supported the prosecution case against them in order to save them but deposed against the accused appellants who also happens to be real nephew of the informant, namely, Mohan Sharma and Sohan Sharma has substance. Hence, the evidence of PW1, PW2 and PW3 cannot be said to be wholly reliable.

The trial Court has acquitted the accused, namely, Sonu Sharma alias Amit who was arrested on the spot with the abductee along with the two accused, namely, Ravindra Sharma and Raj Kumar Sharma who have died during the course of trial and their trial was ordered to be abated, whereas the convicted accused appellants, namely, Mohan Sharma and Sohan Sharma who were not arrested on the spot nor any recovery was made from the accused Sohan Sharma and Mohan Sharma. The conviction of the said accused appellants on the basis of the aforesaid witnesses who are not trustworthy is wholly unsafe, hence, the conviction and sentence of the said accused appellants by the trial Court is wholly unjustified.

35. So far as recovery of of the abductee from the house of appellant, namely, Rajesh Joshi is concerned, taking into account the fact that two sons and one grand-son of PW1-Shiv Kumar Sharma whose participation in the crime cannot be ruled out as per the evidence on record and as PW1 and PW2 have turned hostile for the accused arrested on the spot who wrongfully confined the abductee in his house and out of them two accused have died during trial and the third accused, namely, Sonu alias Amit has been acquitted by the trial Court, hence the conviction of the appellant, namely, Rajesh Joshi merely on the ground that the abductee was recovered from his house is also not proper as he was not arrested on the spot and fled from the place of occurrence with the other two accused appellants, namely, Mohan Sharma and Sohan Sharma. hence, his conviction and sentence by the trial Court is also not justified and proper.

36. The impugned judgment and order dated **21.12.2010** passed by the learned Additional Sessions Judge, Fast Track Court No.7, Lucknow convicting and the sentencing the appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi is hereby set aside and they are acquitted of all the charges.

37. Accordingly, the appeals of appellants, namely, Mohan Sharma, Sohan Sharma and Rajesh Joshi stands **allowed**.

38. The appellants, namely, Mohan Sharma and Sohan Sharma are stated to be in jail since 28.1.2010 and the appellant, namely, Rajesh Joshi since 22.2.2011, they shall be released forthwith unless otherwise wanted in any other case.

39. Office is directed to send a certified copy of this order to the District Judge concerned for its compliance.

(2016) 9 ILRA 1736
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

First Appeal From Order No.- 443 Of 2016
Connected with
Civil Misc. Correction Application No.- 260738 Of 2016

New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Sundari & Ors. ...Respondents

Civil Misc. Correction Application -- Recall of Order Wrongly Transcribed and Uploaded -- Substitution by Order Actually Passed in Open Court -- Application filed seeking correction of order dated 10.02.2016 on the ground that on account of an inadvertent mistake a wrong order was transcribed and uploaded, though the appeal had in fact been allowed and the matter remanded to the Tribunal, as verified from the shorthand book maintained by the stenographer -- **Held:** correction application allowed; order dated 10.02.2016 recalled and substituted by the order actually passed in open Court. (Paras 1-3)

Motor Vehicles Act, 1988 -- Sections 3, 4 and 9 -- Driving Licence -- Minimum Age -- Person below 18 Years Disqualified from Holding or Obtaining Licence -- Driving licence of the driver of the offending vehicle was issued on 01.03.2004 showing his age as 19 years, but his secondary school certificate recorded his date of birth as 09.07.1988, making him about 15 years 7 months of age on the date of issuance -- Tribunal held the licence valid and effective solely on the ground that its issuance was proved by an employee of the licensing authority, without examining the age issue -- **Held:** Sections 3 and 4 of the Act prohibit driving in a public place without an effective licence and bar issuance of a licence to a person below 18 years, except for a motorcycle not exceeding 50cc after attaining 16 years -- a person below 18 years is disqualified from holding or obtaining a driving licence under Section 9 -- proof that a licence was issued by the competent authority establishes only that it is not fake or forged, and is not by itself sufficient to establish it as a valid and effective licence where the holder's eligibility/competence is under challenge -- a licence obtained on the basis of deliberately furnished false or incorrect information as to age falls in the category of a licence obtained fraudulently, taking it out of the category of a valid and effective driving licence.

Motor Vehicles Act, 1988 -- Section 149(2)(a)(ii) -- Breach of Policy Condition Excluding Driving by Person Not Duly Licensed or Disqualified -- Insurer's Defence -- Burden of Proof -- Held: Section 149(2)(a)(ii) permits the insurer to defend a claim on the ground of breach of a policy condition excluding driving by a person not duly licensed or by a person disqualified from holding or obtaining a driving licence -- following Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654 and Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21, the insurer must establish that the breach was wilful and attributable to the insured, but where the insurer has specifically pleaded the driver's disqualification on account of age and filed evidence of his date of birth, the Tribunal cannot decline to examine the issue merely because the licence was proved to have been issued by the competent authority -- Tribunal, having proceeded solely on the ground that the licence was not shown to be fake or forged, without considering the specific pleading in the written statement and the secondary school certificate evidence regarding the driver's age, held to have erred in returning a finding that the licence was valid and effective. (Paras 12-28)

First Appeal From Order Partly Allowed -- Matter Remanded -- Correction application allowed; order dated 10.02.2016 recalled -- appeal against judgment and award dated 26.11.2015 of the Tribunal awarding Rs.12,35,000/- with 7% interest as compensation, partly allowed -- finding of the Tribunal on Issue No. 2 (validity of driving licence) set aside and remanded to the Tribunal for fresh decision in the light of the observations made; findings on the remaining issues confirmed; amount already deposited by the appellant - Insurance Company to continue in deposit, subject to the Tribunal's fresh adjudication on liability; Tribunal directed to conclude the proceedings within two months from production of a certified copy of the judgment by either party -- no order as to costs. (Paras 29-30)

Case Law Discussed:-
1. Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654
2. Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21

(Delivered by Hon'ble Krishna Murari, J.
&
Hon'ble Vivek Kumar Birla, J.)

1. This is an application seeking correction of the order dated 10.02.2016 transcribed and uploaded.

2. It is contended that after hearing learned counsel for the parties, the appeal was allowed and the matter was remanded back to the Tribunal for decision afresh, but on account of some inadvertent mistake, a wrong order has been transcribed and uploaded.

3. On verification from the shorthand book maintained by the stenographer, it appears that due to inadvertent mistake, a wrong order was transcribed and uploaded.

4. In view of above, correction application stands allowed. Order dated 10.02.2016 is recalled and is substituted by the following order, which was passed in open Court.

5. 'This appeal under Section 173 of the Motor Vehicles Act (for short the 'Act') has been filed by the Insurance company challenging the judgment and award dated 26.11.2015 awarding a sum of Rs.12,35,000/- along with 7% simple interest as compensation to the claimant-respondents.

6. Facts, in brief, are that an application under Section 166 read with Section 140 of the Act was filed by the claimant-respondents claiming compensation to the tune of Rs.60,20,000/- alleging that their predecessor-in-interest, Sunil Kumar died in an motor accident on 01.05.2012 at about 3 p.m. It was further pleaded that the accident was a result of rash and negligent driving of the offending vehicle by its driver. The proceedings were contested by the owner of the offending vehicle as well as insurance company by filing written statement. The Tribunal vide judgment dated 19.05.2015 allowed the claim petition and awarded compensation to the tune of Rs.30,80,000/- along with 7% interest. The Insurance company challenged the same by filing FAFO No. 2183 of 2015. A Division Bench of this Court vide judgment and order dated 20th August, 2015 allowed the appeal, set aside the award and remanded the matter back to the Tribunal with the direction to

dispose of the case afresh in accordance with law and in the light of the observations made in the said judgment.

7. It may be relevant to quote the following from the aforesaid judgment.

"The claim was contested by the appellant insurer by filing the written statement wherein the averments made by the claimant in their claim petition were denied and also submitted that the driver of the offending vehicle did not possess any effective and valid driving licence at the time of accident. The insurance company also claimed that the salary certificate of the claimant has not been verified from the said Sugar Mill. He further contends that with regard to the employment as no documentary evidence has been produced to say that deceased was employed in the Sugar Mill.

In view of the material evidence on record, it would be evident that it is for the claimant to approach the sugar cane factory by filing an application and on the application sugar cane factory to issue certificate with regard to employment of deceased and salary certificate and certificate in respect of the period during which he worked, what was the salary being paid to the deceased on the date of accident and also depute someone on behalf of the employer before the court. Tribunal shall also issue notice to Sugar Mill and thereafter Tribunal shall pass appropriate order after giving opportunity of hearing to the parties.

In view of above, without going into the merits of the appeal, we think it proper that the impugned order should be set aside and the matter be remanded back to the Tribunal for deciding afresh.

Accordingly, the award passed by the Motor Accident Claims Tribunal/ Additional District Judge/ Special Judge (Prevention of Corruption Act), Meerut in M.A.C.P. No. 824 of 2012 is set aside and the matter is remanded back to the Tribunal with a direction to dispose of the case afresh in accordance with law and in the light of the observations made by us."

8. In pursuance to the aforesaid order of remand made by this Court, the claim petition was considered afresh by the Tribunal and decided vide judgment and award dated 26.11.2015, which is under challenge in this appeal. By means of the impugned award, the Tribunal awarded a sum of Rs.12,35,000/- along with 7% simple interest as compensation.

9. Issue no. 2 framed by the Tribunal was whether the driver of the offending vehicle was having a valid and effective driving licence. The driving licence of the driver of the offending vehicle, namely, Ankur Jain was available on the record of the Tribunal, which was issued on 01.03.2004 and was valid till 28.02.2024. The age of the licence holder was shown to be 19 years on the date of its issuance. Insurance company filed in evidence the secondary school certificate, 2004 of the Ankur Jain, wherein his date of birth was recorded as 9th July, 1988. On the basis of the secondary school certificate, it was contended that since on the date of issuance of the driving licence, Ankur Jain was only aged about 15 years, as such, he could not have been issued the

licence and was disqualified for the same being less than 18 years of age, however, the Tribunal returned a finding that on the date of accident, the driver of the offending vehicle was having a valid and effective driving licence.

10. Learned counsel for the appellant contends that the aforesaid finding of the Tribunal is solely based on the fact that validity of the said driving licence was duly proved by producing an employee of the office of the Road Transport authority. It is further contended that the question raised that the age of the driver of the offending vehicle was less than 17 years on the date of issuance of the driving licence, has not at all been considered by the Tribunal only on the ground that no issue was raised by the Insurance company in the written statement that driving licence was forged or obtained by fraud.

11. In reply, learned counsel for the claimant-respondents has tried to justify the impugned judgment by contending that once the Insurance Company had not set up the case that the driving license was obtained by fraud and the same was duly proved by producing the employee of the issuing authority, the Tribunal rightly held that the license was valid.

12. We have considered the argument advanced by the learned counsel for the parties and perused the record.

13. The sum and substance of the controversy issued between the parties is not with respect to the effective and valid driving licence, but the question for consideration is whether a person, who is disqualified from holding a driving licence, even if he holds a licence, can be said to be duly licensed and whether the same can be raised as a defence in a claim petition by the insurer.

14. For an effective adjudication of the controversy between the parties, it may be relevant to notice certain relevant statutory provisions of the Statute.

15. Section 2 (10) of the Act defines driving licence as under.

"(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description."

16. Section 3 of the Act prescribes the necessity for driving licence and prohibits of driving of any motor vehicle by any person in any public place unless he holds an effective driving licence. The said Section reads as under.

"**3. Necessity for driving licence**.- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving license issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75 unless his driving license specifically entitles him so to do.

(2) The condition subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

17. Section 4 of the Act prescribes the minimum age limit for being eligible to drive a particular class of motor vehicle in a public place. The said section reads as under.

"**(4) Age limit in connection with driving of motor vehicles.-** (1) No person under the age of eighteen years shall drive a motor vehicle in any public place:

Provided that a motor cycle with engine capacity not exceeding 500cc may be driven in a public place by a person after attaining the age of sixteen years.

(2) Subject to the provisions of section 18, no person under the age of twenty years shall drive a transport vehicle in any public place.

(3) No learner's license or driving license shall be issued to any person to drive a vehicle of the class to which he has made an application unless he is eligible to drive that class of vehicle under this section."

18. Section 5 prescribes for responsibility of owners of motor vehicle for contravention of Sections 3 and 4.

(5) Responsibility of owners of motor vehicles for contravention of sections 3 and 4.- No owner or person in charge of a motor vehicle shall cause or permit any person who does not satisfy the provisions of section 3 or section 4 to drive the vehicle.

19. Section 9 provides for grant of driving licence. Relevant part of the said Section for the purposes of the case reads as under.

"**9. Grant of driving licence.-** (1) Any person who is not for the time being disqualified for holding or obtaining a driving licence may apply to the licensing authority having jurisdiction in the area-

(i) ----------

(ii) ----------"

20. A conjoint analysis of the aforesaid provisions of the Act goes to show that nobody can drive a motor vehicle in a public place without an effective driving license and no one under the age of 18 years is entitled to drive a motor vehicle in a public place with the exception that a motorcycle with engine capacity not exceeding 50cc can be driven by a person after attaining the

age of 16 years. It is, thus, clear that a person unless he attained the age of 18 years, is not eligible to drive a motor vehicle and is disqualified to hold a licence to drive a motor vehicle.

21. Thus, a person below the age of 18 years is clearly disqualified from holding or obtaining a driving licence to drive a motor vehicle and cannot make an application for grant of the same in accordance with the provisions of Section 9 of the Act.

22. The next question which immediately arises for our consideration is whether in a fact situation where the driver of the offending vehicle though has a driving licence, but is below the age of 18 years, the fact can be set up as a defence by the Insurance company to avoid its liability as envisaged in sub-section (2) of Section 149 of the Act. Section 149 (1) castes a liability upon the insurer to satisfy judgment and awards against insured in respect of third party claims. Section 149 (2) enumerates defences available to the insurance companies, which on being established, the insurance company may not be liable to fulfil their statutory obligation under Section 149 (1) of the Act.

23. Relevant Section 149 (2) of the Act is being reproduced hereunder.

"**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks**.-

(1) ---------

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case my be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving license during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

24. The opening words "that there has been a breach of a specified condition of the policy" of clause (a) of sub-section (2) of Section 149 implies that the insurer's defence of an action would depend upon the terms of the policy. The said sub-clause contains three conditions, which on being established, the insurer can get away from its liability.

1. driving of the offending vehicle by a named person or person specifically excluded under the terms of the policy.

2. driving of the offending vehicle by a person, who is not duly licensed; and

3. driving by a person disqualified from holding or obtaining a driving licence.

25. It is clear that the driving by a person disqualified from holding or obtaining a driving licence is one of the defence open to the Insurance company to avoid its liability for indemnifying the insurer.

26. The provisions of Section 149 (2) (b) (ii) of the Act has been subject matter of interpretation by the Hon'ble Apex Court in number of cases.

27. While interpreting the provisions of Section 96 of the old Act, which is in para materia with Section 149 (2), Hon'ble Apex Court in the case of **Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan, (1987) 2 SCC 654,** has held as under.

"Section 96 (2) (b) (ii) extends immunity to the insurance company if a breach is committed of the condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified from holding or obtaining a driving licence during the period of disqualification. The expression 'breach' is of great significance. The dictionary meaning of 'breach' is 'infringement or violation of a promise or obligation' (see Collins English Dictionary). It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of promise that a person who is duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise

that the expression 'breach' carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the vehicle in charge of a person of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the insurance company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself, it cannot be said that the insured is guilty of any breach."

28. The ratio of the decision rendered in the case of **Skandia Insurance Co. LTD. (supra)** has been approved by a three Judges Bench when the correctness thereof was referred to a larger Bench in the case of **Sohan Lal Passi Vs. P. Sesh Reddy, (1996) 5 SCC 21**. The three Judges Bench of the Hon'ble Apex Court noticing the ratio propounded in the **Skandia's case (supra)** observed as under.

"In other words, once there has been a contravention of the condition prescribed in sub-section (2) (b) (ii) of Section 96, the person insured shall not be entitled to the benefit of sub-section (1) of Section 96. According to us, Section (2) (b) (ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by an person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression 'breach' occurring in Section 96 (2) (b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96."

29. In the backdrop of the aforesaid legal proposition, we now proceed to analyse the facts of the case in hand. A perusal of the written statement filed by the appellant-insurance company goes to show that it was specifically pleaded that driver of the offending vehicle was not having a valid and effective driving licence and the owner had entrusted it knowingly and deliberately to a person who was not legally authorised to drive it and, thus, the provisions of Motor Vehicle Act as well as terms of policy had been violated. It may be relevant to quote paragraph 29 of the written statement which contains pleading in this regard.

"29. That although the alleged accident with Car No. UK-07 U-9556 is not admitted but in alternative it is pleaded that at the time of accident, the said vehicle was being driven by its driver having no valid and effective driving license with the proper endorsements. The owner of this vehicle had entrusted it knowingly and deliberately, to a person who was not legally authorised to drive it, and thus he has violated the provisions Motor Vehicle Act 1988 as well as terms and conditions of the policy of insurance, if any is found in future."

30. In support of the averments, the insurance company filed certificate secondary school examination of 2004 of the driver, Ankur Jain, as paper no. "61 ga". The said certificate recorded his date of birth of 09.07.1988. The driving licence filed by the owner of the offending vehicle as paper no. 30 Ga/3 went to show that it was issued on 01.03.2004. Thus, in accordance with the date of birth recorded in the secondary school examination certificate, the age of the driver, on the date of issuance of driving licence was only 15 years and 7 months.

31. Motor Accident Claims Tribunal instead of adverting itself to this issue held the driving licence to be valid and effective solely on the ground that it was proved by producing an employee of the issuing authority in the witness box, hence, it cannot be said to be fake. The Tribunal also held that it was not pleaded by the insurance company that driving licence was fake or was got issued fraudulently. Insofar this issue is concerned, as already noticed above, the written statement filed by the insurance company contained a specific pleading.

32. Tribunal lost sight of the fact that issuance of fake or forged licence is altogether different issue. Licence issued to the driver of the offending vehicle may not be fake or forged but whether the same could have been issued to the holder in view of his disqualification on the ground of having not attained the minimum age prescribed by the Statute and such a licence whether can be termed as effective and valid licence was the issue required to be addressed by the Tribunal. Further if the licence is obtained by furnishing wrong and incorrect information, the same may not be fake but having been obtained on the basis of wrong or incorrect information deliberately furnished, would fall in the category of licence obtained fraudulently. Such a licence cannot fall in the category of valid and effective driving licence. Mere fact that an employee of issuing authority appears and proves the same, only goes to establish it was issued by the authority and was not fake or forged. However, such an evidence is not sufficient to establish it as valid and effective once the competence of the holder is challenged. The Tribunal has to advert to other evidence on record led by the party asserting the fact to come to a finding. In case, the evidence leads to a conclusion that on account of any bar prescribed by the Statute, the holder was disqualified, the licence even

though not being fake or forged cannot be termed to be a valid and effective driving licence. The other consequence is a licence having been obtained on the basis of deliberate false and incorrect information would fall within the category of licence obtained fraudulently automatically taking it out of the category of valid and effective driving licence.

33. The Tribunal without entering into above aspects of the matter held the licence to be effective and valid only because the issuance of the same was proved by producing an employee in the witness box. It was incumbent upon the Tribunal to have considered the issue in the light of evidence adduced by the insurance company to establish the age of the licence holder.

34. In light of above discussions, the finding of the Tribunal on issue no. 2 is not liable to be sustained and is set aside. The matter is remanded back to the Tribunal to decide issue no. 2 afresh in accordance with law and in the light of observations made hereinabove. Findings on rest of issues stand confirmed. Liability to make payment of compensation to the claimant-respondents shall also be determined by the Tribunal in accordance with finding returned on issue no. 2.

35. Appeal to that extent stands allowed. However, in the facts and circumstances, we do not make any order as to costs."

36. After the aforesaid order was directed to be substituted, learned counsel for the appellant submits that in pursuance to the wrong order transcribed in the appeal, entire awarded amount has been deposited. Since the matter is being remanded back and the liability to make payment is also to be determined afresh by the Tribunal, the amount deposited by the appellant-insurance company shall continue to remain in deposit and shall be subject to the adjudication made by the Tribunal with respect to liability to make payment. The Tribunal is further directed to conclude the proceedings within two months from the date of production of certified copy of this judgment by either of the parties.

(2016) 9 ILRA 1746
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 544 Of 2016
&
Connected With Other Cases

Ramesh Chandra Agrawal & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioners:
Arun K. Singh Deshwal, Arun Kumar Singh-I (for petitioners in Writ Tax No. 544 of 2016); Jata Shankar Pandey (for petitioner in Writ Tax No. 582 of 2016); Bidhan Chandra Rai (for petitioners in Writ Tax Nos. 624, 625 and 626 of 2016)

Counsel for Respondents:
C.S.C., Satish Mandhyan

U.P. Municipalities Act, 1916 -- Sections 128, 140, 141, 141-A, 141-B, 142, 143 and 153 -- Assessment of House Tax and Water Tax -- Determination of 'annual value' and minimum monthly rate of rent -- Manner 'as may be prescribed' -- No Rules framed under the Act by the Rule Framing Authority -- Nagar Palika Parishad, Shikohabad, relying solely on a Government Order dated 18.03.2011, unilaterally fixed areawise minimum monthly rental rates through its Executive Officer and applied a multiplier of twelve to raise House Tax and Water Tax demands, without any Committee or Board authorisation and without the manner of determination being prescribed by Rules -- Held: The expression 'prescribed', as defined in Section 2(17)(i) of the Act, means prescribed by or under the Act or the Rules made thereunder, and where the Statute requires a thing to be done in a particular manner as prescribed by Rules, it can be done in that manner alone or not at all -- A Government Order cannot substitute for Rules required to be framed under the Act, nor can it confer power on a Municipality or its Executive Officer to determine annual value, rental rates or assessment on its own -- Since no Rules were framed under the U.P. Municipalities Act, 1916 prescribing the manner of fixation of minimum monthly rate of rent, areawise rental rates, or disposal of objections, the Nagar Palika Parishad had no jurisdiction to make any such assessment. **(Paras 50-79)**

U.P. Municipalities Act, 1916 -- Sections 141 and 142 -- Preparation and publication of areawise rental rates and assessment list -- Requirement of authorisation by Municipality -- Held: Preparation and publication of areawise rental rates or an assessment list can only be undertaken by the Municipality or by an Executive Officer specifically authorised by it in that behalf -- Nothing on record showing that the Executive Officer, Nagar Palika Parishad, Shikohabad, was so authorised prior to getting rental rates published in a newspaper on 12.10.2012 -- Action taken by the Executive Officer without such authorisation, and prior to any Rules being framed, is patently without jurisdiction and a nullity in the eye of law -- Objections to the proposed rates disposed of in a cursory manner without application of mind, contrary to the requirement of a reasoned

disposal -- Committee constituted by the District Magistrate to determine minimum monthly rental rates had no statutory basis under the Act or the Rules, and Rules framed under the U.P. Municipal Corporation Act, 1959 (Municipal Corporations) could not be imported to fill the gap under the U.P. Municipalities Act, 1916 -- Both the exercise undertaken by the Executive Officer and the recommendations of the Committee held to be without jurisdiction. **(Paras 68-82)**

Writ Petitions Allowed -- Assessments made by the Nagar Palika Parishad, Shikohabad, and the demands raised against the petitioners in all five connected writ petitions, quashed -- Nagar Palika Parishad, Shikohabad, held liable to pay costs of Rs. 50,000/- in each set of petitions -- Any amount realised from the petitioners pursuant to the impugned assessments and recovery directed to be refunded with interest at the rate of 10% per annum, computed from the date of payment till the date of refund -- Liberty granted to the State Government to recover the amount of costs and interest from the Executive Officer or other persons found responsible for the illegal action, after due inquiry. **(Paras 86-88)**

Case Law Discussed:
1. Virendra Kumar Tyagi v. Ghaziabad Development Authority, 2006 (1) AWC 834
2. Dr. Umesh Chandra Maheshwari v. Mathura/Vrindavan Development Authority and another, 2010 (4) ADJ 368 (DB)
3. Smt. Rekha Rani v. State of U.P. and others, 2014 (1) ADJ 325 (DB)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. In all these writ petitions, common questions of law are involved therefore same have been heard together and are being decided by this common judgment.

2. For the purpose of factual matrix, we find it appropriate to give brief facts of all writ petitions separately since that will help in understanding the dispute and the manner in which respondents' authorities have acted and given rise to this bunch of writ petitions.

Writ Tax No. 544 of 2016

3. There are two petitioners Ramesh Chandra Agrawal and Amar Singh. Petitioner-1 Ramesh Chandra Agrawal owns two storey building at plot no. 2118, situate at Mohalla Mohammad Mah Nai Basti, Shikohabad, District Firozabad. He also owns a small factory at plot no. 1461 at Sikohabad. Petitioner-2, Amar Singh owns a building at plot no. 1712 at Mohammad Mah, Sikohabad, District Firozabad where he is running a hotel called as 'Mayur Hotel'.

4. Shikohabad has a Nagar Palika Parishad (hereinafter referred to as 'NPP') which is a 'Municipality' as defined under Section 2 (9) of The Uttar Pradesh Municipalities Act, 1916 (hereinafter referred to as 'U.P. Act, 1916') read with Article 243-P (e) and 243-Q (1) (b) of the Constitution of India. Tax Assessment Officer (hereinafter referred to as 'TAO') of NPP sent notice dated 28.03.2015 to petitioner-1 under Sections 140/158/168/173 of U.P. Act, 1916 informing that in respect of House No. 2118, for Financial Years (hereinafter referred to as 'F.Y.') 2012-13 to

2014-15 he is liable to pay house tax at Rs. 57,600/-, Rs. 69,120/- and Rs. 69,120/- respectively. Petitioner-1, if had any objection, may file the same within 15 days along with sanctioned map and copy of sale deed. Further, petitioner-1 was required to deposit house tax of Rs. 69,120/- for F.Y. 2014-15 by 31.03.2015, and in respect to F.Ys., 2012-13 and 2013-14, within 15 days else would be recovered as arrears of land revenue. Similarly in respect of plot no. 1461, petitioner-1 received notice dated 18.03.2015 demanding House Tax for three F.Ys. as under:-

Serial Number	F.Y.	Amount of House Tax
1	2012-13	Rs. 52,272/-
2	2013-14	Rs. 62,724/-
3	2014-15	Rs. 62,724/-

5. Petitioner-2 was also served a notice dated 21.05.2014 under Sections 140, 147, 148, 158, 168, 173 of U.P. Act, 1916 with the direction to pay house tax in respect of House No. 1712, Mayur Hotel, which is a commercial building, for F.Ys. 2012-13, 2013-14 and 2014-15 to the tune of Rs. 2,59,200/-. Petitioner-2 filed objection dated 30.06.2014. Thereafter Executive Officer (hereinafter referred to as 'EO') passed order dated 24.07.2014 determining House Tax afresh, by treating open area as 1500 square foot and covered area as 6000 square foot, as under:-

Serial Number	F.Y.	Amount of House Tax
1	2012-13	Rs. 71,832/-
2	2013-14	Rs. 86,184/-
3	2014-15	Rs. 8,6184/-

The aforesaid amount was required to be deposited within 15 days.

6. Petitioners submitted representations/objections dated 11.08.2014 and 03.09.2015 stating that the area taken by NPP for the purpose of computing House Tax has been wrongly shown as there was no survey of property in dispute and further amount of house tax has been arbitrarily demanded inasmuch as earlier house tax paid by petitioner-1 in respect of House No. 2118 was only Rs. 500/- per annum which now has been increased to Rs. 57,600/- and Rs. 69,120/- respectively. They also pointed out that up to F.Y. 2012-13, required competent authority of 'NPP' to inform the details and relevant material on the basis of whereof, area was determined and House Tax was computed.

7. Petitioner-1 in respect of House No. 2118, furnished copy of map of the building showing area of building as under:-

(आ) व्यवसायिक भवन का विवरण (मूतल)	(ब) आवासीय भवन का विवरण
स्टोर - 858.86 वर्गफीट	स्टोर- 321.00 वर्गफीट
गोदाम - 272.16	कमरा - 670.83
बरामदा - 632.55	बरामदा - 856.45

आफिस - 272.16	

8. Petitioner-2 also stated that the entire hotel is constructed only in 1875 square foot area and it has no open space. The open space is almost negligible but for the purpose of House Tax assessment, in an arbitrary manner, imaginary area has been taken into consideration. E.O. submitted a report dated 06.01.2015 in respect of 'Mayur Hotel' of petitioner-2, informing that area of building is 1975.90 square foot which is being used for commercial purpose and this is a double storey building and adjoining land, measuring 1500 square foot is being used as parking area but the same was not disclosed by petitioner- 2 in his objections/representations. Therefore, total area of building is 3,952 square foot and its carpet area comes to 3,162 square foot. House Tax and Water Tax assessment therefore in respect of the said building for F.Ys. 2012-13 and 2013-14 is as under-

Serial Number	F.Y.	Covered Area	House Tax	Water Tax
1	2012-13	1897 Square foot	Rs. 22,754/-	Rs.22,764/-
2	2013-14	2,428 square foot	Rs. 29,136/-	Rs. 25,500/-

9. With regard to open area also, E.O. submitted assessment of House Tax and Water Tax as under:-

Serial Number	F.Y.	Open Area	House Tax	Water Tax
1	2012-13	1,500 square foot	Rs. 1,356/-	Rs. 1,356/-
2	2013-14	144 square foot	Rs. 1,728/-	Rs. 1,512/-

10. Since petitioners were not communicated anything, petitioner-1 filed Writ (Tax) No. 813 of 2015 which was disposed of vide order dated 12.10.2015 directing E.O. to dispose of petitioner's objection after giving him an opportunity of hearing and by a speaking order.

11. Pursuant thereto, E.O. passed order dated 21.11.2015 informing that assessments have been revised in the light of amendment of Section 140 by U.P. Municipalities (Amendment) Act, 2011 (hereinafter referred to as Amendment Act, 2011, substituting Section 140 of U.P. Act, 1916. The assessment made as communicated by letter dated 07.08.2015 by treating area of building as 4000 square foot. However, the said assessment was revised in the light of lay out plan and map submitted by petitioner-1, taking non-residential area as 2036.03 square foot and residential area as 2048.28 square foot. House tax for F.Ys. 2012-13, 2013-14, 2014-15 and 2015-2016 therefore computed to Rs. 30,802/-; 36,954/-; 36,954/- and 36,954/- respectively.

12. Petitioner-1 again protested by letter dated 01.12.2015 stating that various submissions he made during oral hearing on 03.09.2015 have been omitted and ignored and arbitrary revised assessment has been made which is patently incorrect. He submitted that there was no provision of applying multiplier of twelve and further, monthly rent assumed is also imaginary and conjectural. A detailed objection was filed alleging that officials of 'NPP' are making frivolous, fictional and

arbitrary excessive assessments just to harass residents of Shikohabad and the excessive assessment are also without authority of law, hence they should refrain from such illegal activities. Representation was made by petitioner-1 dated 11.04.2016 to Collector, Firozabad and thereafter present writ petition has been filed challenging impugned assessment of Property Tax on the ground that it is patently illegal and not consistent with Section 140 of U.P. Act, 1916, therefore said assessments be quashed and amount already recovered by coercive method be refunded.

Writ Tax No. 582 of 2016

13. Here petitioner Pankaj Agarwal owns House No. 75 situate at Mohalla, Padav, Shikohabad, District Firozabad. 'NPP' required petitioner and several others to deposit self assessed House Tax, by applying multiplier of twelve where against several objections were filed. The District Magistrate constituted a Committee, consisting of Additional District Magistrate (Finance & Reveue), E.O./City Magistrate, Firozabad and General Manager District Industries Centre (Firozabad) who submitted report that Nagar Palika Parisad, Firozabad's Self Assessment Scheme has been implemented w.e.f 01.04.2013 and at Shikohabad, it has been implemented w.e.f. 01.04.2012, therefore, concerned 'NPP' should proceed to recover House Tax for the period before enforcement of Self Assessment Scheme, as per earlier provisions, and after enforcement of scheme, according to the said scheme and disposed of objections accordingly.

14. Petitioner was required to deposit House Tax to the tune of Rs. 1,88,808/- which was subsequently revised Rs. 1,85,520/-. Recovery certificate was also issued. Petitioner in order to avoid complications due to coercive methods, deposited Rs. 90,000/- vide receipt dated 29.11.2014 and Rs. 95,525/- vide receipt dated 09.12.2014. Simultaneously he challenged the said assessment and demand, in Writ (Tax) No. 515 of 2014. It was disposed of on 08.09.2014 with the following order:-

"The Committee constituted by the District Magistrate, Firozabad has submitted a report on 23 July 2014 (Annexure 5). In the concluding part of its report, the Committee has stated that it could hear objections if any person has a grievance or objection in connection therewith. The petitioner has already submitted objections before that Committee. Hence, at this stage, it is not necessary or appropriate for this Court to express any opinion or to entertain these proceedings. It would be open to the petitioner to request the Committee to hold recovery action in abeyance until the objections are duly considered and disposed of.

The petition is, accordingly, disposed of. There shall be no order as to costs."

15. Thereafter, pursuant to the said judgment dated 08.09.2014, E.O. vide order dated 10.12.2014 furnished details of assessment of F.Ys. 2012-13 and 2013-14 to petitioner as under:-

Sr. No.	Particulars	F.Y. 2012-13	F.Y. 2013-14
(A)	Total area of land	5509 square foot	-do-
(B)	Open area of land	967 -do-	"

(C)	Construction on the ground floor and first floor	5766 "	"
(D)	Assessable constructed area	5735 "	"
(E)	Annual assessment on constructed area	Rs. 55,056/-	"
(F)	Annual assessment on open area	Rs. 1,164/-	
(G)	House Tax on constructed area	Rs. 41,292/-	Rs. 52,848/-
(H)	Water Tax	Rs. 41,292/-	Rs. 46,248/-
(I)	House Tax on open area	Rs. 876/-	Rs. 1,116/-
(J)	Water Tax on open area	Rs. 876/-	Rs. 972/-
(K)	Total House Tax and Water Tax	Rs. 84,336/-	Rs. 1,01,184/-

16. Petitioner filed Writ (Tax) No. 690 of 2014 challenging order dated 10.11.2014 passed by E.O. On the ground of alternative remedy of appeal the writ petition was dismissed on 25.11.2014. The petitioner then filed appeal which was allowed by District Magistrate, Firozabad vide order dated 16.02.2015. Appellate Authority found that order dated 10.11.2014 was passed without affording opportunity of hearing to petitioner, hence appeal was partly allowed and matter was remanded to E.O. to pass appropriate order after hearing petitioner.

17. Thereafter, petitioner filed a detailed objection dated 02.03.2015 before E.O. who communicated a parawise reply to petitioner's objection vide letter dated 08.04.2016 affirming its earlier demand raised vide order dated 10.11.2014. Thereafter, for F.Y. 2015-16, vide notice dated 28.04.2016 demanding House Tax to the tune of Rs. 1,11,392/- and Water Tax to Rs. 97,864/- was raised. It was issued under Section 168 and 173 of U.P. Act, 1916 and petitioner was required to pay the said amount within 15 days.

Writ Tax No. No. 624 of 2016

18. For the year 2012-13 'TAO' vide notice dated 15.02.2014, under Section 140, 147 and 148, required petitioner Smt. Shashi Tikmani to pay House Tax, Water Tax and Property Tax of Rs. 82,932/- and penalty of Rs. 15,000/-. Along with requisite documents petitioner filed representation dated 03.03.2014 disclosing total area of building as 2617 square foot, carpet area 2094 square foot (80% of total area), monthly rent at Rs. 2,094/- and annual value at Rs. 25,128/-. Thus House Tax for 2012 -13 comes to Rs. 18,852/- and the same amount of Water Tax. Similarly for F.Y. 2013-14, House Tax comes to Rs. 24,120/- and Water Tax at Rs. 21,108/-. It was submitted that any higher assessment is illegal. E.O. Vide letter dated 12.03.2014 stated that demand and assessment made, already communicated is correct and no reconsideration is required. However amount already deposited by petitioner was adjusted and balance amount was required to be paid.

19. Petitioner then filed another objection dated 19.03.2014 before E.O. A press notice was published in daily newspaper 'Amar Ujala' dated 26.04.2014 wherein petitioner was required to deposit assessed amount as mentioned in earlier demand notice i.e. Rs. 67,832/- after adjusting Rs.

18,000/- deposited by petitioner. She filed Writ (Tax) No. 310 of 2014 which was dismissed on the ground of alternative remedy of appeal. Petitioner preferred appeal before Chief Judicial Magistrate, Firozabad under Section 160 of U.P. Act, 1916 which has been decided vide judgment and order dated 08.02.2016; after setting aside the assessment and demand raised by 'NPP' on the ground that application of multiplier of twelve was patently illegal since multiplier was to be fixed by Rule and since no Rule was framed therefore 'NPP' itself could not have applied multiplier of twelve. After declaring assessment illegal Appellate Authority directed 'NPP' to make fresh assessment of property tax in accordance with relevant statutory provisions.

20. Petitioner communicated the said judgment to E.O. and requested that the excess amount realized from petitioner, in respect of F.Y. 2012-13 to 2014-15 should be refunded or be adjusted against property tax payable for F.Y. 2015-16. E.O. communicated to petitioner vide letter dated 04.03.2016 that as per agreement dated 16.08.2012, executed by petitioner with Bank of India, with respect to disputed property no. 2864, Mohalla Mohd. Mah. total area is 2617 square foot. If petitioner has any objection in regard to aforesaid area, may file the same. It was also informed that demand of refund along with interest was not correct. Petitioner was further required to pay Rs. 24,720/- towards House Tax and Rs. 21,408/- towards Water Tax for F.Y. 2015-16.

21. Petitioner again demanded, vide letter dated 09.03.2016, that penalty of Rs. 15,000/- has been declared illegal by Appellate Authority i.e. Chief Judicial Magistrate, Firozabad vide judgment dated 08.02.2016 and assessment of property tax has also been illegal, therefore, excess amount realized by E.O. should be refunded. E.O. did not pass any order as directed by Appellate Authority and instead, communicated a minor correction dated 20.06.2016 informing that for the year 2015-16, House Tax amount should be read as Rs. 24,120/- instead of Rs. 24,720/- and Water Tax as Rs. 21,108/- instead of Rs. 21,408/- and the total amount payable for year 2015-16 is Rs. 45,228/-. This demand has been challenged by petitioner in this writ petition and application of multiplier of twelve has also been challenged on the ground that same are illegal and without jurisdiction.

Writ Tax No. 625 of 2016

22. Petitioner Gopal Jain is owner of House No. 21, Mohalla Bara Bazar, Shikohabad, District Firozabad which is let out to State Bank of India. For F.Ys. 2012-13 and 2013-14, 'NPP' demanded property tax of Rs. 1,85,888/-. Petitioner protested but E.O. advised to pay entire amount and in the meantime he would seek clarification with regard to multiplier from Government. Petitioner thus deposited aforesaid amount vide receipt dated 11.06.2014. Petitioner, pursuant to report submitted by Committee constituted by District Magistrate, Firozabad, made representation dated 23.01.2015 to review, assessment by excluding multiplier of twelve, and refund the amount paid in excess by petitioner. 'TAO' on the contrary, vide notice dated 18.05.2015, issued under Section 168/173 of U.P. Act, 1916 informed petitioner that it has to pay property tax for F.Y. 2014-15 at Rs. 1,08,864/- and same amount for F.Y. 2015- 16. Petitioner was required to pay thus total sum of Rs. 2,17,728/- within 15 days. Petitioner deposited Rs. 1,08,864/- vide receipt dated 08.06.2015 whereupon 'TAO' issued demand notice dated 20.07.2016 for Rs. 1,08,864/- for F.Y.

2015-16. Since no valid assessment has been made by excluding multiplier of twelve, and arbitrarily assessed amount was compelled to be deposited, the same has been challenged in this writ petition.

Writ Tax No. 626 of 2016

23. Petitioner, Satyendra Kumar Jain owns property no. 1630-1631, Mohalla Rukunpur, Mainpuri Road, Shikohabad, District Firozabad. The said property is used for running a cold storage. Initially, for F.Y. 2013-14, 'NPP' demanded property tax of Rs. 4,560/- it was paid on 03.12.2013. NPP thereafter enhanced above assessment and demanded Rs. 77,172/- for F.Y. 2013-14. The aforesaid assessment was made taking carpet area as 2745 square foot (constructed) and 7000 square foot as open. On the constructed area, House Tax was computed at Rs. 31,622/- and Water Tax at Rs. 27,670/-. On the open land, House Tax was computed as Rs. 12,096/- and Water Tax as Rs. 10,584/-. Thus, total house tax demanded was Rs. 43,718/- and water tax Rs. 38,254/-. Petitioner then made representation dated 23.01.2015 stating that computation of property tax by applying multiplier of twelve was illegal but without looking to the said objection, 'NPP' is proceeding with the demand of property tax for F.Y. 2015-16 at Rs. 43,718/- (House Tax) and Rs. 38,254/- (Water Tax).

24. NPP has filed counter affidavit and supplementary counter affidavit in leading Writ (Tax) No. 544 of 2016. Learned counsel appearing for NPP requested that aforesaid affidavit be read in all other writ petitions since issues are common and on this request learned counsel appearing in various writ petitions had no objection, hence we agreed to read the said counter affidavit and supplementary counter affidavit for the purpose of all the writ petitions.

25. Affidavit has been sworn by Ninnumal Chaudhary, EO, NPP, Shikohabad. It refers to various provisions of U.P. Act, 1916 and in particular Sections 128, 129, 130A and 140, Principal Secretary U.P. Government issued an order dated 18.03.2011 addressed to all Commissioners, Collectors, Directors and Local Bodies, informing amendments made in U.P. Act, 1916 vide Amendment Act, 2011 and required concerned authorities to comply the amended provisions strictly. Annual value as per Section 140 (amended) is to be determined by computing monthly income on certain buildings of land and multiplying the same by twelve. Section 140 (1) (a) provides for a proportion not exceeding five percent, to be fixed by Rule, made in this behalf, of the sum obtained by adding estimated present cost of erecting building to estimated value of the land appurtenant thereto; and proportion of five percent was provided subject to one fixed by rules. Since no rules were framed by State, Taxes were being levied on the basis of proportion of five percent and no issue on this aspect was raised by any one before filing these writ petitions. The same provision and methodology is continuing under the amended provision by applying multiplier of twelve or as fixed by State Government. In other words, in absence of any rules to be specified, twelve multiplier is to be applied. The petitioners in fact have gained from assessment made by respondents as per Amended Act, 2011 and if they continue under the old provisions they would have to cough up more amount i.e. almost five times than the one which was demanded under Amended Act, 2011. An illustration in this regard has been given in para-12 as under-

"That according to the capital cost of building-cum-land measuring 20.59 Sq. meters executed as late as on 15.04.2015, has been shown at Rs. 20,39,400/- and if this is taken at the annual value as it includes cost of construction as well as the land going by the old provision of Section 140 (1) (a), the annual value would come to Rs. 20,39,400 x 5% = 1,01,970/-, on that Annual Value would be Rs. 1,01,970/-. On this the taxes would as under:-

House Tax = 10,970 x 8% = Rs. 8,158.00

Water Tax = 10,970 x 7% = Rs. 7,138.00

Total* = *Rs.15,296.00

On calculation according to the latest amendment, annual assessment value would be like this:

20.59 Sq. Meters = 222 Sq. feet

Under self-assessment arrangement according to the size of the road = 0.80/ Sq. feet per month. Accordingly the annual rental value would be = 222 x .80 x 12 = 2,131/-

House Tax = 2,131 x 8% = 170 x 12 = Rs. 2,040/-

Water Tax = 2,131 x 7% = 149 x 12 = Rs. 1,788/-

Total* = *Rs. 3,828/-

The above example would show that even multiplier of 12 would result in less of property Tax than under the old arrangement."

26. In absence of any other rate fixed by State Government, multiplier of twelve as provided by Amendment Act, 2011 has to be applied along with old provisions where it was 5%. Petitioners earlier also filed writ petitions but they were dismissed and no relief was granted. The Committee constituted by Collector was not a valid Committee. NPP is acting strictly according to the directions given by Principal Secretary in the letter dated 18.03.2011. The multiplier of twelve is being applied since State Government has not fixed any other multiplier and this application of multiplier of twelve is within competence of NPP.

27. The supplementary counter affidavit has been sworn by Mahadeo Singh, TAO stating that he has come to join NPP, Shikohabad on his transfer vide order dated 17.11.2012. During the working period of erstwhile EO, Nand Lal (now retired), the resolution of NPP and adoption of Self-Assessment Tax Scheme with proposed rate was published in Newspaper 'Amar Ujala' dated 13.10.2012. The petitioners and others were given option to file objection if any. A large number of objections were received which were considered by Board in a meeting dated 31.10.2012 and rates

were finalized. Pursuant to resolution dated 31.10.2012, giving final shape to the rates, a format under Self-Assessment Tax Scheme was promulgated, providing multiplier of twelve for computing House Tax and Water Tax. A photocopy of format under Self-Assessment Tax Scheme is filed along with supplementary counter affidavit. The action taken by 'NPP' is consistent with Principal Secretary's letter dated 18.03.2011 and decision regarding applicability of multiplier of twelve was finalized by the Board. It was circulated by the then EO to all residents of Shikohabad, After taking charge by Mahadeo Singh, new EO, he sent a letter dated 26.07.2014 to Director, Local Bodies, seeking clarification about multiplier but no reply has been received. A similar letter was also forwarded to State Government on 27.08.2015 but reply is still awaited.

28. Petitioners have also filed a rejoinder affidavit sworn on 21.08.2016 reiterating basically what they have pleaded in the writ petitions, therefore, we are not repeating the same and would refer whenever it may be necessary during the course of discussion.

29. The basic issue is, manner and procedure, necessary for assessing House Tax and Water Tax whether followed by NPP or not.

30. Section 128 has been substituted by Amendment Act, 2011. It details various taxes imposable by a Municipality. For our purposes, Section 128 (1) (i) (x), as it was before Amendment Act, 2011 is reproduced as under:-

"(1) Subject to any general rules or special order of the State Government in this behalf , the taxes which a Municipality may impose in the whole or part of a municipality are,-

(i) a tax on the annual value of building or lands or of both;

...

(x) a water-tax on the annual value of buildings or lands or of both;"

31. After amendment of Section 128, now the relevant clauses for the purpose of House Tax and Water Tax, are contained in Section (1) (i) and (ii), which read as under:-

"(1) Subject to the provisions of this Act and of Article 285 of the Constitution of India, a Municipality shall impose the following taxes, namely:-

(i) ***a tax on the annual value of buildings or*** *lands or both.*

(ii) a water tax ***on the annual value of buildings or lands*** *or both;"*

32. Sub-Section (3) of Section 128 as amended provides that Municipal Tax shall be assessed/levied in accordance with provisions of U.P. Act, 1916 and Rules and bye laws framed thereunder. It reads as under:-

"(3) The municipal ***taxes shall be assessed and levied in accordance with the provisions of this Act and the rules and bye-laws framed thereunder."***

33. Section 128A relates to Tax on transfer of immovable property, hence we do not find the same relevant for the dispute in present writ petitions. Section 129, however, imposes certain restrictions with regard to water tax and reads as under:

*"**129. Restriction on the imposition of water-tax-** The imposition of a tax under clause (ii) of sub-section (1), Section 128 shall be subject to the restriction that the tax shall not be imposed,-*

"(i) on land exclusively used for agricultural purposes unless water is supplied by the Municipality for such purpose; or

(ii) on a plot of land or building the annual value whereof, does not exceed rupees three hundred and sixty, and to which no water is supplied by the Municipality; or

(iii) on any plot or building no part of which is within the radius prescribed for the municipality from the nearest stand-pipe or other water works whereat water is made available to the public by the Municipality.

Explanation.-- For the purposes of this section,-

(a) "building" shall include the compound, if any, thereof, and where there are several buildings in a common compound, all such buildings and the common compound;

(b) "a plot of land" means any piece of land held by a single occupier, or held in common by several co-occupiers whereof no one portion is entirely separated from other portion by the land of another occupier or of other co-occupier or by public property.

34. Section 129-A has been inserted by Amendment Act, 2011 specifying certain exceptions from levy of tax on annual value of buildings or lands or both, and, reads as under:-

*"**129A. Levy of tax on annual value of buildings or lands or both**.-- The tax on annual value of buildings or lands or both shall be levied in respect of all buildings and lands situated in the municipal limit except,-*

(a) buildings and lands solely used for purposes connected with the disposal of the dead;

(b) buildings and lands or portions thereof solely occupied and used for public worship or for the charitable purposes, fields, farms and gardens of Government aided institutions

of research and development, play grounds of Government aided or unaided, recognized educational institutions or sports stadium;

(c) buildings solely used as schools and intermediate colleges, whether aided by the State Government or not;

(d) ancient monuments as defined in the Ancient Monuments Preservation Act, 1904, subject to any direction of the State Government in respect of any such monument;

(e) buildings and land vested in the Union of India, except where provisions of clause (2) of Article 285 of the Constitution of India, apply;

(f) any owner occupied residential building constructed on a plot of land measuring thirty square metres or having a carpet area upto fifteen square metres, provided that the owner thereof does not own any other building in the municipal limit; and

(g) residential buildings occupied by the owner of the building which is located in such area which has been included in the limit of municipal council, within five years or the facilities or roads, drinking water and street light provided in the area, whichever is earlier."

35. Sections 140 to 149 provide and deal with assessment and levy of tax on annual value of buildings or land or both. Section 140 talks of 'annual value' and reads as under:

*"**140. Definition of annual value**.--(1) "Annual Value" means–*

*(a) In the case of railway stations, colleges, schools, hotels, factories, commercial buildings and other non-residential buildings, twelve times the value arrived at on multiplying with multiplier to be fixed by rules in the **monthly rate of rent per square foot of residential buildings** fixed under clause (b) with the covered area of the buildings or open area of the land or both, as the case may be.*

*(b) In the case of a building or land not falling within the provisions of clause (a), twelve times the value arrived at on **multiplying the carpet area of the building**, or the area of the land, **by the** applicable **minimum monthly rate of rent** per square foot of the carpet area in the case of building or the applicable minimum monthly rate of rent per square foot of the area in the case of land, as the case may be, and for this purpose the minimum monthly rate of rent per square foot shall be such as may be fixed once in every two years by the executive officer of the Municipality on the basis of the location of the building or the land, nature of the construction of the building, the circle rate fixed by the Collector for the purpose of the Indian Stamp Act, 1899, and the current minimum rate of rent in the area for such building or land and such other factors, and in such manner, **as may be prescribed**:*

Provided that where the annual value of any building would, by reason of exceptional circumstances, in the opinion of the Municipality, be excessive if calculated in the aforesaid manner, the Municipality may fix the annual value at any less amount which appears to it equitable.

Explanation I. - For the purpose of calculation of annual value the carpet area shall be calculated as under:

(i) Rooms-full measurement of internal dimension;

(ii) Covered Verandah-full measurement of internal dimension;

(iii) Balcony, Corridor, Kitchen and Store-50 per cent measurement of internal dimension;

(iv) Garage-one-fourth measurement of internal dimension;

(v) Area covered by bathroom, latrines, portico and staircase shall not form part of the carpet area.

Explanation II.- The standard rent, the agreed rent or the reasonable annual rent of a building for the purposes of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 shall not be taken into account while calculating the annual value of the building.

(2) Where the Municipality so resolves, the annual value for the purpose of assessment of property taxes shall-

(a) in the case of land and owner-occupied residential building which is not more than ten years old, be deemed to be 25 per cent less and if it is more than ten years but not more than twenty years old, be deemed to be 32.5 percent less, and if it is more than twenty years old, be deemed to be 40 per cent less than the annual value determined under clause (b) of sub-section (1); and

(b) in the case of residential building let on rent, which is not more than ten year old, be deemed to be 25 per cent more and if it is more than ten years but not more than twenty years old, be deemed to be 12.5 per cent more than the annual value determined under clause (b) of sub-section (1),l and if it is more than twenty years old, be deemed to be equal to the annual value determined under clause (b) of sub-section (1).

36. A perusal of Section 140 which is the provision up for serious contentions in these writ petitions, and has real concern with the issues raised in these writ petitions, shows that buildings in municipal area are divided into two distinct categories:-

(i) Those used as railway stations, hotels, colleges, schools, hospitals, factories, commercial buildings and other non-residential buildings.

(ii) Those not used as such i.e. one not covered by Section 140 (1) (a).

37. The buildings, therefore, described in Section 140 (1) (a), can safely be termed as 'public buildings', 'commercial buildings', 'industrial buildings' or 'non-residential buildings'. Similarly those covered by Section 140 (1) (b), we may safely term the same as 'residential buildings'. In our further discussion we will refer same accordingly.

38. Now method for determining 'annual value' of first category of buildings i.e. non-residential is as follows:

Monthly rate of rent per square foot of residential buildings fixed by clause (b)	x	Covered area of buildings or Open area of building, or both

39. The aforesaid value has to be multiplied by a multiplier as fixed by Rules. Whatever, value would be arrived at, would be further multiplied by twelve and that will be 'annual value'.

40. In respect of 'residential buildings' or 'land' for determining annual value firstly monthly rent has to be seen i.e.----

(a) Minimum monthly rate of rent per square foot of carpet area, or;

(b) Applicable minimum monthly rate of rent per square foot of the area in the case of land.

41. This minimum monthly rate of rent has to be fixed by EO of Municipality once in every two years, on the basis of location of buildings or land, nature of construction of the building, circle rate fixed by Collector for the purpose of Indian Stamp Act, 1899 and current minimum rate of rent of such area or such other factors in such manner as may be prescribed. Therefore, to determine minimum monthly rate of rent per square foot, manner and factors including certain aspect referred in Section 140 (1) (b), as prescribed, will be taken into consideration by EO of Municipality to determine minimum monthly rate of rent.

42. Now, carpet area of the building or area of the land shall be multiplied by minimum monthly rate of rent of carpet area of the building or area in the case of land and whatever value comes, it is twelve times of such value which is 'annual value'.

43. In other words, methodology is as under:

(a) EO of Municipality shall fix minimum monthly rate of rent per square foot of carpet area in the area of building or;

(b) Minimum monthly rate of rent per square foot area in the case of land.

44. For such fixation, he shall follow the manner as prescribed in Rules and take into consideration as under:-

(i) Location of building or land;

(ii) Nature of construction of building.;

(iii) Circle rate fixed by Collector;

(iv) Current minimum rate of rent in the area for such building or land;

(v) Such other factors as may be prescribed.

45. Thereafter, this minimum monthly rate of rent shall be multiplied by carpet area of building or the area of land as the case may be and then whatever value comes, it shall again be multiplied by twelve. That would give annual value.

46. Then explanation-I provides certain guidelines which have to be followed as an obligation by authority concerned in calculation of carpet area:-

(i) For rooms and covered Verandah its full measurement of internal dimension;

(ii) For Balcony, Corridor, Kitchen and Store it is 50 percent of internal dimension;

(iii) In the case of Garage, one-fourth of the internal dimension i.e. only 25 percent of the actual dimension;

(iv) Bathrooms, latrines, portico and staircase shall not form part of the carpet area.

47. Explanation-II states that agreed rent or standard rent etc. under Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction), Act, 1972 shall not be any standard for calculating annual value of building.

48. Section 140 sub-section (2) provides that Municipality may resolve to assess differently certain buildings occupied by owners and period of construction. If building is not more than 10 years old, 'annual value' may be determined 25 percent less and if it is more than 10 years old but less than 20 years old, relaxation in annual value may be 32.5 percent and if building is more than 20 years old, relaxation may be up to 40 percent. In respect of the buildings which are let on rent,

up to 10 years old building, relaxation is same i.e. 25 percent but in other cases it is 12.5 percent and equal to 'annual value' as the case may be.

49. Record shows that after amendment of Section 140 by U.P. Act No. 8 of 2011 the EO, NPP got a public notice published in daily newspaper 'Amar Ujala' a press note dated 12.10.2012/13.10.2012.

50. Section 140 requires determination of minimum monthly rate of rent shall be in such manner as may be prescribed. It is nobody's case that any Rule in respect of such determination were framed by Rule Framing Authority. Hence there was no manner prescribed.

51. The word 'prescribed' has been defined in Section 2 (17) (i) reads as under:-

"[(17) (i) "*Prescribed*" means prescribed by or under this Act or rules made thereunder or by or under any other enactment."

52. The 'prescribed' therefore must be either under the Act or by the Rules or under any other enactment.

53. Learned counsel for NPP did not dispute that manner prescribed, in the case in hand, is not covered by any provisions under Act, 1916 and, therefore, it should have come by way of any Rule but even Rules were not framed under U.P. Municipal Corporation Act, 1959 (hereinafter referred to as 'Act, 1959').

54. For the purpose of determination of annual value U.P. Municipal Corporation (Property Taxes) Rules, 2000 (hereinafter referred to as 'Rules, 2000') were framed but we are informed that under U.P. Act, 1916 no such Rules have been framed. Therefore other factors and manner as contemplated by Section 140 sub-section (1) is still unprescribed.

55. Section 141 has also been substituted U.P. Act No. 8, 2011 and the substituted provisions reads as under:-

*"**141. Preparation of assessment list.** - The Municipality or the Executive Officer authorized by it in this behalf, shall cause areawise rental rates and an assessment list in the municipal area or part thereof to be prepared from time to time in accordance with the manner prescribed in the rules."*

56. Similarly Section 141 talks of areawise rental rates and assessment list to be prepared in accordance with the manner prescribed in the Rules but here also we are not apprised of any Rules under which procedure has been prescribed. It is admitted by respondents that in respect of buildings and land, under U.P. Act, 1916, no such Rules have been made.

57. Section 141 as it existed prior to its substitution in 2011, did not contain the word 'areawise' rental rates. Earlier it was confined to only assessment list but substituted Section 141 now includes word 'areawise' rental rates i.e. to be prepared from time to time in accordance with the manner prescribed in the Rules.

58. Section 141-A inserted by amendment Act, 2011 gives an option to the owner or occupier of the building or land or both to himself assess his liability of tax in respect of the building or land, after determining annual value in accordance with Section 140 and deposit tax assessed by him in such manner and such form as may be prescribed. Therefore to attract Section 141-A also, manner and form has to be prescribed either under the provisions of Act, 1916 or Rules framed thereunder or both but if it is not prescribed at all, then we have to see its repercussion in the matter.

59. Section 141-B which is also inserted by amendment Act, 2011 makes it obligatory to every owner or occupier of the building or land to submit a return up to date but here also that has to be as prescribed. Failure to submit return may attract penalty as prescribed in Section 140-B. Therefore it also contemplates something to be done as prescribed. One has to follow provisions contained under the Act or the Rules, as the case may be, for such compliance.

60. Section 142 substituted by amendment Act, 2011 contemplates publication of list prepared under Section 141 in accordance with manner prescribed in Rules. This provision also specifically contemplates that list has to be published in accordance with manner prescribed in Rules.

61. Similarly Section 143 substituted by amendment Act, 2011 authorized Municipality or EO authorized by Municipality in this behalf, to dispose of objection in accordance with manner prescribed in the Rules. Here also the prescription and manner has to be, by framing of Rules.

62. It is admitted case of respondents including NPP that wherever provisions discussed above talk of manner etc. as prescribed, such has not been prescribed either under the Act or the Rules framed thereunder.

63. The meaning of the word 'prescribed' and its consequence came up for consideration before this Court **in Virendra Kumar Tyagi v. Ghaziabad Development Authority 2006 (1) AWC 834,** wherein Division Bench presided by Hon'ble R.K. Agrawal, J. (as His Lordship then was) construed Section 15 (2A) read with Section 2 (ii) of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'U.P. Act, 1973') and held that mutation charges can be levied and demanded at such rates and in such manner as may be prescribed. The meaning of the word 'prescribed' has been given the same meaning as under Section 4 of U.P. General Clauses Act, 1904 i.e. prescribed by Rules made under the Act. Court also observed that when something is required to be prescribed by framing Rules as per the provisions of the Act, such Rules can not be made unless notified in gazette. Following the well settled principle that if a Statute provides that an act has to be done in a particular manner then it has to be done in that manner alone or not at all, court

held that unless prescribed by Rules mutation charges can not be levied. Law laid down therein, in the context of mutation charges under U.P. Act, 1973 is equally applicable in respect to assessment of house tax and water tax under the provisions of U.P. Act, 1916, whereas we have already demonstrated above that unless prescribed Nagar Palika has no authority to do something on its own by acting upon itself as if even without any prescribed manner under the rules it is empowered to determine on its own, amount of tax and raise demand from the residents.

64. Similar view has been expressed by other Division Benches in **Dr. Umesh Chandra Maheshwari v. Mathura/Vrindavan Development Authority and another [2010 (4) ADJ 368 (DB)]** and **Smt. Rekha Rani Vs. State of U.P. and others [2014(1) ADJ 325 (DB)].**

65. For that purpose, NPP has relied on solely on the Government order dated 18.03.2011 and stated that it has followed the same. We may examine whether a Government order can be a substitute of something which is required by prescribed Act or Rules. First of all, we may examine whether Government order dated 18.03.2011 itself provides anything as required by Sections 140, 141, 141-A, 141-B, 142 and 143 as amended in 2011. Copy of this order has been filed as Annexure-CA-1 to the counter affidavit of NPP and reads as under:-

"उपर्युक्त विषयक प्रदेश की नगर पालिका परिषदों / पंचायतों के आय के संसाधन में वृद्धि एवं एकरूपता बनाये रखने के उद्देश्य से उत्तर प्रदेश नगर पालिका अधिनियम 1916 को उत्तर प्रदेश अधिनियम संख्या 8 सन् 2011 द्वारा निम्नलिखित व्यवस्था करने के उद्देश्य से संशोधित किया गया है-

(क) नगर पालिका द्वारा संपत्ति कर को उदग्रहीत करना (धारा 128)

(ख) नगर पालिका के निवासियों को स्वकर निर्धारण की सुविधा प्रदान करना (धारा 141 क)

(ग) नगर पालिका के क्षेत्र के भीतर गैर आवासीय संपत्ति के संबंध में वार्षिक मूल्य की परिभाषा को परिवर्तित करना (धारा 140)

2. अधिनियम में उक्त संशोधन उत्तर प्रदेश असाधारण गजट के विधायी परिशिष्ट के भाग-1 के खण्ड-क में अधिसूचना दिनांक 11.03.2014 द्वारा प्रकाशित किया गया है। अधिनियम में संशोधन से सम्बन्धित प्राविधान संलग्न हैं।

कृपया अधिनियम की उक्त संशोधित व्यवस्था का कड़ाई से अनुपालन सुनिश्चित किया जाय।"

"In reference to the above mentioned subject, with the objective of bringing about growth and uniformity in the means of income of Nagar Palika Parishads/Panchayats, the Uttar Pradesh Municipalities Act, 1916 has been amended by the Uttar Pradesh Act No. 8 of 2011 for making the following arrangements:-

(a) The property tax to be levied by Nagar Palika (Section 125).

(b) Providing facility of self tax assessment to the residents of Nagar Palika (Section 141 A).

(c) Modifying the definition of annual value in relation to non- residential property situated within the limits of Nagar Palika (Section 140).

(2) The aforesaid amendment has been published by the notification dated 11.03.2011 in the clause (A), part I under the legislative appendix of the Uttar Pradesh Gazette, Extraordinary. The provisions in relation to the amendment in the act is attached herewith.

Strict compliance of the aforesaid amended provisions of the Act may please be ensured."

(English translation by the Court)

66. The letter dated 18.03.2011 has been issued by Sri Alok Ranjan, Principal Secretary, Government of Uttar Pradesh and addressed to all Commissioners, District Magistrate of State of U.P. and Director of Local Bodies. It informs them that for the purpose of bringing uniformity and to augment income of Nagar Palika Parishad/Panchyats in the State of U.P., amendment has been made in U.P. Act, 1916 by U.P. Amendment Act No. 8 of 2011 and it refers to Sections 128, 140 and 141-A. It is also said that amendment has been notified in U.P. Gazette (Extraordinary) dated 11.03.2011 and amended provisions should be implemented and observed strictly. The aforesaid Government order nowhere requires or authorizes any Nagar Palika Parishad or Local Bodies to proceed to assess annual value on its own without there being any manner etc. prescribed as contemplated under the Act or the Rules. On the contrary, it requires Local Bodies to observe compliance of amended statute strictly. Copy of U.P. Amendment Act No. 8 of 2011 was appended to the aforesaid Government order dated 18.03.2011. Since aforesaid Act has no clause declaring as to when this amendment shall come into force, therefore, by application of provisions of U.P. General Clauses Act, amendment shall be taken to have come into force on the date of publication in official gazette i.e. 11.03.2011. The aforesaid Government order, nowhere authorized any Municipality or its EO or any one else to proceed to determine 'annual value' on their own, and make assessment, without following the requirement which has to be prescribed by Rules.

67. NPP Shikohabad, it appears, undertook on its own, authority to proceed to determine 'annual value' without waiting Competent Rule Framing Authority to prescribe manner etc. in which things have to be done, by making Rule. NPP due to its illegal and hurried act has caused disputed assessments which are subject matter of challenge in these writ petitions though it could have been avoided.

68. We also find it surprising to see that Board, NPP Shikohabad held a meeting on 31.10.2012 chaired by Sri Ram Prakash Yadav @ Nehru Ji and resolved to affirm rental rates as published in newspaper vide EO's letter dated 12.10.2012. Neither in counter affidavit nor supplementary counter affidavit it has been stated that EO was so authorized in this behalf by Municipality to prepare areawise rental rates and get it published.

69. Section 141 read with Section 142 specifically provides that either preparation and publication has to be done by Municipality or EO authorized by it in this behalf. Therefore, EO has to be authorized by Municipality in respect of action to be taken under Section 141 and 142, and, otherwise EO had no jurisdiction or authority to proceed on its own for preparation of areawise rental rates or assessment list and get it published.

70. Copy of letter dated 12.10.2012 sent by the then EO to Editor of newspaper also nowhere refers to any resolution of Municipal Board authorizing EO to proceed to prepare areawise rental rate and assessment and get it published and instead, it refers to only Government order dated 18.03.2011 which we have already discussed above, does not say anything. The EO, NPP, it appears was either deliberately and negligently proceeded in the matter by taking upon himself an authority which was not actually vested in him and for that purpose deliberately misrepresented things by referring to a Government order which did not confer any such authority.

71. We failed to understand as to what prevented NPP to pass an appropriate resolution, first to authorize EO so as to take action, as contemplated under Sections 141 and 142 and why EO on its own proceeded by treating upon himself a power which was not actually conferred upon him. This action of preparation and publication of rental list by EO vide letter dated 12.10.2012, by simply referring to Government order dated 18.03.2011, is patently without jurisdiction and a nullity in the eye of law. He had no such authority on 12.10.2012 to proceed to get published the so called assessment rental rates and assessment which were not even determined by any competent authority in the manner as prescribed in Statute till that time. The very basic exercise undertaken by EO was without jurisdiction.

72. We also find that Section 143 contemplates objections, when public notice is given with respect to areawise rental rates or assessment. Section 143, as it stood prior to 2011 amendment provided that not less than one month time shall be given from the date of public notice to concerned persons to make objections. A complete procedure was given in previous Section 143. Now amended provision has shifted procedure to be laid down in Rules. Hence so long as Rules are not framed and procedure including time for filing objection is prescribed in Rules, the local body or its authority can not usurp any power upon itself in its own wisdom.

73. Admittedly, Rules have not been framed. So long as Rules are not framed there was no occasion or justification for Municipality or EO to dispose of objections of concerned aggrieved persons. Moreover public notice in newspaper was published on 13.10.2012, and Board, passed resolution on 31.10.2012. It thus gave only 17 days time. Even if it would have followed old provision which contemplates minimum period of one month for inviting objections, that period had not expired. Nowhere, any existing provision has been shown to us in which such period has been prescribed so as to allow to consider subject of public notice on 31.10.2012.

74. Further we find reference to various objections but how and in what manner those objections were dealt with and decided, nothing has been said. The objections have to be disposed of in accordance with the manner prescribed in Rules.

75. When word 'disposed of' has been used by Statute, it does not mean that only a reference of such objection will be given, but points raised in such objections have to be considered. There has to be an application of mind for taking a particular view on such objections. But there is no such disposal of objections in the resolution dated 31.10.2012. It appears that Board treated objections as a mere formality and assumed that they can take a decision with respect to rental rates or assessment, as the case may be on their own caprice without disposal of objections in the manner prescribed in Rules. Therefore, this resolution passed on 31.10.2012 under chairmanship of the then President Sri Ram Prakash Yadav is also patently illegal and cannot be sustained.

76. Section 153 of U.P. Act, 1916 also provides that certain matters shall be regulated and governed by Rules, except insofar as specific provisions are made in the Act. It reads as under:-

*"**153. Rules as to assessment, collection and other matters.-** The following matters shall be regulated and governed by rules except in so far as provision therefor is made by this Act, namely,-*

*(a) the **assessment, collection or composition of taxes**;*

(b) the prevention of evasion of taxes;

(c) the system on which refunds shall be allowed and paid;

(d) the fees for notices demanding payments on account of a tax and for the execution of warrants of distress;

(e) the rates to be charged for maintaining live-stock distrained; and

(f) any other matter relating to taxes in respect of which this Act makes no provision or insufficient provision and provision is, in the opinion of the (State Government), necessary."

77. Therefore, without framing Rules laying down manner and other things, it was not possible or permissible, legally to NPP to determine monthly rental rates or assessment of any building or land for the purpose of levy of 'House Tax' or 'Water Tax'. The Statute as amended in 2011 is much different than it was earlier.

78. Earlier provisions contain more detailed procedure themselves but amended provisions have shifted prescription of procedure etc. to Rules. It is admitted that no such Rules were framed by Rule Framing Authority. It is not disputed that Rule Framing Authority is the State Government.

79. Supplementary counter affidavit filed on behalf of NPP and sworn by Mahadeo Singh newly posted TAO shows that new EO sought some clarifications from Government but admits that

no clarification has been received by it. It is also reiterated that monthly rent was determined by NPP Board based on Government order dated 18.03.2011, but we do not find anything contained in the order dated 18.03.2011 which requires determination of minimum monthly rent of any building or land, as the case may be, in a particular manner. When confronted, learned counsel appearing for NPP could not dispute this fact. In what manner even minimum monthly rate of various area was arrived at, has not been specified. Public notice only shows rates proposed by EO which have already been held as without any authority. The manner and method so as to arrive at such rate not disclosed either to the public or even to this Court. Apparently, it is a clear case of arbitrary determination on the part of an officer of NPP who was not authorized to do so as also NPP and entire exercise is patently illegal.

80. Things do not rest here. We find that there appears to be a public unrest and therefore taking note thereof District Magistrate, Firozabad constituted a Committee consisting of EO, NPP Shikohabad, City Magistrate Firozabad, General Manager District Industries Centre Firozabad and Additional District Magistrate (Finance and Revenue) Firozabad. They recommended, for the purpose of determination of monthly minimum rate of rent and Assessment/Self Assessment, procedure prescribed in Rules, 2000. These Rules are in respect of Nagar Nigams governed by Act, 1959 and not by U.P. Act, 1916.

81. The NPP in its counter affidavit has said that said Committee was illegally constituted and, therefore, recommendation of said Committee was not followed by it. We sustain this objection that Committee had no statutory basis for the reason that no such Committee is contemplated either under Act or any Rules or bye laws framed thereunder. Secondly, Rules framed under U.P. Act, 1959 applicable to the Municipal Corporations could not have been imported for the purpose of compliance of provisions of U.P. Act, 1916 by such Committee constituted by District Magistrate, for the reason that power and authority for such procedure vested in the Rule Framing Authority and has to be prescribed by Rules or by making specific provisions in the Act, 1916 which was not done by the competent authority. The Committee obviously had no such jurisdiction.

82. Having said so we also find that NPP also had no jurisdiction on its own to proceed to make wholly illegal assessments of rates of minimum rent of building and land and thereafter assessments when the manner of same has to be prescribed by competent authority i.e. Rule Framing Authority.

83. The audacious defiance on the part of NPP is also writ large from the fact that an appeal was preferred by a resident under Section 160 of U.P. Act, 1916 before Chief Judicial Magistrate, who declared such assessment illegal and held that it was not in accordance with Statute. Instead of looking into the matter in correct perspective so as to have an occasion to follow Statute, NPP simply ignored the said judgment rendered by a Court of law and continued to press for recovery based on wholly illegal assessment and that is why it has caused all these writ petitions which otherwise could have been avoided.

84. We may also take notice of the fact that dispute raised in these writ petitions is of a general nature covering entire residents of the area. Report of Committee constituted by District Magistrate shows that a large number of people raised complaints against arbitrary recovery being pressed by NPP and its authorities. In two appeals decided by Appellate Authorities, demand/assessment was quashed. But it did not deter NPP in its activities and it continued to proceed with its recovery with adamant attitude. This is neither expected from a statutory local authority nor from the officers and public representatives managing such body. It was responsibility of Chairman, NPP to ensure strict compliance of Statute, assisted by EO, who is highest executive servant of NPP and it is his obligation to assist elected Board in discharge of their duties in accordance with Statute, but, both have failed miserably. We find no justification even otherwise as to why illegal activities had continued. These writ petitions have been imposed though with a little more care and consideration shown by respondents in faithful observance of Statute, this bunch of litigation could have been avoided but that has not been done.

85. We, therefore, find it a fit case NPP should be saddled with exemplary cost.

86. The writ petitions are allowed. Assessments made by NPP and demand raised against petitioners are hereby quashed. Respondents NPP, Shikohabad shall be liable to pay cost of Rs. 50,000/- in each set of petitions.

87. Further, pursuant to impugned assessment and recovery any amount, if has been realized from petitioners, same shall be refunded with interest @ 10% per annum, which shall be computed from the date of payment by petitioners, till the date of refund.

88. However, we give liberty to State Government to look into the matter and recover the amount of cost and interest from the concerned EO or any other persons found responsible for such illegal act, by making such inquiry as permissible in law.

(2016) 9 ILRA 1769
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 578 Of 2016

M/S Ebiz. com Pvt. Ltd. ...Petitioner

Versus

Commissioner of Central Excise, Customs and Service Tax & Ors. ...Respondents

Counsel for Petitioner:
Chandra Kumar Rai, J.K. Mittal

Counsel for Respondents:
C.S.C., Krishna Agarawal

Central Excise Act, 1944 -- Section 11B -- Finance Act, 1994 -- Refund of amount deposited during search/investigation -- Nature of deposit -- Whether amount deposited by Assessee under coercion during search, subsequently appropriated towards a Service Tax demand which was later set aside in appeal, is 'duty' governed by Section 11B or a pre-deposit -- Revenue's contention that no refund application was filed under Section 11B(3) and that appeal against the appellate order was pending -- Held: Amount got deposited from an Assessee during pendency of investigation or adjudication proceedings, prior to any demand being crystallised, is in the nature of a deposit under protest/pre-deposit and does not partake the character of 'duty' or 'Service Tax' -- Principles of unjust enrichment under Section 11B have no application to refund of such pre-deposit -- Pendency of Revenue's appeal against the order setting aside the demand is not a valid ground to withhold refund of the pre-deposit. **(Paras 19-27)**

Central Excise Act, 1944 -- Interest on refund of pre-deposit -- Whether interest payable on delayed refund of pre-deposit though Section 11BB does not, in terms, apply to such deposit -- Held: Grant of interest on refund of pre-deposit stands settled by Circulars of the Central Board of Excise and Customs and by binding precedent -- Even in the absence of a specific statutory provision, interest on wrongfully withheld money is payable on general/equitable principles as compensation to a party wrongfully deprived of the use of its money by illegal retention -- Petitioner held entitled to refund of the pre-deposit together with interest at the rate of 12% per annum, computed from three months after the date of the appellate order till the date of actual payment. **(Paras 28-36)**

Writ Petition Allowed -- Respondents directed to refund the entire amount refundable to the petitioner pursuant to the Commissioner (Appeals)'s order dated 29.08.2012, together with interest at the rate of 12% per annum computed from three months after the date of that order till actual payment -- Petitioner also held entitled to costs quantified at Rs. 50,000/-. (Paras 36-37)

Case Law Discussed:
1. Commissioner of Central Excise, Coimbatore v. Pricol Ltd., 2015 (39) STR 190 (Mad.)
2. Suvidhe Ltd. v. Union of India, 1996 (82) E.L.T. 177 (Bom.)
3. Union of India v. Suvidhe Ltd., 1997 (94) E.L.T. A159 (S.C.)

4. Commissioner of Customs v. Mahalaxmi Exports, 2010 (258) E.L.T. 217
5. Parle International Ltd. v. Union of India, 2001 (127) E.L.T. 329 (Guj.)
6. Summerking Electricals (P) Ltd. v. CEGAT, 1998 (102) E.L.T. 522 (All.)
7. Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd., 2005 (179) E.L.T. 15 (S.C.)
8. Surinder Singh v. Union of India, 2006 (204) E.L.T. 534 (Del.)
9. Prince Khadi Woollen Handloom Producers Co-operative Society v. CCE, 1996 (88) E.L.T. 637 (SC)
10. Kuil Fireworks v. CCE, 1997 (95) E.L.T. 3 (SC)
11. Union of India v. TATA SSL Ltd., 2007 (218) E.L.T. 493
12. Hindustan Coca-Cola Beverages Pvt. Ltd. v. UOI, 2015 (324) E.L.T. 299 (Guj.)
13. Commissioner of Central Excise v. KVR Construction, 2012 (50) VST 469 (Karn.)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri J.K. Mittal and Sri Chandra Kumar Rai, learned counsel for petitioner and Sri Krishna Agarwal, learned counsel for respondents.

2. This writ petition has been filed under Article 226 of Constitution of India seeking a writ of mandamus directing respondents to refund amount of excess paid 'Service Tax', by petitioner, and retained by respondents, unauthorizedly and illegally, along with interest at the rate specified under Section 11B read with Section 35F of Central Excise Act, 1944 (hereinafter referred to as 'Act, 1944').

3. The brief factual matrix giving rise to present dispute is that M/S EBIZ.COM PVT LTD (hereinafter referred to as 'Assessee') is engaged in business of developing and selling various online/off line educational software packages. It is also providing holiday accommodation booking packages. It is registered with Service Tax Department since 2001.

4. On 12.01.2007 an Anti-Evasion Branch of Central Excise Department, Noida headed by Deputy Commissioner (A.E.) conducted search in petitioner's premises and got deposited Service Tax of Rs. 25,55,000/-. Petitioner was also forced to pay interest of Rs. 2,59,000/- on 29.03.2007.

5. Thereafter a show cause notice dated 03.07.2007 was issued by Additional Commissioner Central Excise, Noida (hereinafter referred to as 'ACCE') demanding 'Service Tax' on handling charges. Assessment was finalized by ACCE vide order dated 31.12.2007 confirming payability of 'Service Tax' of Rs. 25,55,000/- and interest of Rs. 2,59,000/- under Section 75. It further imposed penalty under Section 76, 77 and 78 of Finance Act, 1994.

6. Petitioner on 02.02.2008 deposited an amount equivalent to 25% of penalty, imposed under Section 78 of Finance Act, 1994.

7. Against order dated 31.12.2007, petitioner preferred Appeal No. 99/CE/APPl/NOIDA/08 but same was dismissed by Commissioner (Appeals) vide order dated 29.08.2008. Thereafter,

further Appeal No. ST/748/2008 was filed by petitioner before Central Excise Service Tax Appellate Tribunal (hereinafter referred to as 'Tribunal') which was allowed vide judgment and order dated 23.12.2012. Tribunal remitted matter back to Commissioner (Appeals) to rehear and decide.

8. Commissioner (Appeals), thereafter, vide order dated 29.08.2012, allowed appeal and set aside order dated 31.12.2007 whereby 'Service Tax' along with interest and penalty were imposed by ACCE. Order dated 29.08.2012 passed by Commissioner (Appeals) was communicated to Superintendent (Range-I) vide letters dated 02.04.2013, 06.06.2013 and 03.01.2014, requiring to refund entire amount deposited by petitioner under coercion exercised by respondents' authorities.

9. Despite personal visits, when petitioner did not receive any refund, he filed a refund claim on 27.01.2014 for Rs. 34,51,500/- in the office of Commissioner Central Excise, Customs and Service Tax, Noida (hereinafter referred to as 'Commissioner (CECST)'. Superintendent (Refund) Noida, wrote a letter dated 25.02.2014, requiring petitioner to submit some documents and also to file refund application in Form-R. No such form existed having been repealed long back. Other documents demanded were submitted by petitioner vide letter dated 25.02.2014. Petitioner sent reminder dated 25.03.2014 and reply dated 01.04.2014 to Superintendent (Refund) reminding that refund has to be granted within three months in terms of Board's Circular dated 08.12.2014.

10. Deputy Commissioner (Service Tax) issued a show cause notice dated 02.04.2014 requiring petitioner to show cause why refund claim be not rejected under Section 11B of Act, 1944 read with Section 83 of Finance Act, 1994 for the reason that refund claim ought to have been made within one year but not so made.

11. Petitioner then made a lot of correspondence with respondents. Further no any decision was taken by Deputy Commissioner (Service Tax) after serving notice which was duly replied by petitioner, hence this writ petition.

12. Respondents have filed a counter affidavit stating that petitioner paid 'Service Tax' voluntarily. It is also said that Section 11B of Act, 1944 would not be applicable since 'Service Tax' was deposited voluntarily and not under protest. It is also said that interest was also deposited by petitioner on his own since it was his legal obligation. Against Commissioner's order dated 29.08.2012, department reviewed matter and filed appeal before Tribunal which is pending. Since petitioner never filed any application for refund in accordance with Section 11B (3) of Act, 1944, hence respondents can not entertain any claim of refund, and, no refund claim of petitioner, in law, is pending with respondents. No refund is due, automatically. Moreover, order of Commissioner (Appeals), dated 29.08.2012, is not final since appeal is pending before Tribunal. Board's Circular dated 08.12.2014 deals with amount deposited under Section 35F while in the present case it is Section 11B which will be applicable. Since petitioner never filed application as prescribed under Section 11B, hence no mandamus for refund is permissible.

13. The issue is simple though sought to be made complex, and it is, "Whether petitioner is entitled for refund, and if yes, whether also entitled for interest thereon."

14. The undisputed facts are that show cause notice dated 03.07.2007 was issued to petitioner to show cause why "Service Tax" of Rs. 25,55,000/- for the period of July 2003 to January 2006 should not be recovered from him under Section 73(1) of Finance Act, 1994, under extended period of limitation. It was also stated that since this amount was already paid, same may be appropriated. Further, notice required to show cause why interest of Rs. 2,59,000/- as per Rule-6 of Service Tax Rules, 1994 read with Section 75 of Finance Act, 1994 may not be recovered from petitioner. Since it was already paid voluntarily, why the same should not be appropriated.

15. The facts stated by Revenue in notice dated 03.07.2007 that petitioner's deposit already made, why be not appropriated, shows that on that dated, Revenue was clear in its understanding that money lying with them does not belong to them, but they are, at the best, custodian and in fact money belong to petitioner. Till it is not appropriated, it was in the nature of deposit or predeposit. The Adjudicating Authority thereafter passed order confirming aforesaid demand and appropriating amount already deposited by petitioner towards 'Service Tax' and interest on 'Service Tax'. It is thus evident that petitioner had not deposited any 'Service Tax' or interest but deposit of Rs. 25,55,000/- and Rs. 2,59,000/- was in the nature of pre-deposit which, subsequently, after confirming demand, was appropriated by Adjudicating Authority.

16. Commissioner (Appeals) found that under Section 65 (105) (zzb) of Finance Act, 1994, taxable service under category of "Business Auxiliary Services" cover only service provided or to be provided to client, by any person in relation to "Business Auxiliary Services" as defined under Section 65 (19) of the Finance Act, 1994. After considering nature of business etc., it held that petitioner was not engaged in providing any service to client in any manner in terms of category defined under Section 65 (19) of Finance Act, 1994, hence not chargeable to 'Service Tax' under category of "Business Auxiliary Services" under Section 65(105) (zzb) and demand of 'Service Tax' along with interest and penalty was not justified. The demand of 'Service Tax' and interest and appropriation of amount already deposited, against such demand rendered illegal and without any authority of law.

17. Apparently, in view of aforesaid facts, it can not be said that Section 11B Central Excise Act, 1944 has no application in the case in hand. Section 11B Central Excise Act, 1944 reads as under:-

"Section 11B Claim for refund of duty.-

(1) Any person claiming ***refund of any duty of excise*** *may* ***make an application for refund of such duty*** *to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise* ***before the expiry of one year from the relevant date in such form and manner as may be prescribed*** *and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish* ***to***

establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:

Provided further that the ***limitation of one year shall not apply where any duty has been paid under protest.***

(2) If, ***on receipt of any such application****, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central* ***Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable****, he may make an order accordingly and the amount so determined* ***shall be credited to the Fund:***

*Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall****, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--***

(a) ***rebate*** *of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;*

(b) ***unspent advance deposits*** *lying in balance in the applicant's current account maintained with the Commissioner of Central Excise; "(b****) unspent advance deposits*** *lying in balance in the applicant's current account maintained with the Commissioner of Central Excise;"*

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

*(d) the duty of excise paid by the manufacturer****, if he had not passed on the incidence of such duty to any other person;***

*(e) the duty of excise borne by the buyer****, if he had not passed on the incidence of such duty to any other person;***

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued ***unless in the opinion of the Central Government, the incidence of duty has not been passed on by the persons concerned to any other person.***

*(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force****, no refund shall be made except as provided in sub-section (2).***

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

18. It is urged that amount got deposited from petitioner under coercion, pursuant to search conducted on 12.01.2007, and retained by respondents subsequent appropriation is illegal jurisdiction. The same is liable to be refunded along with interest.

19. We have to examine, if there is any provision applicable to the facts of the case in dealing with the demand of petitioner for refund of the amount along with interest or whether in general law, petitioner can be held entitled to such relief.

20. If an amount is paid by an assessee, in duty of excise, pursuant to a liability created under a Statute or by statutory order, passed by competent authority, and such demand is later found illegal, Section 11 AB contemplates that amount received shall be refunded to assessee provided that the incidence of such duty had not been passed on by him to any other person.

21. In the present case, the amount in question, refund whereof is claimed, was not paid. It is not such amount of duty which was deposited by assessee. To check evasion of 'Excise duty' or 'Service Tax', raid was conducted on 12.01.2007, when during raid, sum of Rs. 25,55,000/- was got deposited. Amount of interest thereon was subsequently realized from petitioner on 29.03.2007 i.e. before issue of notice on 03.07.2007. Such deposit was involuntary by petitioner since no one shall deposit a huge money without creation of liability in law. Such an amount has been held to be a pre-deposit and principles of unjust enrichment has been held inapplicable in such cases.

22. In **Commissioner of Central Excise, Coimbatore v. Pricol Ltd. 2015 (39) STR 190 (Mad.)** of Division Bench of Madras High Court had an occasion to look into a similar dispute. Therein also payment was made during investigation by assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by Assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless Assessee prove that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by Assessee at the time of investigation under protest. Similarly in the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in original proceedings itself. Court has said as under:-

" There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."

23. It has been consistent view various Courts that any amount, deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and, therefore, principles of unjust enrichment would not be attracted.

24. Madras High Court in **Commissioner of Central Excise v. Pricol Ltd. (supra)** relied on a Bombay High Court judgment in **Suvidhe Ltd. v. Union of India - 1996 (82) E.L.T. 177 (Bom.**); Gujarat High Court judgments in **Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) E.L.T. 217; Parle Internation Ltd. v. Union of India - 2001 (127) E.L.T. 329 (Guj.)** and this Court's judgment in **Summerking Electricals (P) Ltd. v. CEGAT - 1998 (102) E.L.T. 522 (All.**).

25. Against the judgment of Bombay High Court in **Suvidhe Ltd. (supra),** Revenue preferred an appeal before Supreme Court but High Court's view was maintained. The said judgment is reported in **Union of India v. Suvidhe Ltd. - 1997 (94) E.L.T. A159 (S.C.).**

26. We are also informed that following the judgment in **Suvidhe Ltd. (supra),** Central Board of Excise and Customs (hereinafter referred to as 'CBEC') issued Circular No. 275/37/2K-CX.8A dated 02.01.2002 providing as under:-

"2. It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of NELCO LTD, challenging the grant of interest on delayed refund of pre-deposit as to whether:

(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,

(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.

The Hon'ble Supreme Court vide its order dated 26.11.2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for ***dismissal****, it can well be constructed in the light of its earlier judgment in the case of Suvidhe Ltd. And Mahavir Aluminium that the law relating to refund of pre-deposit has become final.*

3. In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. ***A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose.*** *All pending refund applications already made under the relevant provisions of the Indirect Tax Enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned."*

27. Circular dated 02.01.2002 has been modified by subsequent Circular dated 20.06.2003 to the following effect:-

"It has been brought to the notice of the Board that the wordings in para 4 of the Circular, namely, "any deviation and resultant liability to interest on delayed refunds shall be viewed strictly" convey the impression that interest is liable to be granted for refund of pre-deposits even when there is no corresponding provision in the Central Excise Act, 1944. The mater has been examined and the sentence is re-worded as under:-

"Any deviation from the procedure explained hereinabove shall be viewed strictly."

28. There is one more Circular No. 802/35/2004-CX dated 08.12.2004 which provides that against an order whereunder refund is admissible to an assessee with regard to the pre-deposit, if an appeal is pending, that shall not be taken as justification for denying refund.

29. The question of interest on delayed deposit or refund pre-deposit came to be considered by Supreme Court in **Commissioner of Central Excise, Hyderabad v. I.T.C. LTD. 2005 (179) E.L.T. 15 (S.C.)**. A statement was made on behalf of the Central Board of Excise and Customs by the Solicitor General of India that Board proposes to issue a circular in connection with the payment on all such pre-deposits. A draft copy of the circular was also handed over to the Supreme Court. In view thereof, Supreme Court decided the appeal holding as under:-

"Having regard to the contents of the draft circular we direct compliance with the final order impugned before us and payment of interest in terms of the draft circular. The draft circular shall be appended to and the contents form part of this order. The appeal is disposed of. In view of this order any judgment of any High Court holding to the contrary will no longer be good law."

30. Supreme Court in the aforesaid order allowed interest at the rate of 12% per annum.

31. Then we come on the question of interest on refund. In this regard, we find that a Division Bench of Delhi High Court in **Surinder Singh v. Union of India 2006 (204) E.L.T. 534 (Del.)** relying on Supreme Court judgment in **Prince Khadi Woollen Handloom Producers Co-operative Society v. CCE 1996 (88) E.L.T. 637 (SC),** said that State, if has wrongly collected a tax from a person, and, even if there is no specific provision, still is liable to refund tax along with interest. Similar view was taken in **Kuil Fireworks v. CCE 1997 (95) E.L.T. 3 (SC) and CCE Hyderabad v. ITC 2005 (179) E.L.T. 15 (SC).**

32. Recently also in **Union of India v. TATA SSL Ltd. 2007 (218) E.L.T. (493),** Court held that pre-deposit is refundable along with interest and for that purpose, relied on its decision in **Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd. (Supra)** and Central Board of Excise and Customs' Circular dated 08.12.2004.

33. In a recent judgment of Gujarat High Court in **Hindustan Coca-Cola Beverages Pvt. Ltd. v. UOI 2015 (324) E.L.T. 299 (Guj.),** an argument was raised, if there is no provision for payment of interest, the same shall not be payable. Court in para 5.4 and 6 said as under:-

"5.4 The ***contention to the effect that no interest is payable because there is no provision of interest under the scheme of the Act is also thoroughly misconceived and misplaced. When the Department acts illegally and not as per the scheme of the Act, the interest on such refund can never be provided for under the Scheme of the Act.*** *If the authorities act as per the law, the question of granting interest on refund can be appreciated and considered as per the scheme of the Act.*

6. ***Learned Senior Advocate for the petitioner cited various judgments in support of his contention that even in absence of any statutory provision, interest on refund is automatic and has to be granted on commercial principles. The Court finds force in the contentions of the learned Senior Advocate for the petitioner****. The learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of Sandvik Asia Ltd. v. Commissioner of Income-tax, Pune (supra), wherein the Hon'ble Apex Court* ***even while finding that there was no statutory provision to pay interest on delayed payment of interest, held the assessee entitled to the same on general principles and found that the assessee would be entitled to be compensated by way of interest on interest.*** *It was further pointed out by the learned Senior Advocate for the petitioner that the decision of the Hon'ble Supreme Court in the Sandvik Asia Ltd. v. Commissioner of Income-tax, Pune (supra), has been referred to a Larger Bench in the case of Commissioner of Income-tax, Gujarat v. Gujarat Flouro Chemicals, (2012) ITR 319 (SC). The said decision is neither stayed nor suspended and therefore, continues to hold the field. Moreover, the said decision is doubted with respect to the issue whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance tax/TDS paid exceeds the assessed tax. Therefore, a doubt is cast only in respect of*

the finding which is in context with Section 214 and Section 244 of the Income-tax Act, 1961 and not with regard to grant of interest as compensation to the party who has been wrongfully deprived of the use of its money by an illegal retention of the same by the authority. ***Therefore, the said decision will continue to hold good in respect of refund cases, on equitable considerations, where any amount is wrongfully withheld from an assessee without authority of law."***

34. We may also refer hereon a Division Bench judgment of Karnataka High Court in **Commissioner of Central Excise v. KVR Construction 2012 (50) VST 469**, wherein construing Section 11B, Court said that it refer to claim for refund of duty of excise only and does not refers to any other amount collected without authority of law. That was a case of 'Service Tax' and Court said as under:-

"Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to leavey and collect such service tax. In case, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularize such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17.09.2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When ***once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levey and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them****. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion."*

35. The consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorizedly or under mistaken notion etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest.

36. In view of above, we allow the writ petition directing the respondents to refund the entire amount refundable to the petitioner as a result of Commissioner's order dated 29.08.2012 with interest at the rate of 12% per annum, which shall be computed from the date, after three months of passing of order by Commissioner, till the amount is actually paid.

37. Petitioner shall also be entitled to cost which is quantified to Rs. 50,000/-.

(2016) 9 ILRA 1779
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 948 Of 2015

M/S Dabur India Limited ...Petitioner
Versus
Union Of India & Ors. ...Respondents

Counsel for Petitioner:
Nishant Mishra, M.P. Devnath

Counsel for Respondents:
Ashok Singh

Central Excise Act, 1944 -- Section 11BB -- Interest on delayed refund of excise duty -- Classification dispute -- Refund following Tribunal's finding that product not classifiable under disputed Heading -- Assessee's application for refund rejected on one pretext or the other over several rounds of litigation, culminating in refund being allowed after over fourteen years but without interest -- Whether Assessee entitled to interest under Section 11BB for the entire period of delay reckoned from three months after filing of refund application, notwithstanding that intervening orders rejecting/allowing refund were themselves set aside in appeal -- Held: Interest under Section 11BB becomes payable on expiry of three months from the date of receipt of the application for refund under Section 11B(1), and this liability is not deferred merely because the Revenue passed erroneous orders which were subsequently held illegal by the Tribunal and the High Court -- The date of the final order allowing refund is not relevant for computing interest; what matters is the date of the refund application -- No person can take advantage of his own wrong, and Revenue authorities who wrongfully retained the Assessee's money through illegal orders cannot escape liability to pay interest for the entire period of delay -- Petitioner held entitled to interest under Section 11BB from three months after the date of the refund application till the date of actual payment, together with costs. **(Paras 5-15)**

Writ Petition Partly Allowed -- Respondents directed to pay interest on the refunded amount for the period the refund was delayed, computed from three months after the date of the refund application till the amount was actually paid -- Petitioner also held entitled to costs quantified at Rs. 25,000/-. (Paras 16-17)

Case Law Discussed:
1. M.D., H.S.I.D.C. and Ors. v. Hari Om Enterprises and Another, 2009 (16) SCC 208
2. Badri Kedar Paper Pvt. Ltd. v. U.P. Electricity Regulatory Commn. and others, 2009 (3) SCC 754
3. National Highways Authority of India and Anr. v. Bumihiway DDB Ltd. (JV) and others, 2006 (10) SCC 763
4. India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd., 2007 (5) SCC 510
5. Ranbaxy Laboratories Ltd. v. Union of India & others, 2011 (10) SCC 292
6. Union of India (UOI) and others v. Hamdard (Waqf) Laboratories, AIR 2016 SC 1124

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Nishant Mishra and Sri M.P. Devnath, learned counsels for petitioner and perused the record.

2. Question of classification of petitioner's product 'Gulabari' and rate of tax was in dispute between petitioner and Central Excise Department which was finalised by Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi vide judgment dated 14.01.2000, holding that product 'Gulabari' is not classified under Heading 33.03 of the First Schedule to Central Excise Tariff Act, 1985 (hereinafter referred to as 'Act 1985').

3. It is not disputed that in the meantime when such dispute was pending, Excise Authorities insisted upon petitioner to deposit excise duty by treating aforesaid product under classifiable Heading 33.03 and as a result whereof a total sum of Rs. 1,14,78,517/- was deposited by petitioner.

4. Once matter was decided by Tribunal and judgment attained finality, petitioner became entitled for refund. Hence application for refund was submitted by petitioner in prescribed proforma on 08.03.2000. The said application was rejected by Central Excise Authority and that matter went up to Customs, Excise & Service Tax Appellate Tribunal, New Delhi who allowed appeal of petitioner vide order dated 10.10.2003 and thereafter Assistant Commissioner passed another order dated 20.01.2006 holding that though petitioner was entitled for refund but the same shall not be refunded for the reason that it is hit by clause of unjust enrichment. This order of Assistant Commissioner dated 20.01.2006 was confirmed by Commissioner (Appeal) whereagainst petitioner went to Tribunal who decided in favour of petitioner vide judgment dated 10.04.2008 and appeal preferred by Revenue was also dismissed by this Court vide judgment reported in 2014 (304) ELT 321 (All). It is only then, Assistant Commissioner passed order dated 17.07.2014 allowing refund but rejecting claim to pay interest on aforesaid amount.

5. Counsel for petitioner submitted that under Section 11BB of Central Excise Act, 1944 (hereinafter referred to as 'Act 1944'), any duty ordered to be refunded to any applicant, if not refunded within three months from the date of receipt of application, Assessee shall be entitled for interest on such rate not below ten percent and not exceeding thirty percent on the delayed amount.

6. In the present case, refund became due to petitioner after the matter was decided by Tribunal on 14.01.2000 whereupon an application was also submitted by petitioner on 08.03.2000 but for one or other reason, incorrect and illegal orders were passed by Revenue authority and could not defeat in even up to this Court, yet amount was refunded only in 20.01.2006 and that too without any interest.

7. Facts detailed above evidently show that respondent authorities were adamant in retaining huge money legally refundable to petitioner for one or the other reason which could not withstand when tested in Court i.e. Tribunal and this Court. Now respondents are trying to deprive petitioner, benefit of interest though respondents themselves were guilty by not refunding amount in due time and also withheld the same without any authority of law. In other words, here is a case, where respondents deprive petitioner of his property in a manner which was not permissible in law. Once it was held by Tribunal, vide judgment and order dated 14.01.2000 that product "Gulabari' was not classifiable under the Heading 33.03 of the First Schedule of Act 1985. Pursuant thereto petitioner submitted application for refund in prescribed form but the Revenue authorities again relying on Heading 33.03 rejected claim for refund and again lost before Tribunal who held vide order dated 10.10.2003 that once an issue was already decided by it, it was not open to departmental authorities to sit in appeal and reiterate their view which has not been found correct by Tribunal in its order dated 14.01.2000. Respondents therefore, had no authority in law to retain the amount realised from petitioner on and after the judgment dated 14.01.2000 passed by Tribunal and non refund thereof despite of application filed by petitioner in prescribed form under Section 11BB renders them liable to pay interest on refundable amount.

8. It is well established that no person can take advantage of his own fault.

9. In the present case, we find that respondents have retained huge money of petitioner without any authority of law and for their own fault are penalising the petitioner by denying due interest on the amount refundable to petitioner.

10. In **M.D., H.S.I.D.C. and Ors. vs. Hari Om Enterprises and Another, 2009 (16) SCC 208,** Court said "party cannot take advantage of its own wrong". Same view was taken in **Badri Kedar Paper Pvt. Ltd. vs. U.P. Electricity Regulatory Commn. and others, 2009 (3) SCC 754 and National Highways Authority of India and Anr. vs. Bumihiway DDB Ltd. (JV) and others, 2006 (10) SCC 763 and India Household and Healthcase Ltd. Vs LG Household and Healthcare Ltd., 2007 (5) SCC 510**.

11. There is another aspect of matter, application for refund was filed by petitioner on 08.03.2000. Under Section 11 BB it is provided that if the authority is satisfied that an amount is to be refunded to Assessee but the same has not been refunded within three months from the date of filing of application, Assessee would be entitled for interest. Order passed by Revenue authority under Section 11B(2) for refund is not relevant for the purpose of attracting interest under Section 11BB but what is said that once refund is found admissible, Assessee if has not been refunded the amount within three months from the date of receipt of application under sub Section (1), he shall be paid interest. Meaning that there is no time limit prescribed for taking a decision about refund but that law makes it very clear that amount if not refunded within three months from the date of receipt of application, interest shall be payable.

12. In our view, even if an order has been passed much later on, for the purpose of interest it will relate back and Assessee would be entitled for interest after three months from the date he has filed application under Section 11B.

13. In **Ranbaxy Laboratories Ltd vs Union Of India & others, 2011 (10) SCC 292** construing Section 11BB Court has said "interest under Section 11BB of Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1) of Section 11b of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable."

14. Recently, in **Union of India (UOI) and others Vs. Hamdard (Waqf) Laboratories, AIR 2016 SC 1124** Court held "...our answer to the question formulated in para (1) supra is that the liability of the revenue to pay interest Under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund Under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made."

15. Considering aforesaid exposition of law and factum that after the judgment of Tribunal dated 14.01.2000 petitioner was entitled for refund and he had also submitted application on 08.03.2000, pursuant whereto refund was not made within three months. In our view, petitioner would be entitled for interest under Section 11BB of Act 1944, after three months from the date of representation till the amount of refund actually paid.

16. In the result, writ petition is partly allowed. Respondents are directed to pay interest on the refunded amount for the period refund was delayed after three months from the date of application till it is actually paid.

17. Petitioner shall also be entitled to cost which we quantify to Rs. 25,000/-.

(2016) 9 ILRA 1783
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 970 Of 1983

Murari **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Sri S.P. Tewari, Sri Ajay Dubey, Ms. Kamini Pandey, Sri P.N. Mishra

Counsel for Respondent:
A.G.A., Sri Satya Prakash

Criminal Procedure -- Section 396 I.P.C. -- Dacoity -- Murder During Dacoity -- F.I.R. Silent on Names of Accused -- 20-21 dacoits raided the houses of P.W.1 and P.W.2 at night, during which the son of P.W.1 was shot dead and the son of P.W.2 was assaulted -- F.I.R. lodged about 7-8 hours later by a neighbour, P.W.3, did not name a single accused though several perpetrators were subsequently claimed to have been recognised by P.W.1, P.W.2, P.W.4 and P.W.5 -- appellants Murari, Jeevan, Hema and (late) Shyama convicted under Section 396 I.P.C. and sentenced to life imprisonment. (Paras 1-9)

Evidence -- Recognition of Accused Confined to Persons with Whom Witnesses Had Prior Inimical Relationship -- Concealment of Faces by Dacoits -- Held: all the eye-witnesses admitted that the dacoits had covered their faces with scarves, yet each claimed to have recognised precisely those persons with whom they, or their family, had a pre-existing property or marital dispute -- explanations offered for such selective recognition, including that faces were open only from the front, are inherently improbable -- where witnesses concede concealment of identity by the accused and yet claim recognition confined to persons against whom they harbour ill-will, such testimony must be viewed with grave suspicion. (Paras 10-14, 21-26)

Evidence -- Non-Examination of Independent Witnesses Named as Present at the Spot -- Adverse Inference -- Held: numerous persons, armed with lathis and firearms, were named by the prosecution witnesses themselves as having gathered at the spot and even repelled the dacoits by retaliatory fire, yet not a single one of them was produced by the prosecution -- the only independent witness who lodged the F.I.R. specifically disowned recognition of any accused -- withholding of such independent testimony, coupled with absence of any recovery from the appellants and absence of any criminal history, renders the prosecution version doubtful. (Para 27)

Evidence -- Plea of Alibi -- Corroboration by Independent Defence Witness -- Standard of Appraisal -- Held: evidence of prosecution and defence witnesses must be appraised on the same yardstick of credibility and truthfulness, and defence evidence cannot be discarded merely because it is led by the defence -- plea of alibi of appellant Jeevan, supported by the testimony of an independent Mess Commander and contemporaneous mess records showing his presence at a distant Army establishment on the date of occurrence, found credible and not liable to be discarded. (Paras 29-30)

Criminal Appeal Allowed -- Judgment and order dated 20.4.1983 passed by the Special Sessions Judge, Dacoity Affected Area, Agra in Sessions Trial No. 22 of 1982, arising out of Crime No. 17 of 1982, Police Station Achnera, District Agra, convicting and sentencing appellants Murari, Jeevan and Hema under Section 396 I.P.C. to life imprisonment, set aside -- appellants acquitted, bail bonds cancelled and sureties discharged, appellants to be released forthwith if not wanted in any other case. (Paras 31-33)

(Delivered By Hon'ble Bharat Bhushan, J.)

1. Appellants, Murari, Jeevan, Hema and late Shyama were charged under Section 396 of Indian Penal Code (in short I.P.C.) on 31.5.1982 by the court of Special Judge constituted under U.P. Dacoity Affected Area Act 1983 (in short Dacoity Act).

2. Appellant Shyama died during course of trial, therefore, his trial stood abated. Remaining three appellants, namely, Murari, Jeevan and Hema were convicted under Section 396 I.P.C. and sentenced to undergo imprisonment for life vide judgment and order dated 20.4.1983 passed in S.T. No.22 of 1982 arising out of Crime No.17 of 1982 (State Vs. Murari and others) Police Station(P.S.) Achnera, District Agra.

3. Brief facts giving rise to this appeal are, that between the night of 22/23.1.1982 around 11 pm. in village Nagar, P.S. Achnera, Bhoop Singh (P.W. 2) was having conversation with his brother Preetam Singh in the verandah of his house after coming back from their agriculture field. His son Bahadur Singh (P.W. 4) was sleeping inside the room. Suddenly, some 20-21 dacoits entered his house after breaking the door of his house. The dacoits picked up the double barrel gun of Bhoop Singh (P.W.2) and commenced the dacoity. Bahadur Singh (P.W.4) got awakened, picked up a lathi and assaulted one dacoit. The dacoit, who lost his riffle in this attack, got infuriated. The dacoits grabbed Bahadur Singh (P.W. 4), took him to gallery and hit him with lathies and butt of guns. The light of lantern was available in the verandah. Dacoits were using flashlights also. Miscreants were armed with various kinds of fire arm weapons, though one or two dacoits were only using lathies. It is said that dacoits plundered the house of Bhoop Singh (P.W.2) and Preetam Singh for almost half an hour and thereafter ransacked the residence of Vijay Singh (P.W. 1). Virendra Singh son of Vijay Singh was busy in studies in his room but Vijay Singh's nephew Ram Bhajan (P.W. 5) and his brother-in-law Nihal Singh got awakened after hearing the noise of fire arm weapons. Deceased Virendra Singh son of P.W. 1 Vijay Singh fought with dacoits and allegedly shouted that he had recognized accused/appellant Hema. He is said to have grabbed the appellant Hema, whereupon another dacoit, namely, appellant Murari shot Virendra Singh from very close quarters and killed him.

4. Vijay Singh (P.W. 1) claims to have recognized accused appellants Hema, Murari, Jeevan, late Shyama his sons Kartar and Randheer. He also sighted other dacoits but could not recognize them. The dacoits pillaged the residence of Vijay Singh for almost forty five minutes and thereafter left.

5. Core of prosecution story is that the dacoity was committed at the residence of P.W. 1 Vijay Singh and P.W. 2 Bhoop Singh wherein Virendra Singh son of Vijay Singh was killed and

Bahadur Singh (P.W. 4) son of P.W. 2 Bhoop Singh was severely wounded. The prosecution has claimed that Vijay Singh (P.W. 1) had recognized appellant Murari, Hema, Jeewan, late Shyama, his sons Kartar and Randheer while Bhoop Singh (P.W. 2) was also able to recognize appellants Murari, Jeevan, Hema and three others, namely, late Shyama, his sons Randheer and Kartar. A first information report (F.I.R.) (Exh. Ka-4) was lodged by one Hitler Singh (P.W. 3) resident of same village Nagar without naming any accused. This report was lodged in morning at 7 am. at P.S. Achnera, District Agra. The distance between the police station Achnera and village Nagar is said to be seven miles as per chick report (Exh. Ka-5). Subsequent to lodging of F.I.R., investigation was conducted by P.W. 7 H.K. Vashishtha, the then Station House Officer (S.H.O.), P.S. Achnera. He rushed to the place of occurrence, recorded the statements of various witnesses, prepared site plan, took samples of blood stained earth and simple earth and thereafter submitted charge-sheet (Exh.Ka-16) against the appellants Hema, Jeevan, Murari and late Shyama.

6. The trial Judge framed charges against appellants Murari, Jeevan and Hema along with late Shyama under Section 396 I.P.C. Appellants pleaded not guilty and desired to be tried. During course of trial as many as 7 witnesses were produced by prosecution. Vijay Singh father of deceased Virendra Singh gave his evidence as P.W. 1. Bhoop Singh father of injured Bahadur Singh as P.W.2, Hitler Singh, informant as P.W. 3, Bahadur Singh as P.W. 4, Ram Bhajan eye witness as P.W. 5, constable Kashmir Singh as P.W. 6 and H.K. Vashishtha the then S.H.O., P.S. Achnera as P.W. 7. The statements of appellants were recorded under Section 313 Cr.P.C. wherein they denied all allegations. Defence also produced Ram Vilas Singh, the then Mess Commander, Armoured division Head quarter Squadron, Ambala as D.W. 1 for supporting the plea of alibi raised on behalf of appellant Jewan. As stated earlier, Shyama died during trial, therefore, the criminal proceedings against late Shyama stood abated. The trial court found three appellants, namely, Murari, Jeevan and Hema guilty of offence under Section 396 I.P.C. They were sentenced to undergo an imprisonment for life. This judgment is under challenge before this Court.

7. Heard Sri S.P. Tewari learned counsel for appellants and learned A.G.A. on behalf of State.

8. Before embarking to analyze the prosecution evidence, it would be appropriate to refer briefly the content of evidence available on record.

9. F.I.R. (Exh.Ka-4) was lodged by P.W. 3 Hitler Singh, admittedly neighbour of victims of dacoity, namely, P.W. 1 Vijay Singh and P.W. 2 Bhoop Singh. Incidentally appellants Murari and Jeevan also belong to the same village Nagar. It is admitted by P.W. 1 Vijay Singh that only 5-6 houses situate between his house and residence of appellant Murari. Similarly Jeevan also lives in the neighbourhood. Hema is admittedly related to appellant Murari and had in fact received his initial education in the same village. Admittedly, he was known to village folks and certainly to P.W. 1 Vijay Singh. However, F.I.R. does not contain the names of any accused. Though presence of several witnesses, namely, Preetam Singh, Nawab Singh, Gyasi, Fauran Singh, Kashmir Singh, Kirodi, Bhagwan Singh, Sonveer and Atar Singh have been mentioned in F.I.R.

10. P.W. 1 Vijay Singh is the father of deceased Virendra Singh. He could not lodge the F.I.R. though he has deposed about the incident in detail. He has testified that in the night of occurrence, he was sleeping in his room along with his nephew Ram Bhajan and his brother-in-law Nihal Singh. His deceased son Virendra Singh was reading in the same room. All of them got awakened on hearing the noise of fire arm weapons. The dacoits entered into his house by using staircase. This witness could perceive that the house of P.W. 2 Bhoop Singh had also been robbed. His son Virendra Singh entered into scuffle with one desperado and allegedly shouted that he had recognized the appellant Hema. He is said to have also caught appellant Hema but allegation is that appellant Murari put the gun at Virendra Singh's body and shot him. House was robbed by dacoits who were 20-21 in number. But P.W. 1 claims to have recognized only appellant Hema, Murari, Jeevan and three others, namely, late Shyama, his sons Kartar and Randheer. He has also claimed that he would be able to recognize other accused persons as well, if produced before him. He has testified that Bahadur Singh (P.W.4) son of Bhoop Singh (P.W.2) was also hurt in the same incident. He was beaten by butt of fire arms and Pharsa (axe). It is claimed that several villagers, namely, Preetam Singh, Nawab Singh, Gyasi, Fauran Singh, Kashmir Singh and Kirodi etc. arrived on the spot. Some of them were armed with lathies and some of them were armed with firearm weapon and that; these witnesses opened retaliatory fire upon miscreants. Accused/appellants and their cohorts, therefore, left the village with looted goods. It is pertinent to point out that this witness initially claimed that miscreants had concealed their identity by covering their faces but still he was able to recognize appellants. The testimony of P.W. 1 Vijay Singh indicates that he had prior inimical relationship with appellant Murari on account of his stated failure to recover the loaned money from Murari.

11. P.W. 2 Bhoop Singh has also testified in the similar vein. He has stated that miscreants had covered their faces. However, he could manage to recognize appellants Murari, Jeevan and Hema as well as other accused, namely late Shyama and his sons Randheer and Kartar. P.W. 2 Bhoop Singh has said that 20-21 dacoits entered into his house and looted him for almost half an hour. Lantern was burning in his house. Dacoits were also flashing torches. He also claimed that he would be able to recognize other miscreants as well, if produced before him. This witness has stated that Leela, Bachchu and Mukhtar had arrived in the aftermath of dacoity. He has also conceded that there was some prior tension between him and late appellant Shyama on account of refusal of Shyama to marry his daughter to Bahadur Singh (P.W. 4) son of Bhoop Singh even after engagement. This witness has also stated that his son Bahadur Singh (P.W. 4) was severely beaten by dacoits though no medical report of Bahadur Singh has been placed or proved by prosecution.

12. P.W.3 Hitler Singh, neighbour of P.W. 1 Vijay Singh, lodged the F.I.R. He has reinforced the contention of prosecution that some 20-21 dacoits first marauded the house of P.W. 2 Bhoop Singh and thereafter robbed P.W. 1 Vijay Singh. He has reiterated that P.W. 4 Bahadur son of P.W. 2 Bhoop Singh was beaten by lathies and Farsa (axe) by dacoits. Miscreants also snatched the double barrel gun of Bhoop Singh (P.W. 2) while Virendra Singh son of P.W. 1 Vijay Singh was murdered. But this witness has not named any miscreant. He has specifically asserted that he did not recognize even a single perpetrator of crime. He has denied the claim of other witnesses that any shouts were made by anyone regarding stated recognition of late appellant Shyama, his sons

Randhir and Kartar and appellant Hema etc. He has denied that any accused was recognized by any village folk.

13. P.W. 4 Bahadur Singh is an injured witness. He has supported the prosecution version saying that 20-21 miscreants robbed his house and thereafter plundered the house of P.W. 1 Vijay Singh. He has stated that he was beaten in the same episode. He claimed to have recognized the appellants Jeevan, Murari, Hema, late Shyama and his sons Kartar and Randhir. Interestingly, this witness has also said that dacoits had concealed their faces by employing the scarves across their faces, though he has also said that during marpeet the cloths covering their faces fell down. Interestingly, he has not specified whether the coverings across the face of all dacoits fell away or only some of dacoits failed to conceal their identities properly. This witness has also admitted that his marriage was fixed with daughter of late appellant Shyama and that; engagement was done and later on it was broken and that; buffalo calf was given by Shyama to P.W. 2 Bhoop Singh (his father) on account of this engagement which was not returned by his father Bhoop Singh saying that he had spent money in the maintenance of buffalo calf.

14. Fifteen years old Ram Bhajan (P.W. 5) is nephew of P.W. 1 Vijay Singh. He was sleeping with his uncle in the same room at the time of incident. He has said that 20-21 dacoits entered their residence and that; one dacoit, namely, appellant Hema was caught by his deceased brother Virendra Singh and that; appellant Murari killed his brother. He claims to have recognized appellant Murari and Hema in the light generated by flashlights and lantern. Interestingly, this witness has also conceded that appellants Murari and Jeevan had covered their faces with the piece of cloth though they fastened it around the head but their faces were open from the front.

15. P.W. 6 Kashmir Singh is formal witness who had recorded the F.I.R. on 23.1.1982 at 7 am. of Hitler Singh and carved out a chick report (Exh. Ka-5) and made relevant entry in G.D. no. 8 (general diary) proved as Exh. Ka-6.

16. P.W. 7 the then S.H.O. Sri H.K. Vashishtha investigated this case. He has given the details of investigation, though he has conceded that several claims made by witnesses during their deposition were infact not made to him during investigation.

17. Learned counsel for appellant has argued that the names of accused were not mentioned in the F.I.R. despite the fact that report was lodged after 7-8 hours by neighbours of P.W 1 Vijay Singh and P.W. 2 Bhoop Singh and that; evidence discloses that accused persons had concealed their faces from scarf and yet prosecution witnesses managed to identify only those people with whom they had inimical relationship. Submission is that medical report of Bahadur Singh (P.W. 4) has not been placed on record. It is also argued that a hand of appellant Jeevan got crippled prior to this incident and that it was not possible to him to participate in crime of this magnitude with his lame hand. It is further submitted that no recovery of any kind was made from any accused named during course of investigation and that; appellants have no criminal history. It is further submitted that it is inconceivable that the residents of same village would commit offence of this magnitude without effectively concealing their identity.

18. Per contra learned A.G.A. has submitted that the incident occurred in the night and that; appellant had been recognized during the course of dacoity. The learned A.G.A. has submitted that it depends on the personal courage of accused whether they would hide their identity or not and merely because miscreants had not covered their faces effectively or hidden their identities efficiently, the prosecution case cannot be disbelieved.

19. As far as factum of dacoity is concerned, it admits of no doubt. We believe that dacoity indeed took place in the houses of P.W. 1 Vijay Singh and P.W. 2 Bhoop Singh. During course of this dacoity, Virendra Singh son of Vijay Singh (P.W. 1) lost his life. P.W. 2 Bhoop Singh claims that his son Bahadur Singh (P.W. 4) was also severely injured in this alleged dacoity. P.W. 4 Bahadur Singh himself has reiterated the allegation that he was beaten by miscreants with the butt of fire arm weapons etc and that; he was injured in the same episode. But the medical report of Bahadur Singh has not been placed on record to substantiate the claim of injuries. P.W. 2 Bhoop Singh claims that he did not file F.I.R. as he was busy in taking his son Bahadur Singh (P.W. 4) to the hospital. He has admitted that Bahadur Singh (P.W. 4) was indeed taken to the hospital. Unfortunately, the medical reports of Bahadur Singh or the documents prepared during the stated treatment of Bahadur Singh have not been placed on record thereby giving the legitimate opportunity to the appellants for disputing the factum of injuries on the person of P.W. 4 Bahadur Singh. It has also given opportunity to the appellants to claim that Bahadur Singh was not present on the spot otherwise, his medical report would have been placed on record.

20. But considering the fact that Virendra Singh, son of P.W. 1 Vijay Singh lost his life in this episode and that; incident of dacoity was seen by several persons and four witnesses of fact have supported the claim of dacoity, we believe that there is no dispute as far as factum of dacoity is concerned. Even the appellants have not challenged the factum of dacoity per se.

21. The only question that falls for consideration is whether or not appellants participated in the crime. P.W. 1 Vijay Singh has stated that as many as 20-21 people committed the stated dacoity out of which he could recognize the appellants Hema, Murari, Jeevan and late Shyama and his sons Kartar and Randheer. Four persons, namely, Hema, Murari, Jeevan and late Shyama were prosecuted in the instant case. P.W. 2 Bhoop Singh has also taken the same names. These names were repeated by P.W. 4 Bahadur Singh as well. However, P.W. 5 Ram Bhajan who was sleeping in the same room with P.W. 1 Vijay Singh has named only four appellants, namely, Hema, Murari, Jeevan and late Shyama. He did not name Kartar and Randhir (sons of late appellant Shyama). To that extent there are discrepancies between the evidence of P.W. 5 Ram Bhajan (eye witness) and other eye witnesses. All these witnesses have conceded that miscreants had concealed their identity by covering their faces by scarfs. It was quite natural for miscreants to cover their faces for the simple reason that stated miscreants were in fact known to these witnesses since long. Therefore, the claim that miscreants had muffled their faces is acceptable and yet all the witnesses of fact have claimed that they were able to recognize the identities of only those perpetrators of the crime with whom they had inimical relationship. P.W. 1 Vijay Singh specifically conceded that criminals had muffled their faces and yet he was able to recognize at least six miscreants. He did not explain under what circumstances he was able to recognize the muffled faces of perpetrator of crime.

Similarly, P.W. 2 Bhoop Singh was able to recognize the appellants out of which two appellants, namely, Murari and Jeevan were the resident of the same village. Appellant Hema is not only nephew of Murari but was educated initially in the same village. Even P.W. 2 Bhoop Singh did not give any satisfactory explanation for his ability to recognize miscreants despite the fact that miscreants had covered their faces with the piece of cloths. P.W. 4 Bahadur Singh has tried to give some explanation by saying that miscreants had indeed covered their faces with the pieces of cloth but during the scuffle, the pieces of cloth fell away whereby he was able to recognize the appellants. Interestingly, he also claimed that the face of late appellant Shyama was open, contrary to the evidence of P.W. 1 Vijay and P.W. 2 Bhoop Singh. P.W. 5 Ram Bhajan has stated that the faces of appellants Jeevan and Murari were open. In para no. 8 of his testimony he has given interesting explanation that the appellants Murari and Jeevan had covered their faces from all other sides but their faces were open from front side, without realizing the incongruity of his statement. If appellants committed dacoity in the same village, it was natural for them to conceal their identities and if they had indeed covered their faces as stated by prosecution witnesses, then it is inconceivable that they would have covered their faces from all other sides but kept it open from the front side.

22. As far as the statement of P.W. 4 Bahadur Singh (son of P.W. 2 Bhoop Singh) is concerned, his evidence is strange. He recognized only those miscreants with whom his father Bhoop Singh and Vijay Singh had hostile relationship. He claims that face of late Shyama was open, is contrary to the prosecution story. He reluctantly conceded his family's antagonistic relationship with late Shyama. His testimony is neither credible nor trustworthy. Attempt to implicate certain people is palpable. His presence on the spot is doubtful for the simple reason that his medical report subsequent to the incident has not been placed on record despite the claim that he spent several days in hospital.

23. We believe that the contents of F.I.R. and the testimony of P.W. 3 Hitler Singh (informant) need to be taken into consideration as well. It may be stated at the risk of repetition that incident occurred around 11 am. in the night and F.I.R. was lodged in the morning at 7 am. The informant Hitler Singh (P.W. 3) of the same village lodged the F.I.R. at P.S. Achnera. He has stated very clearly in his testimony that he was present at the time of dacoity. This fact has been confirmed both by P.W. 1 Vijay and P.W. 2 Bhoop Singh. In fact P.W. 3 Hitler Singh tried to intervene by using his licensed gun and firing few shots towards dacoits. After departure of dacoits, P.W.3 Hitler Singh visited residence of both P.W. 1 Vijay Singh and P.W. 2 Bhoop Singh. He has admitted that large number of people had gathered at the residences of both persons. After visiting both residences in the presence of hundreds of people, he went to the Police Station Achnera for lodging the F.I.R. at 6 am. At least four alleged perpetrators of crime named by P.W. 1 Vijay Singh and P.W. 2 Bhoop Singh were also known to P.W. 3 Hitler Singh and yet he did not name even a single person in this F.I.R. He has denied that either P.W. 1 Vijay Singh, P.W. 2 Bhoop Singh or P.W. 4 Bahadur Singh had disclosed the identities of some of the miscreants to anyone in village. This witness has also claimed that dacoits went out of village after crossing his house i.e all the dacoits 15-20 in number crossed his residence for leaving the village. This witness has also mentioned the use of battery torches etc. and yet this witness, a member of same village, Nagar did

not recognize a single person. It is pertinent to point out that he had informed Investigating Officer that he could recognize the miscreants if produce before him. Meaning thereby that he had seen the dacoits but did not find any known person amongst them and that is why F.I.R. does not contain names of appellants inasmuch as, the appellants also known to informant, did not participate in the crime.

24. Surprisingly, test identification parade was held but assistance of P.W. 3 Hitler Singh was not taken. The record does not indicate that appellants were put up for test identification parade. Though two persons, namely Guddo and Bhopal were put up for test identification which was held almost after three months of the incident i.e.16.4.1982. The testimony of P.W. 3 Hitler Singh has debunked the claim of other eye witnesses that they had recognized the appellants during commission of dacoity. It is pertinent to point out that at least two appellants, namely, Murari and Jeevan belong to same village and appellant Hema had received his early education in the same village and eye witnesses have admitted that they knew these appellants since long.

25. Now question arises why the eye witnesses have taken the name of appellants. A bare perusal of evidence would reveal that witnesses have accepted that they had antipathetic relationship with both appellants Murari and late Shyama. It has come on record that marriage of P.W. 4 Bahadur Singh was settled with the daughter of late accused Shyama and this engagement was later on broken on account of some dispute. Bahadur Singh (P.W. 4) says that they had wriggled out the marriage commitments, though it has been argued on behalf of appellants that late appellant Shyama later on came to know that Bahadur Singh P.W. 4 was not suitable for his daughter and because of this bad blood developed between two parties.

26. A careful examination of evidence demonstrates that there was indeed bad blood between P.W. 2 Bhoop Singh, P.W. 4 Bahadur Singh and late appellant Shyama. Similarly there was adversarial relationship between P.W. 1 Vijay Singh and appellant Murari. P.W. 1 Vijay Singh reluctantly conceded that appellant Murari owed considerable amount of money to him and that; appellant Murari had not returned his money. The prosecution evidence would indicate that there was some tension between P.W. 1 Vijay Singh and appellant Murari. Appellant Hema admittedly is relative of appellant Murari. This therefore, furnishes an immediate motive for false implication.

27. We believe that the Trial Judge has overlooked another important point. P.W. 5 Ram Bhajan is nephew of P.W. 1 Vijay Singh. Similarly, P.W. 4 Bahadur Singh is son of P.W. 2 Bhoop Singh. Only these four witnesses have been produced. The evidence of these four witnesses could have been sufficient in ordinary circumstances but in present case due to prior inimical relationship, their testimony has to be seen with suspicion especially on account of significant discrepancies. P.W. 1 Vijay Singh has conceded that there were several persons around his house. In para no. 5 of his evidence he took the names of Kashi, Bachu, Mukhtar Singh, Nawab, Fauran Singh Gyasi etc. who arrived on the spot along with several village folks and some of these village folks were armed with lathies and fire arm weapons. In fact these witnesses have admitted that dacoits left the village due to arrival of these armed neighbours. But not a single person, named by P.W. 1 Vijay Singh in paras no. 2, 5, 12 and 14 of his evidence has been produced by prosecution. Presence of several

other persons has been admitted by P.W. 2 Bhoop Singh as well. In para-15 of his testimony, he also claims that he communicated the names of perpetrators of the crime to Leela, Bachu and Mukhtar yet none of those persons, have been produced by the prosecution. P.W. 2 Bhoop Singh also named Gyasi, Kashi, Fauran, Har Prasad, Mohan Singh, Tej Singh, Preetam and Revti, who were present but none of them have been produced. P.W. 3 Hitler Singh has also named Gyasi Ram, Kirodi, Preetam Singh, Kashi Ram, Nawab Singh and none of them have been produced. The only independent witness, P.W. 3 Hitler Singh, has not supported the prosecution allegation against appellant. He has not named a single person while supporting the factum of dacoity. If we take the testimony of P.W. 5 Ram Bhajan and P.W. 7 H.K. Vashishtha I.O. into consideration, it would reveal that police became aware of some of the perpetrators of the crime on next date in the afternoon. Two appellants namely, Murari and Jeevan were resident of same village and yet not a single recovery of stolen articles were made from their residence.

28. As per prosecution version several persons had assembled at the place of occurrence. Some of them were armed with fire arm weapons, others with lathi and farsa (axe). We fail to understand why these persons did not choose to support the prosecution case. Perhaps they did not want to be participant in false implication. Interestingly, criminal history of appellants has not been made available. More than 20-21 persons committed dacoity. One person died during course of this crime. It is alleged that another person was severely injured. Only those persons were identified by P.W. 1 Vijay Singh and P.W. 2 Bhoop Singh with whom they had inimical relationship and yet no recovery was made. Ordinarily, it is inconceivable that a crime of this magnitude would be committed by a persons with no criminal history.

29. Evidence reveals that one hand of appellant Jeevan got crippled prior to this incident. Counsel for the appellants has argued that it is not believable that man with such disability would have had committed this crime in his own village. Appellant Jeevan has infact been accused of using fire arm weapon during dacoity which in ordinary circumstances would have been very difficult for a disabled person. In addition to that, the disability of appellant Jeevan could have been used by victims for identifying him. In fact looks strange that criminals would use appellant Jeevan in actual commission of crime. They might have used a disabled person for backroom purposes but to use him in actual commission of crime meant inviting trouble.

30. It is pertinent to point out that appellant Jeewan has taken plea of alibi. He has claimed that he was living with his brother at Ambala Armoured division Head quarter at Ambala. He has submitted that from 21.1.1982 till 29.1.1982 he was present in Ambala Mess. This has been fortified by testimony of D.W. 1 Ram Vilas Singh, Mess Commander of Armoured division Head quarter Ambala. He has testified that Purushottam Singh brother of appellant Jeewan Singh was posted at Ambala and Jeevan Singh was frequent visitor to Ambala Mess and at the time of incident he was present at Ambala Mess. He has shown the record of the Mess for demonstrating the presence of appellant Jeewan in Ambala at the time of incident. In our opinion there is no reason to disbelieve the testimony of D.W. 1. Ram Vilas Singh. It is pertinent to point out that, the testimony of both, prosecution as well as defence witness have to be appraised on same yardstick. The courts cannot say that they will not believe the defence witnesses merely because they have been produced

by defence. The evidence of all witnesses have to be adjudged on the touch stone of credibility and truthfulness. If the evidence of defence is trustworthy then that evidence cannot be discarded merely because it has been produced by the defence. Mess Commander is an independent person. He has testified on oath that on the date of incident appellant Jeewan was present at Ambala Mess. There is no reason to discard his testimony specially in the light of significant discrepancies in the prosecution evidence and lack of coherent, credible and trustworthy evidence. Doctor, who conducted autopsy, has also been withheld without any explanation.

31. 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.

32. In view of the aforesaid, the judgment and order dated 20.4.1983 passed by the Special Sessions Judge, Dacoity Afffected Area, Agra in Sessions Trial No. 22 of 1982 is hereby, set aside. The appeal is allowed. The surviving appellants, namely, Murari, Jeewan and Hema are acquitted. Their bail bonds are cancelled and sureties are discharged. The appellants be released forthwith if they are in custody and not wanted in any other case.

33. Let a copy of this order be certified to concerned court through Sessions Judge, Agra within a fortnight for compliance. The court concerned shall report the compliance within a month thereafter.

(2016) 9 ILRA 1793
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.09.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VINOD KUMAR SRIVASTAVA-III, J.

Capital Sentence No.- 3 Of 2013
&
Criminal Appeal No.- 1038 Of 2013

State Of U.P. **...Appellant**
Versus
Ranjeet Yadav **...Respondent**

Counsel for Appellant:
Sri Gopal Krishna Pathak

Counsel for Respondent:
Sri U.C. Verma, A.G.A.

Penal Code, 1860 -- Sections 302, 376(2)(f), 201 -- Rape and murder of minor girl -- Circumstantial evidence -- Chain of circumstances -- Deceased, a four-year-old girl, went missing from her father's house during a family ceremony and was found dead the next day in a nearby field, with ante-mortem injuries on her private parts and death caused by asphyxia as a result of strangulation -- Prosecution case rested entirely on circumstantial evidence, viz. recovery of the dead body and blood-stained articles, medical evidence of injuries on the private part of the accused consistent with rape of a minor, evidence of witnesses of last seen, and tracking by a sniffer dog leading to the accused's house -- **Held:** Each link in the chain of circumstances was independently proved and, taken together, pointed unerringly to the guilt of the accused and to no other hypothesis -- Contention that the injuries on the accused's private part were self-inflicted or caused by police torture rejected as unsubstantiated -- Conviction under Sections 302, 376(2)(f) and 201 I.P.C. upheld. (Paras 26-33)

Evidence Act, 1872 -- Section 3 -- Witness of last seen -- Related/interested witness -- Evidentiary value -- Witnesses who deposed to having last seen the accused carrying the deceased were related to the informant -- **Held:** Mere relationship of a witness with the complainant is not, by itself, a ground to discard testimony where it inspires confidence and is corroborated by other circumstances such as medical evidence and sniffer dog tracking. (Paras 30-32)

Criminal Trial -- Sniffer dog evidence -- Corroborative value -- Sniffer dog tracked scent from the place of occurrence to the house of the accused -- **Held:** Following Lalit Kumar Yadav @ Kurri v. State of U.P., conviction cannot rest solely on sniffer dog tracking, but such evidence may be relied upon as a corroborative circumstance where other independent evidence establishes guilt. (Para 33)

Penal Code, 1860 -- Section 302 -- Sentence of death -- 'Rarest of rare' doctrine -- Mitigating circumstances -- Reference made by trial court for confirmation of death sentence awarded to a 20-year-old convict for rape and murder of a minor -- **Held:** Following Bachan Singh v. State of Punjab and subsequent decisions of the Supreme Court, State failed to establish that the accused was a continuing threat to society or beyond reformation; young age of the accused a relevant mitigating factor -- Case did not fall within the

category of 'rarest of rare cases' where the alternative of life imprisonment is unquestionably foreclosed -- Death sentence commuted to imprisonment for life to extend to the full natural life of the appellant, other sentences to remain unaltered and to run concurrently. (Paras 34-45)

Reference for Confirmation of Death Sentence Rejected -- Criminal Appeal Partly Allowed -- Sentence of death awarded to the appellant under Section 302 I.P.C. by Additional District Judge-V, Barabanki in S.T. No. 492 of 2012 commuted to imprisonment for life to extend to the full term of natural life of the appellant; conviction and sentence under Sections 376(2)(f) and 201 I.P.C. upheld; all sentences to run concurrently. (Paras 44-47)

Case Law Discussed:

1. Sahdev v. State of Karnataka, 2012 (6) SCC 403
2. Baldev and another v. State of U.P., 2013 (81) SCC 166
3. Rishi Pal v. State of Uttarakhand, 2013 (81) ACC 442
4. Chhotu @ Ajay v. State of U.P., 2013 (82) ACC 102
5. Dhan Raj @ Dhand v. State of Haryana, 2014 (85) ACC 932
6. Sampath Kumar v. Inspector of Police, Krishnagiri, 2012 (77) ACC 251
7. Manish v. State of U.P., 2014 (86) ACC 31
8. Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan, 2013 (82) ACC 431
9. State of Maharashtra v. Suresh, 2000 SCC (Cri.) 263
10. Lalit Kumar Yadav @ Kurri v. State of U.P., 2014 Crl. Law Journal 2712 (SC)
11. Darga Ram @ Gunga v. State of Rajasthan, 2015 Crl. Law Journal 1403 (SC)
12. Ashok Kumar Pandey v. State of Delhi, 2002 SCC (Cri.) 728
13. Bachan Singh v. State of Punjab, 1980 (2) SCC 684
14. Mulla and another v. State of U.P., 2010 (2) SCC (Cri.) 1150
15. Rajesh Kumar v. State through Government of NCT of Delhi, 2011 (75) ACC 553
16. Rameshbhai Chandubhai Rathod v. State of Gujarat, 2011 (2) SCC 764

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

1. The present appeal has been preferred by the appellant against the judgment and order dated 29.6.2013 passed by Additional District Judge-V, Barabanki in S.T. No. 492 of 2012 convicting and sentencing the appellant under section 376 (2) (F) I.P.C. with imprisonment for life and Rs. 5,000/- fine and under section 201 I.P.C. 5 years imprisonment and Rs. 3,000/- fine, and under section 302 I.P.C. imprisonment of death (hanged to death).

2. The prosecution case in brief is that a written report was given by the informant Rajesh Kumar Yadav son of Sant Saran Yadav resident of Gram Maujabad, Majre Shahpur, police station Deva, District Barabanki on 8.4.2012 stating that on 7.4.2012 there was a Mundan ceremony of his youngest daughter Laxmi in which many relatives were present. His daughter, namely, Baby @ Devika at about 10 p.m. went to his father's cot for sleeping. The informant and his other family members were busy in entertaining the guests. After completion of said ceremony when all the relatives gone, the informant along with his family members slept in the Pundal itself where the said ceremony was held. On 8.4.2012 after waking up when his daughter was not seen, he along with his family members starting searching her. At about 5 p.m. his son while searching her reached at the wheat field of Qamaruddin Halwai where he saw his daughter lying in a dead condition. On receiving the information, the informant reached at the spot and saw his daughter in a

dead condition. On her person, he saw injuries including abrasion on private parts of body from which it was clear that his daughter was murdered, hence leaving the dead body on the spot, he informed the concerned police station for necessary action.

3. On the basis of written information Ex. Ka-1, an F.I.R. was registered as case crime no. 87 of 2012 under section 302, 201 I.P.C. against unknown person on which investigation started. On 9.4.2012, the informant Rajesh Kumar Yadav had given further an information at police station Kotwali Deva that he had lodged an F.I.R. for the murder of his daughter on 8.4.2012 and on 9.4.2012 after post mortem of the deceased was conducted and the last rites of the deceased was performed his relatives and other villagers had gathered on which one Vinod son of Garibe Prasad and Shrawan son of Nageshar resident of Gram Mohnapur, police station Jaidpur, District Barabanki, who on 7.4.2012 had come in the Mundan ceremony of his daughter and was present at night informed the informant that on 7.4.2012 at about 11 p.m. when they were coming to his house from the side of school then they saw Ranjeet son of Ram Aadhar of the village taking a girl but at that moment they could not know that it was the daughter of the informant, namely, Baby @ Devika. The informant had earlier some suspicion about the involvement of accused Ranjeet. The Dog Squad of the police had also visited the house of Ranjeet, who taking advantage of the situation had committed rape and murder of his daughter and further he made request that the said information may be also taken into account and be made part of investigation. The information given by the informant which was registered as case crime no. 87 of 2012 under section 302, 201 I.P.C., the investigation was conducted.

4. On completion of investigation charge-sheet was submitted against the accused appellant before the competent court. On 17.7.2012, the trial court framed charges against the appellant under section 376, 302, 201 I.P.C. The accused denied the charges and claimed trial.

5. The prosecution in support of its case has examined P.W. 1 Rajesh Kumar Yadav, P.W. 2 Vinod, P.W. 3 Constable Anil Kumar Singh, P.W. 4 Head Constable Praveen Kumar Singh, P.W. 5 Dr. Brijesh Kumar Srivastava, P.W. 6 Constable Nandlal Yadav, P.W. 7 Constable Lallu Singh, P.W. 8 Dr. Mohammad Azam Hanfi, P.W. 9 S.I. Pramod Kumar Singh, P.W. 10 S.I. Jitendra Giri, P.W. 11 Constable Moharrir Anil Kumar.

6. The documentary evidence which have been produced by the prosecution are written report of the informant dated 8.4.2012 marked as Ex. Ka.-1, application of the informant dated 9.4.2012 marked as Ex. Ka.-2., Chik F.I.R. marked as Ex. Ka.-3, carbon copy of G.D. marked as Ex. Ka.-4, injury report of accused Ranjeet marked as Ex. Ka.-5, Docket marked as Ex. Ka.-6, post mortem report of the deceased marked as Ex. Ka.-7, charge-sheet marked as Ex. Ka.-8, Panchayatnama marked as Ex. Ka.-9, Photonash marked as Ex. Ka.-10, Challan Nash marked as Ex. Ka.-11, letter of Medical Superintendent marked as Ex. Ka.-12, letter of Pratisar Nirikshik marked as Ex. Ka.-13, specimen seal of deceased Km. Baby marked as Ex. Ka.-14, Naksha Nazri, Gram Maujabad marked as Ex. Ka.-115, recovery of blood stained and plain earth marked as Ex. Ka.-16, underwear of the deceased marked as Ex. Ka.-17, empty bottle of liquor marked as Ex. Ka.-18, spot inspection marked as Ex. Ka.-19 and other material exhibits.

7. The statement of the accused-appellant was recorded under section 313 Cr.P.C. in which he denied the prosecution case and stated that the case against him has been instituted because of the enmity. He has stated that he was taken from his house on 8.4.2012 by the police, who tortured him and caused injuries on his private part. Thereafter he was challaned showing his false arrest on 10.4.2012 though his arrest was shown in the G.D. on 9.4.2012. The scribe of the second F.I.R., namely, Prem Sukh Yadav, who is the uncle of the informant and a Government Ameen, was having some dispute with the accused-appellant and his family members earlier to the incident regarding 'Medh' of the field and crop of mustard, hence he bore enmity with him.

8. P.W. 1, Rajesh Kumar Yadav was examined by the trial court and in his statement he has deposed that on 7.4.2012 there was a Mundan ceremony of his youngest daughter Laxmi aged about one year in which many relatives and villagers were gathered. In the said ceremony arrangement of food for the guests and religious songs were made. His daughter, namely, Baby @ Devika at about 10 p.m. went to his father's cot for sleeping as she used to sleep with his father. The informant and his other family members were busy in entertaining the guests. After completion of said ceremony when all the relatives gone, the informant along with his family members slept in the Pundal itself where the said ceremony was held. On 8.4.2012 after waking up when his daughter was not seen, he along with his family members and some relatives, who stayed at night starting searching her. At about 5 p.m. his son while searching the sister reached at the wheat field of Qamaruddin Halwai where he saw his daughter lying in a dead condition. On receiving the information, the informant reached at the spot and saw his daughter in a dead condition. On her person, he saw injuries including abrasion on several parts of body on which apprehending that his daughter was murdered, he got a report written by one Dinesh Chandra Yadav of his village. He stated that what he dictated to Dinesh he wrote and after writing he read the same before him then he made signature on it. The said report is on record as Ex. Ka. 1. He has given the said written report in the concerned police station on the basis of which F.I.R. was lodged. Thereafter the police arrived at the spot and recorded his statement. The dead body of the deceased was lying in the field of the Qamaruddin where the underwear of the deceased and empty bottle of country made liquor were also lying, the police took possession of the same. On 9.4.2012, the post mortem of the deceased was conducted and thereafter the dead body of the deceased was handed over to him. The last rites of the deceased was performed in the presence of his relatives and villagers. He stated that Vinod and Shrawan, who came to participate in the funeral has told him before all the relatives and villagers that on 7.4.2012 at 11 p.m. when they were coming to his house to participate in the Mundan ceremony of his daughter Laxmi from the side of school, they saw accused Ranjeet was taking a girl but they could not presumed that it was the daughter of the informant, namely, Baby and for what purpose she was being taken away. He had strong suspect about the involvement of the accused Ranjeet in the crime as he was of bad character. After the incident, the Dog Squad of the police went to the house of accused Ranjeet twice. He states that the accused appellant, who is present in the Court had committed rape and murder of his daughter. He also stated that he had given an application at the concerned police station which was written by one Prem Sukh Yadav and signed by him which is on record as Ex. Ka. 2. In his cross examination, he has stated that the dead body of his daughter was lying at the Southern side of the field where the crops were found to be damaged. There were abrasion found on the person of the deceased and from her private part

blood was coming out and her underwear was lying separately where empty bottle of liquor was also lying. He stated that the Dog Squad when reached the house of the accused-appellant had started barking on which the police personnel got opened the door of the house of accused-appellant and apprehended him and took him to the police station. The said incident had taken place between 11-12 p.m. on 8.4.2012. He stated that Prem Sukh was of his village and his uncle. He stated that the report which he got written by Prem Sukh was not at the dictation of police and he has lodged the same on his own.

9. P.W. 2 Vinod, who is the real brother-in-law of the informant and maternal uncle of the deceased had deposed that his sister is married with P.W. 1 Rajesh Kumar Yadav, who has seven children and the eldest one is son. The deceased Baby was aged about 4 years and the youngest one is Laxmi, aged about one year whose Mundan ceremony was held on 7.4.2012 that he along with other family members and relatives had come to participate at the house of his sister at village Maujabad in the night at abut 9-10 p.m. After having the dinner, he along with his cousin Shrawan went towards Gwari Chauraha situated at Chinhat and Lucknow Road for having Gutkha. At about 11 p.m. in the night while they were returning from the side of school, they saw accused-appellant, who is present in the Court, carrying a girl on his shoulder and going towards the agricultural field. The accused Ranjeet Yadav was known to them prior to the incident as he used to come at his sister's house frequently. Ranjeet was also invited in the function where he met him. He stated that he along with Shrawan had returned to his village Mohnapur in the night of 7.4.2012 itself. On 9.4.2012 at about 12 p.m. in the afternoon, he again came to his sister house. After performing the last rites of the deceased, when they gathered at the evening he told his brother-in-law whatever he saw on 7.4.2012 regarding the accused-appellant. He has strong suspicion that accused-appellant has murdered the deceased after committing rape on her. On receiving the said information, his brother-in-law had gone to the police station and thereafter, the police arrived. The police has interrogated him along with Shrawan and in their statement they told the police whatever they saw.

10. P.W. 3 Constable Anil Kumar Singh in his statement has stated that on 8.4.2012, he was posted at police Lines Lucknow and is a member of Dog Squad. On the said date he has received an information from the Control Room to report at police station Deva, District Barabanki. On which, he along with Constable Handler Sriram Yadav had gone to the said police station in a jeep driven by Ram Bhawan Singh along with Dog Squad from where he reached at the place of occurrence where the high officials of the police were present. On the spot the crop of wheat damaged and empty bottle of country made liquor was lying. On smelling the empty bottle of country made liquor and smell of foot prints of the accused, the dog went from the field for about 200-300 meters through the house of the deceased where she was sleeping reached at the house of the accused-appellant and after roaming around the said house stopped there. Thereafter, the police surrounded the said house and on search of the said house one person tried to flee away from the house on which the police apprehended him. The said witness in his cross examination had further stated regarding the capability of the dog with respect to smelling strength is maximum period is 24 hours.

11. P.W. 4 Praveen Kumar Singh has stated that on 8.4.2012 he was posted as Head Constable and on the said date a written report was given by the informant, who was accompanied Manoj Yadav and Dinesh Yadav on the basis of which Chik No. 31 of 2012 and Case crime no. 87 of 2012 under section 302, 201 I.P.C. was lodged against unknown person. He proved the chik F.I.R. in his writing and signature. He has further stated that he has endorsed the said F.I.R. in G.D. No. 29 at 7:45 p.m., carbon copy of which is also on record which was also compared with original. He has proved the chik F.I.R. as Ex. Ka. 3 and G.D. as Ex. Ka 4. He further stated that he had given the information about the registration of the case to the higher officials on the R.T. set and telephone.

12. P.W. 5 Dr. Brijesh Kumar Srivastava, who was examined before the trial court has stated that he was posted as Medical Officer at District Hospital Barabanki on 10.4.2012 on which date he has examined accused Ranjeet Singh. He stated that he was also a member of Medical Board consisting of Dr. V.H. Gupta Emergency Medical Officer, Dr. I.K. Ram Chandani Senior Consulting Physician. He was the Chairman of the said Board and in his presence and supervision the medical examination of accused Ranjeet was done at 3 p.m. which is as follows:-

"Dr. V.H. Gupta, examined Ranjeet aged about 20 years Male S/o- Ram Adhar, R/o- vill- Mauzabad H/o Shahpur, P.S. Dew Distt. BBK. At Emergency Deptt. Distt. Hospital Barabanki on 10.4.2012 at 01.15 P.m., whose medico-legal Examination was done on 10.04.12 at 3.00 Am. At PHC Dewa Distt. BBK.

B/B: CP. 163, Shankar Lal, Ps. Kowali Dewa, BBK.

MI: Black mole over Rt. Side of face, 4.0 cm. Lateral to nose.

Examination of Accused:-

1. Age about 20 years.

2. General built average built body.

3. Height 163.0 cm.

4. Wt. 55 kg.

5. Stains of semen present on the underwear (infront) which is being sealed and handed over to CP. concerned for further investigation.

Examination of Sex Organ:-

Prepuce- Normal

Blance- Cluish coloured mild swelling present all over the glans.

Frenulum-Normal

Pubic hair shaved and sealed and handed over to CP. concerned for further investigation.

Part of all nails are cut and sealed and handed over to CP. concerned.

***Opinion**:- Injury KUO. Caused by friction.*

***Duration**:- about two to four days."*

13. He has proved the medical report of accused Ranjeet as Ex. Ka.-5. The injuries found on the penis of the accused appellant was possible in an incident which had taken place on 7.4.2012 in between 10-11 p.m. It was stated that the said injury can be caused to the accused if he had committed rape on any minor girl. He has further proved the writing and signature of Panel of doctors, i.e., Dr. V.H. Gupta and Dr. I.K. Ramchandani, who were working with him. In his cross examination he has stated that the first medical examination which was conducted of accused Ranjeet at Deva, the doctor has mentioned healed linear abrasion.

14. P.W. 6 Constable Nand Lal Yadav has stated before the trial court that on 8.4.2012, he was posted as constable at police station Deva, District Barabanki and after the inquest of the deceased was conducted her dead body was handed over to him on 9.4.2012 at 8 am along with other police papers for taking the dead body to the mortuary for post-mortem. On 9.4.2012 he had handed over the dead body of the deceased to the official concerned for post-mortem and so long as the dead body was in his custody along with constable Shanker Lal, he had not allowed any person to temper with it. After the post-mortem was conducted, the dead body of the deceased was handed over to her father and submitted the post-mortem report along with other police papers in the concerned police station and copy of the post-mortem report was got received by him in the S.P. Office, Barabanki.

15. P.W. 7 Constable Lallan Singh has stated that on 17.4.2012 he was posted at police station Deva, District Barabanki. On the said date he has received the case property at the police station in a sealed condition and thereafter he produced the same in the Court of C.J.M. at the docket in a sealed condition on which the C.J.M. put his signature. He further took two copies of the docket of the case property from the Court of C.J.M. and on 30.4.2012 he handed over the same to Forensic Science Laboratory for its examination and thereafter brought one of the docket and submitted the same in the Malkhana of concerned police station and he has proved his signature on the same.

16. P.W. 8, Dr. Mohammad Azam Hanfi has stated that he was posted as Medical Officer on 9.4.2012 at the District Hospital Barabanki. He has conducted the post mortem of the deceased

Km. Baby aged about 4 years, who was brought in a sealed condition by S.H.O. Deva Kotwali, Barabanki along with police papers and constable Nand Lal Yadav and Shanker Lal, who had identified the same. On the dead body of the deceased following ante-mortem injuries were found on her person:-

*"**Ante mortem injuries***

1. Multiple abrasion on nexk anterialy & laterally illegible (Limbs) clavicle each about min. size 1 cm. X 4.5 cm. & max size 3 cm. x 1 cm. Present in mid line. On cutting (Illegible) ecchymosed congested.

2. (illegible) abrasion on both lower limb below knee joint anteriorly.

3. (illegible) abrasion (illegible) cut over anteriorly both upper limb. Below elbow.

4. Both labera major showing superfacial linner abrasion brownish cut end. Extending for (illegible) size (7 cm. x 0.5 cm.)

5. Lateral majora showing gaping and ecchymosed."

6. Hymen lacerated & ecchymosed.

7. Vaginal orifice admitting two fingers easily margins torn & ecchymosed. Vaginal (iilgible) taken & sent for exami.

17. As per the opinion of the doctor the cause of death of the deceased is asphyxia as a result of ante mortem strangulation. He found that injury nos. 1, 2, 3 and thyroid cartilage bone was fractured which was sufficient to cause death. He further stated that death would have occurred between 7.4.2012 to 8.4.2012.

18. P.W. 9 Pramod Kumar In-charge Inspector has stated that he was entrusted the investigation of the case by the earlier I.O. Jitendra Giri-P.W. 10, who was transferred. He recorded the statement of Constable Anil Kumar Singh-Dog Handler and Constable Sri Ram Yadav and thereafter submitted charge-sheet against the accused on 2.5.2012 and proved the same as Ex. Ka. 8.

19. P.W. 10 Jitendra Kumar Giri, who was posted as Inspector at police station Deva on 8.4.2012 has stated that the F.I.R. of the present case was lodged on 8.4.2012 and in his presence the case was registered on which he started investigation and got the inquest of the deceased done by S.S.I. Vijay Singh. He has proved the inquest report, photonash, Challan, letter to C.M.O. and R.I. and further stated that he has handed over the dead body of the deceased after inquest for post mortem with police papers to Constable Shanker. He recorded the statement of the informant Rajesh Kumar on the same day on the orders of higher officials. He has called the Dog Squad

information of which he has endorsed in the case dairy. He states that the Dog reached at the house of accused Ranjeet smelling from where the dead body of the deceased was lying on the pointing out of the informant on 9.4.2012. He had prepared the site plan of the place of occurrence. He has also recovered from the place of occurrence underwear of the deceased and sealed the same. He has also recovered one empty bottle of country made liquor in which Miss Jalwa was written and he sealed the same in the presence of witnesses. He has also mentioned in the case dairy about the second information given by the informant on which Section 376 I.P.C. was added. On 10.4.2012, he arrested the accused and recorded his statement, who confessed his guilt.

20. P.W. 11 Constable Anil Kumar has stated that he was posted on 9.4.2012 at the concerned police station and on an application given by the informant, he added Section 376 I.P.C. in the F.I.R. which was registered as Case Crime No. 87 of 2012 under section 302, 201 I.P.C. and also endorsed the same in the G.D. and proved the same as Ex. Ka. 20.

21. Heard Sri Gopal Krishna Pathak, learned counsel for the appellant, Sri U.C. Verma, learned A.G.A. for the State and perused the record.

22. Learned counsel for the appellant argued that the F.I.R. of the present case was lodged against unknown persons by P.W. 1. Initially the F.I.R. was registered under section 302, 201 I.P.C. on 8.4.2012 at 7:45 p.m. whereas the incident has taken place on 7.4.2012 and on 9.4.2012 another F.I.R. was lodged giving reference to the earlier F.I.R. by which Section 376 I.P.C. was added in the present case and the scribe of the written report was one Prem Sukh Yadav, who was the real uncle of the complainant P.W. 1, who was inimical to the appellant. He submitted that the finding recorded by the trial court in this respect that the two information given do not make the prosecution case doubtful appears to be not correct as the trial court has failed to appreciate the fact that the witness of last seen were not reliable at all and further the case laws which have been cited on behalf of the appellant were held to be not applicable in the facts and circumstances of the instant case. He further urged that the finding of the trial court regarding the arrest of the accused also appears to be not correct as the arrest of the accused justifying the possibility of manipulations in the prosecution case after taking him into custody on 8.4.2012 in the night but the police has shown his arrest on 10.4.2012 which also shows his false implication in the case as is apparent from the evidence of P.W. 10 Jitendra Giri. It was next submitted that the Dog Handler P.W. Constable Anil Kumar Singh has submitted before the trial court in his evidence that the sniffer Dog did not take any smell of the house of the accused and also not of accused but the trial court then too has believed its evidence and convicted the appellant. He further argued that the learned trial court brushed aside the inimical relationship of the accused with the uncle of complainant, namely, Prem Sukh Yadav with whom altercation took place between him and family members of the accused and also the case laws which cited in this regard was held to be not applicable in the present case. He submitted that there was no motive on the part of the accused appellant to commit the crime but the trial court took the motive as suggested by the prosecution with accused on imaginary and flimsy ground. He submitted that the inquest report, medical report, post mortem report and the report of the laboratory also makes the prosecution case doubtful and any such doubt based on the circumstantial evidence does not call for any conviction and sentence to an accused. He further

submitted that the evidence led by the prosecution of P.W. 1 and 2, who are highly interested and partisan witnesses and no independent witness has come to support the prosecution, therefore, the conviction and sentence of the appellant be set aside. He next argued that it is highly improbable that the deceased, who was a minor girl aged about 4 years used to sleep with her grand father but no explanation as to this effect that at 10:00 p.m. she can alone go to sleep at the cot of her grandfather and the grand father has not been produced before the trial court. He further submitted that non examination of witness of last seen Shrawan, who was said to be accompanying P.W. 2 Vinod would have been most reliable as he was not related to the complainant and the prosecution with holding the said witness also creates doubt about the prosecution case and the conviction of the appellant only on the basis of evidence of P.W. 1 and 2 does not appear to be proper, hence the conviction and sentence by the appellant is liable to be quashed. Thus the argument of learned counsel for the appellant in short is that the case rests on circumstantial evidence there is no direct evidence against the appellant only on the basis of last seen evidence and injuries found on the private part of the appellant, he was convicted and sentenced. Moreover, the witnesses are highly interested and partisan witnesses and their evidence is at the instance of Prem Sukh Yadav, who is the real uncle of the complainant and the evidence of his arrest on the basis of sniffer Dog does not led a complete chain of circumstances to prove the guilt of the accused and his conviction and sentence by the trial court for death sentence is liable to be set aside. In support of his argument he has placed reliance on the judgment of the Apex Court in the case of ***Sahdev vs. State of Karnataka reported in 2012 (6) SCC 403 and drawn the attention of the Court towards paras-13, 28, 34 of the said judgment, 2013 (81) SCC 166 Baldev and another vs. State of U.P. and drawn the attention of the Court towards paras-11, 21 and 22, 2013 (81) ACC 442 Rishi Pal vs. State of Uttrakhand and drawn the attention of the Court towards paras-15, 16, 18, 19, 20, ACC 2013 (82) (102) Chhotu @ Ajay vs. State of U.P. and drawn the attention of the Court towards paras-7, 13, 17-21, 23-25 and 27, 2014 (85) ACC 932 Dhan Raj @ Dhand vs. State of Haryana and drawn the attention of the Court towards paras-14-18, 2012 (77) ACC 251 Sampath Kumar vs. Inspector of Police, Krishnagiri and drawn the attention of the Court towards paras 10 to 16, 2014 (86) ACC 31 Manish vs. State of U.P. and drawn the attention of the Court towards paras-23-25 and 35 & 36, 2013 (82) ACC 431 Raj Kumar Singh @ Raju @ Batya vs. State of Rajasthan and drawn the attention of the Court towards paras 17 to 27 and 30, 32, 34, 36, 38 to 40***.

23. He lastly argued that the conviction of the appellant under section 302 I.P.C. for imprisonment of death does not fall within the category of rarest of rare case, hence the same should be set aside and the reference to made by the trial court to that count should also be rejected and the sentence under Section 302 I.P.C. may be converted for imprisonment of life.

24. Per contra learned A.G.A. vehemently opposed the arguments of learned counsel for the appellant and justified the judgment and order of the trial court convicting and sentencing the appellant. He submitted that the deceased, who was a minor girl aged about 4 four years was taken away by the accused appellant from her house where 'Mundan' ceremony of her younger sister was going on and many relatives and others persons of the village including the accused appellant was invited as all family members of the deceased were engaged in looking after the guests invited in the said ceremony the accused taking advantage of the said ceremony took the deceased to a lonely

place in the night and committed rape on her and thereafter strangulated her to death. He argued that the place from where the dead body of the deceased was recovered, i.e., the field of Qamaruddin where the underwear of the deceased was lying and empty bottle of country made liquor was recovered. The brother of the deceased, who saw the dead body of the deceased immediately informed his father P.W. 1, who along with other persons reached there as they were searching the deceased when she was not traceable in the morning on 8.4.2012. He immediately lodged the F.I.R. suspecting the murder of his daughter by some miscreants at the concerned police station on 8.4.2012 after the recovery of the dead body. He further pointed out that another application was given by the father of the deceased on 9.4.2012 giving reference to the earlier F.I.R. as he suspected that her daughter was subjected to rape also on the basis of which Section 376 I.P.C. was added in the present case. It was submitted by the learned A.G.A. that as the F.I.R. was lodged against unknown persons and after registration of the case, the police in order to arrest the culprit of the crime had taken the help of sniffer dog which was called at the instructions of higher authorities, who also arrived at the place where the dead body of the deceased was lying and the dog had travelled from there and reached to the house of the accused smelling underwear of the deceased and empty bottle of liquor lying at the place of occurrence and started barking and when the police got opened the door of the said house, the accused tried to flee away from the house and was arrested on 8.4.2012 by the police. He next submitted that as per the statement of P.W. 1, the informant and father of the deceased along with the statement of P.W. 2 Vinod recorded by the trial court, who was though related to P.W. 1 as he was his brother-in-law was also invited in the said ceremony had seen the accused carrying a child on his shoulder in the night but the said witness was not aware of the fact that it was the deceased and when he came to know that the deceased was untraceable and her dead body was recovered from the field of Qamaruddin, he also reached there and after cremation of the dead body of the deceased, he informed about the said fact to P.W. 1 along with one Shrawan had also seen that the accused was carrying the deceased. He argued that as per the medical evidence, the deceased has suffered injuries on her private part and blood was oozing out from the same. Moreover, the injuries were also found on the private part of the accused-appellant, i.e., on his penis which shows strong circumstance of his participation in the present crime though it has been alleged by learned counsel for the appellant that the said injuries was caused to the appellant by the police just to show the good work and solve the present case. He argued that though the case rests on circumstantial evidence but taking into account the evidence on record which shows that the chain of circumstances which have been brought on record bring out the guilt of the accused-appellant and the finding recorded by the trial court in convicting and sentencing the accused-appellant on the basis of evidence on record is perfectly right and the appeal be dismissed by this Court. In support of his contention, he has placed reliance on the judgment of the Apex Court in the case of ***State of Maharashtra vs. Suresh reported in 2000 SCC (Cri.) 263, Lalit Kumar Yadav @ Kurri vs. State of U.P. reported in 2014 Crl. Law Journal 2712 SC and drawn the attention of the Court towards para-34 of the said judgment, in the case of Darga Ram @ Gunga vs. State of Rajasthan reported in 2015 Crl. Law Journal 1403 (SC) and drawn the attention of the Court towards paras-10 and 11***.

25. Considered the rival submissions of learned counsel for the parties and perused the record.

26. From the prosecution case it is apparent that the deceased, who was a minor girl aged about 4 years was the daughter of P.W. 1 Rajesh Kumar Yadav. On 7.4.2012, a 'Mundan' ceremony was organized by P.W. 1 at his house where the relative and other persons of the village were invited along with the accused-appellant, who also belong to the same village. The family members of the deceased including P.W. 1 were busy in taking care of the guests, who were invited in the said ceremony in offering food etc. to them. The accused-appellant, who was also invited in the said ceremony taking advantage of the ceremony took away the deceased from her house and carried her to a lonely place in the village and committed rape on her after consuming liquor as empty bottle of liquor was found by the police at the place where the dead body of the deceased was recovered.

27. When, P.W. 1, the informant, who is the father of the deceased and other family members did not found the deceased in the morning on 8.4.2012 at the place where she used to sleep with her grand father then a search was made in the house and nearby places and ultimately when the brother of the deceased, who was tracing her reached at the field of Qamaruddin found the dead body of the deceased lying there. He immediately informed about the recovery of the dead body of the deceased to his father, who reached there along with his family members and other persons of the village and immediately lodged an F.I.R. of the incident for the murder of his daughter at the concerned police station. After post mortem, the dead body of the deceased was handed over to P.W. 1, who performed her last rites and in the evening when all the relatives had gathered, P.W. 2 Vinod and one Sharawan informed P.W. 1 that in the night when they were returning back to his house after taking Gutkha, they saw the accused carrying a child on his shoulder. They at that time did not suspect that it was the deceased and after recovery of the dead body on 8.4.2012 in the evening and coming to know about the incident then suspected that it was the accused-appellant, who had taken the deceased from her house in the night and committed rape and murder of her. Thereafter on 9.4.2012 another application was given by the informant-P.W. 1 giving reference to the earlier F.I.R. lodged by him suspecting the involvement of the accused-appellant on the basis of which offence under section 376 I.P.C. was added. The investigating officer after investigation submitted charge-sheet against the accused-appellant and charges were framed by the trial court against him on 17.7.2012 under section 302, 201, 376 I.P.C. The appellant was put to trial and was convicted by the trial court for the offence in question against which present appeal has been preferred by him before this Court.

28. The argument which has been advanced by learned counsel for the appellant that the case rests on circumstantial evidence and there is no direct evidence against the appellant and only on the basis of suspicion and evidence of last seen and some injuries found on his private part which was cause to him by the police to work out the case and further the evidence of P.W. Nos. 1 and 2 suffers several discrepancies and contradictions, his conviction and sentence by the trial court is against the evidence on record, hence the same be set aside by this Court cannot be accepted.

29. From the evidence which have been collected by the investigating agencies and produced before the trial court which after examining the prosecution witnesses and other formal witnesses and the recovery which have been made has come to the conclusion that it was the

accused-appellant, who has committed the crime and on the basis of evidence led by prosecution convicted the accused-appellant. So far as the cases which have been cited by learned counsel for the appellant in which the Apex Court has held that in a case of circumstantial evidence, the Court must considered the same in the light of settled legal proposition. The inference is drawn from the aspect of the case lodged. The Court has to consider whether the chain of circumstances is complete.

30. In our considered opinion, the said legal proposition as has been laid down by the Apex Court in its catina of decisions is not at all disputed. So far as the instant case is concerned the following chain of circumstances which has been brought by the prosecution to prove the guilt of the accused are as follows:-

1. Recovery of dead body of the deceased from the field of Qamaruddin and her blood stained frock which she was wearing at the time of incident.

2. Recovery of blood stained earth from the place where the dead body of the deceased was recovered.

3. The report of Forensic Science Laboratory U.P. Lucknow dated 1.12.2012 which found blood on the frock of deceased and on the soil recovered from the place of occurrence.

4. Recovery of empty bottle of liquor of brand 'Miss Jalwa' and underwear of the deceased near the dead body.

5. Evidence of sniffer dog.

6. The medical examination of accused-appellant conducted on 10.4.2012 at 1:15 p.m. at P.H.C. Deva, District Barabanki marked as Ex. Ka. 5.

7. The evidence of P.W. 1 Rajesh Kumar Yadav informant of the case and father of the deceased.

8. Further the evidence of P.W. 2 Vinod the maternal uncle of the deceased, who is witness of last seen.

9. The evidence of P.W. 5 Dr. Brijesh Kumar Srivastava, under whose supervision the Medical Board examined the accused-appellant, who found injuries on his penis.

10. The evidence of P.W. 8 Dr. Mohammad Azam Hanfi, who conducted the the post mortem of the deceased and found as many as seven ante mortem injuries on her person including on private part and cause of death is his opinion is asphyxia as a result of strangulation.

31. From the evidence of P.W. 1 Rajesh Kumar Yadav, it is an admitted fact that a 'Mundan' ceremony was organized by him of his younger daughter, who is aged about one year on 7.4.2012 and in the night several relatives and guests were invited. P.W. 2 Vinod, who was the maternal uncle of the deceased was also invited it has also come in the evidence that the accused-appellant was also invited in the said ceremony. The accused-appellant took the deceased from his house to a lonely place taking advantage of the said situation and committed rape on her. As per the post mortem report of the deceased several injuries were found on her person including her private part. The cause of death is asphyxia as a result of strangulation. The accused-appellant was apprehended from his house taking assistance of sniffer dog by the police and challaned on 10.4.2012 after finding evidence against him. Moreover, the injuries which has been sustained by the accused-appellant on his male organ while committing crime goes to show that because of the said injuries, injuries were also caused on the private part of the deceased. The contention of learned counsel for the appellant that the injuries which were found on the private part of the accused-appellant was caused by the police when he was arrested is not at all acceptable. The evidence of P.W. 5 Dr. Brijesh Kumar Srivastava recorded by the trial court also show that the said injuries could be caused to the accused while committing rape on a minor child on 7.4.2012 between 11-12 p.m. and from his evidence it is also clear that the accused committed rape on the deceased. Moreover, from the evidence of P.W. 8 Dr. Mohammad Azam Hanfi, it is evident that the ante mortem injuries were found on the private part of the deceased and blood was oozing out and the cause of death is asphyxia as a result of strangulation and her thyroid cartilage bone was found to be fractured. Lastly the evidence of P.W. 2 Vinod who is witness of last seen coupled with the aforesaid evidences which are sufficient to prove the guilt of the accused-appellant, hence the trial court was right in accepting their evidence. So far as the evidence of sniffer dog is concerned, the Apex Court in the case of ***Lalit Kumar Yadav (Supra***) has held as follows:-

"In the present case, the services of a sniffer dog was taken for investigation. The said dog traced the accused and he was formally arrested in the evening of the next day. The Investigating Officer, Ashok Kumar Yadav (PW-10) corroborated the evidence of Abdul Lais Khan (PW-4) to the effect that "Raja' sniffer dog after picking up scent from the place of occurrence tracked down the house of the accused. What is relevant to note is that the accused has not been convicted on the ground that the sniffer dog tracked down the house of the accused and barked at him. .....

Since there is no direct evidence to prove the guilt of the accused the Trial Court and the Appellate Court considered the circumstances which led towards the accused. Admittedly, nobody was named in the FIR but referring to the incident that Km."x' was murdered the FIR was lodged. Since nobody was named in the FIR the Investigating Officer took the help of the dog squad and the dog handler Abdul Lais Khan (PW-4) came with the dog. Dog tracking proceeding was done and the dog tracked the accused. The said fact is not disputed. ....."

32. In the case of ***State of Maharashtra vs. Suresh (Supra)*** has upheld the conviction of the accused for the rape and murder of four years girl on the basis of circumstantial evidence, i.e., witness of last seen together with recovery of dead body, injuries found on the male organ of the

accused and detection of stains of human blood and semen on underclothes of the accused were held on fact and circumstances sufficient to convict the accused with the offence of rape and murder of minor girl. In the instant case the evidence which have been led by the prosecution, i.e., the injuries were found on the penis of the accused-appellant and as per the opinion of the doctor, who had examined the appellant, the said injuries could be caused on his penis while committing rape on a minor girl. Moreover the injuries were also found on the private part of the deceased and blood was oozing out from it as is evident from the post mortem report and blood stains were found on the frock of the deceased as per the report of Serelogist. The evidence of witness of last seen and the evidence of sniffer dog.

33. Thus, in our considered opinion, the prosecution has proved its case beyond reasonable doubt by chain of circumstances which led to only conclusion that the accused-appellant committed rape on the victim and thereafter she was strangulated to death by him, hence the conviction of the appellant by the trial court is perfectly justified and correct which is hereby upheld.

34. Having considered the submissions advanced by the learned counsel for the parties regarding sentence of death awarded to the accused appellants, it is necessary to take into consideration the various pronouncements of the Hon'ble Apex Court taking into the circumstances of each case. Some of the latest pronouncement of the Apex Court on this point in which the earlier decisions of the Apex Court have also been considered are being discussed as under:

35. In similar facts and circumstances, the Apex Court in the case of ***State of Maharashtra v. Suresh (Supra) where death sentence was awarded to the accused,*** had altered the sentence to life imprisonment

36. The Supreme Court in the case of ***Ashok Kumar Pandey Vs. State of Delhi*** reported in ***2002 SCC (Cri.) 728,*** wherein a husband was convicted and sentenced to death for committing the murder of his wife and daughter. The Supreme Court having regard to the decision in the case of ***Bachan Singh vs. State of Punjab*** reported in ***1980(2) SCC 684*** held that in the facts and circumstances of the case it could not be concluded that the present case fell within the category of "rarest of rare cases' hence sentence of death was commuted to rigorous imprisonment for life.

37. The Supreme Court in the case ***of Mulla and another Vs. State of U.P.*** reported in ***2010 (2) SCC (Cri.) 1150*** has again narrated the principles of Bachan Singh case (supra). In the said case, in the night incident eight miscreants killed five persons mercilessly for non-payment of ransom. Taking into account all the aggravating and mitigating circumstances, the appellants' death sentence was commuted to life imprisonment which was to extend to the full term of life.

38. In another case of ***Rajesh Kumar Vs. State through Government of NCT of Delhi*** reported in ***2011 (75) ACC 553***, relevant paragraph Nos. 86 to 90 and 105, the Supreme Court has held that the principles discussed in ***Bachan Singh (Supra)*** set out certain mitigating circumstances which was suggested by Dr. Chitaley. At paragraph 207 of the report of the learned Judge that these

are undoubtedly relevant circumstances and must be given great weight in determination of the sentence. The circumstances set out here-in-below:

"206. Dr. Chitaley has suggested these mitigating factors :

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

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

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

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

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

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

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

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

39. In the said case, the Supreme Court observed that the High Court while discussing the mitigating circumstances as against the aggravating circumstance has not properly followed the principle discussed in ***Bachan Singh's case supra)***, hence the Supreme Court held that the persons convicted of murder life imprisonment is the rule and death sentence is an exception hence the Supreme Court in the said case substituted death sentence by imprisonment for life.

40. In another case, Apex Court in ***Rameshbhai Chandubhai Rathod Vs. State of Gujrat*** reported in ***2011 (2) SCC 764*** reiterated the principles of law laid down in Bachan Singh's case (supra), Mullah's case (supra). In the said case the Supreme Court considering the gravity of the offence, behaviour of appellant and fear and concern such incident generate in ordered society commuted the death sentence to life imprisonment directing that life imprisonment would extend to the full life of the appellant subject to any remission/commutation at the instance of Government for good and sufficient reasons.

41. Now in the light of the principles laid down in ***Bachan Singh(supra)*** case, which has been followed by the Supreme in its latest decisions, as seen above, the present case has to be adjudged whether there are mitigating circumstances which could be taken into account for appellants' death sentence commuted to life imprisonment to extend full term of life.

42. In the instant case, the State has failed to show that the appellant is a continuing threat to Society or he is beyond reform or rehabilitation. Secondly, accused appellant Ranjeet aged about 20 years, when his statement was recorded by the trial Court under Section 313 Cr.P.C on 1.6.2013. Thirdly, there is no material shown by the State or the complainant to that there was a probability that the appellant would again commit criminal acts of violence as would constitute a continuing threat to Society.

43. In the instant case a minor girl aged about four years has been murdered after committing rape on her by the appellant which is undoubtedly a grave and heinous offence for which the duty of the Court is to impose adequate punishment depending upon the degree of criminality and desirability to impose such punishment, as a measure of social necessity and also as a means of deterring other potential offenders the sentence should be appropriate and befitting the crime.

44. Having considered the principles discussed in the Bachan Singh case (Supra) as well as Rameshbhai Chandubhai Rathod (supra) and other cases of the Apex Court mentioned above, we are of the opinion that the present case does not fall within the category of 'rarest of rare cases' where the other option of awarding a sentence of imprisonment for life is unquestionably foreclosed. The death sentence taking into all aggravating and mitigating circumstances, the appellant's death sentence is commuted to life imprisonment to extend to the full term of life of the appellant would be sufficient and meet the ends of justice. We, therefore, reduce the sentence under section 302 I.P.C. of death of the appellant to life imprisonment which extend to the full term of life of the appellant. The sentence imposed by the trial court on the appellant on all other counts would remain unaltered.

45. The accused appellant is already confined in jail, hence he shall serve out the sentence as altered/modified by this Court under section 302 I.P.C. as well as on all other counts by the trial court. All the sentences shall run concurrently.

46. Thus, the reference made by the trial court as well as prayer made by the State to confirm the sentence of death of the appellant under section 302 I.P.C. are hereby rejected.

47. The appeal filed by the accused-appellant is partly allowed.

(2016) 9 ILRA 1810
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.09.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VINOD KUMAR SRIVASTAVA-III, J.

Criminal Appeal No.- 1115 Of 2007
&
Criminal Appeal No.- 94 Of 2006

Kaptan **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Munnilal Yadav, Soniya Mishra

Counsel for Respondent:
Govt. Advocate

Penal Code, 1860 -- Section 302 -- Murder -- Common intention -- Distinct roles of co-accused -- Misreading of evidence -- Two accused persons alleged to have fired at the deceased during an altercation over construction of a wall; F.I.R. named both as having fired, but eye-witnesses in their sworn depositions before the trial court attributed the fatal shot solely to one accused and stated that the other had merely caught hold of the deceased -- Trial court convicted both under Section 302 I.P.C. relying on their earlier statements recorded under Section 161 Cr.P.C. -- **Held:** Conviction based on statements recorded under Section 161 Cr.P.C., in the face of contrary sworn testimony recorded before the court, amounts to misreading of evidence -- Participation of the accused who did not fire the fatal shot rendered doubtful; benefit of doubt extended and his conviction and sentence set aside. (Paras 22, 27-28)

Penal Code, 1860 -- Section 302 -- Sudden provocation -- Section 304 Part I I.P.C. -- Applicability -- Contention that the incident arose out of a sudden quarrel over construction of a wall and that the offence would not travel beyond Section 304 Part I I.P.C. -- **Held:** Where the fatal injury on the deceased's neck was caused from close range with 42 pellets recovered therefrom and was proved to be attributable to the accused, the plea of sudden provocation reducing the offence to culpable homicide not amounting to murder rejected. (Para 29)

Penal Code, 1860 -- Section 302 -- Life imprisonment -- Remission -- Period already undergone -- Plea that the appellant, having already undergone fourteen years in custody, be released on the sentence already served -- **Held:** Following Gopal Vinayak Godse v. State of Maharashtra and Muthuramalingam and others v. State, imprisonment for life lasts until the last breath of the convict, subject only to remission by the appropriate Government; period of incarceration already undergone is not, by itself, a ground for release. (Para 29)

Appeal of Kaptan Dismissed -- Appeal of Suresh Allowed --
Conviction and sentence of appellant Kaptan under Section 302 I.P.C. for life imprisonment passed by Additional Sessions Judge, Kheri in S.T. No. 412/2002 upheld; conviction and sentence of appellant Suresh set aside on benefit of doubt, his bail bonds and sureties discharged. (Paras 28-31)

Case Law Discussed:
1. Murlidhar Shivram Patekar and another v. State of Maharashtra, 2014 (3) JIC 830 (SC)
2. Gopal Vinayak Godse v. State of Maharashtra, 1961 (3) SCR 440
3. Muthuramalingam and others v. State, J.T. 2016 (7) SC 1

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

1. Both the aforesaid criminal appeals have been preferred against the judgment and order dated 23.12.2005 passed by the Additional Sessions Judge, Kheri in S.T. No.412/2002 whereby the appellant Kaptan and Suresh have been convicted u/s 302 IPC and sentenced to undergo for life imprisonment with fine of Rs.4,000/- and in default further undergo for a period of six months imprisonment.

2. As both the above mentioned criminal appeals have been preferred against a common judgment and order, hence the same are being heard and decided together by a common judgment.

3. Prosecution story in brief is that the complainant Ram Chandra lodged an FIR by submitting an application Ext. Ka.1 at the concerned police station stating that on 5.12.2001, he along with his son Raj Bahadur were constructing a toilet in the North side of their house. One of his friend Lalta Prasad, S/o Jugunu R/o village Pasgaon was also present at the time of incident i.e. about 5 p.m. in the evening and at that time, accused Kaptan and Suresh, r/o his village also started to construct a wall adjoining to toilet. The informant and his son Raj Bahadur objected the accused-appellant Kaptan and Suresh from constructing wall. On this accused-appellant Kaptan and Suresh took out their country-made pistol and fired at Raj Bahadur. On an alarm raised by them which was heard by one Pratap and Smt. Ramshree wife of informant and other persons came there. Thereafter the accused-appellant Kaptan and Suresh ran away towards their house. The son of the informant died due to fire-arm injury.

4. On the basis of written report Ext. Ka.1, a first information report Ext.Ka.2 was registered at Police Station Pasgaon, District Kheri. The investigation of the case was started and investigated by the Station Officer Devendra Pandey. During investigation, the Investigating Officer prepared the site-plan Ext. Ka.11 of the place of occurrence. He also took the plain and blood-stained soil and prepared memo Ext.Ka.12. The inquest was prepared Ext.Ka.5, Police Form No.13 Ext. Ka.6, specimen seal Ext. Ka.9, sent the dead-body for postmortem and its report Ext. Ka.4 and also submitted charge sheet Ext. Ka.13 against accused-appellants Kaptan and Suresh.

5. The case was committed to the Court of Sessions and charges were framed against the two accused-appellants u/s 302 IPC by the trial court. They pleaded not guilty and claimed to be tried.

6. The prosecution in support of it's case has examined P.W.1 Ram Chandra, P.W.2 Lallu, P.W.3 Pratap, P.W.4 Shiv Shankar Singh, Head Moharir, P.W.5 Smt. Ramshree, P.W.6 Dr. S.P. Verma who conducted autopsy on the dead-body of the deceased, P.W.7 Devendra Pandey, Investigating Officer of the case.

7. The statement of the accused-appellant Kaptan and Suresh were recorded u/s 313 Cr.P.C who denied the prosecution story and stated that they have been falsely implicated due to enmity. Opportunity to produce the defence evidence was given to the accused-appellants thrice but on 7.12.2005 counsel for the accused-appellants stated that the defence would lead no evidence.

8. P.W.1 Ram Chandra, the informant of the case and the father of the deceased deposed before the trial court reiterating the prosecution case as narrated by him in the FIR. He stated before the trial court that when he and his son objected the accused from constructing the wall adjacent to his toilet, then accused Kaptan and Suresh took out country-made pistol and accused appellant Suresh caught-hold of Raj Bahadur and accused Kaptan fired shot on Raj Bahadur which hit him on his neck. Raj Bahadur sustained fire-arm injury then fell down and died. On hearing alarm, one Pratap of his village and his wife Ram Shree and other villagers came there. On this accused ran away towards their house. He submitted written report at the Police Station which he proved to be in his hand-writing and signature and marked as Ext. Ka.1.

9. The said P.W.1 Ram Chandra in his cross-examination further stated that the deceased Raj Bahadur sustained fire-arm injuries on his neck. The deceased fell near about 10-12 paces away from the door of accused Kaptan. Toilet was constructed on the date of occurrence. The accused Kaptan fired on Raj Bahadur at a distance of 4-5 paces. The altercation between the accused and Raj Bahadur did not take place at the time of occurrence. The I.O has inspected the place of occurrence.

10. P.W.2 Lallu who is stated to be the friend of P.W.1 and is eye-witness of the occurrence has been examined by the trial court and he stated that he was present at the house of P.W.1 Ram Chandra as he had gone there to participate in Anna Prashan ceremony of his grand-son. Ram Chandra and Raj Bahadur were constructing toilet in the North side of the house. The accused-appellants Suresh and Kaptan also started to construct the wall. P.W.1 Ram Chandra and his son Raj Bahadur prevented the accused to construct a wall on which the accused Suresh caught-hold of Raj Bahadur and Kaptan fired on Raj Bahadur. Raj Bahadur sustained fire-arm injuries, he fell and died. The occurrence taken place in the evening at 5 P.M. The accused Suresh was also armed with country-made pistol. On the alarm raised by him and Ram Chandra, P.W.5 Ram Shree came there along with other villagers and accused ran away from the place of occurrence.

11. In the cross-examination, P.W.2 Lallu Ram stated that he does not remember the date of occurrence but only stated that he remember that it was Wednesday on the date of occurrence in Aghan (Hindi month). He also did not told about the date of incident to the I.O. When he reached the house of Ram Chandra, he saw that the two accused were constructing there a wall and they have constructed near about 4 feet high wall. Ram Chandra and Raj Bahadur came there and Ram

Chandra tried to take out brick. Accused Kaptan slapped to Ram Chandra after which Suresh and Kaptan fired on Raj Bahadur from their country-made pistol. Raj Bahadur received one injury on his neck and other injuries of fire-arm at his hand. The accused persons fired twice at the place of occurrence and the accused-appellant Kaptan made first fire on Raj Bahadur. Ram Chandra was not assaulted by the butt of the country-made pistol and he was only slapped. After hearing fire shot, he saw Raj Bahadur was lying to the North side of the toilet. The blood also fell on the ground where Raj Bahadur has fallen. The Police had come at the place of incident at 9 p.m. in the night. The police sealed the dead-body and he remained present at about two hours. The police had taken the dead-body of the deceased to the police station. He did not go to the police station with Ram Chandra.

12. P.W.3 Pratap who is an eye-witness of the occurrence and a villager was examined by the trial court and he has stated that he was at his house on the date of occurrence and on hearing the noise at 5 p.m, he reached to the house of P.W.1 Ram Chandra where he saw the dead-body of the deceased Raj Bahadur lying. He did not see the two accused firing at Raj Bahadur, thus the witness was declared hostile by the prosecution.

13. P.W.4 Shiv Shanker Singh, Head Constable has stated before the trial court that on 5.12.2001, he was posted as Head Moharir at Police Station Pasgawan. On the said date, he scribed the FIR on the basis of written report as Ext. Ka.1. The informant Ram Chandra came out at the police station for lodging FIR with written report FIR who proved the FIR as Ext. Ka.2 which is in his hand-writing and signature. He also recorded the summary of the case in G.D which was proved as Ext. Ka.3. In his cross-examination the witness has stated that Ram Chandra was present at about 8.10 p.m. At that time the Station Officer Devendra Pandey was also present at the Police Station who on receiving the information proceeded to the place of occurrence at about 8.10 p.m.

14. P.W.5 Smt. Ram Shree W/o P.W.1 Ram Chandra the mother of the deceased has stated before the trial court that at about 5 p.m. in the evening, her husband and son were constructing the toilet in the North side of the house. Her husband and son prevented the accused Kaptan and Suresh from raising a wall on which accused Kaptan and Suresh took out country-made pistol and fired at her son who received fire-arm injury and died. The accused-appellant Suresh and Kaptan ran away towards their houses.

15. In cross-examination the witness stated that on the date of occurrence, she was present at her house. On hearing the firing shot, she came out of the house. After that accused ran away towards their house. She heard three fire shots. Raj Bahadur died in-front of the house and the blood was oozing out. The police came in the night at the place of occurrence and she witnessed the accused committing the murder of her son and running from the place of occurrence.

16. P.W.6 Dr. S.P. Verma who has conducted the post-mortem of the deceased was examined by the trial court and he deposed that he has conducted the postmortem of the deceased and found following ante-mortem injuries on his person:-

(I) Fire-arm wound of entry measuring 6.00 cm.x 3 cm. over front of neck, 4 cm. below chin and 7 cm. above sterno sternal notch, margins inverted, irregular and echy-mosed, blackening and tattooing present 2.00 cms. around the wound. On dissection underlying muscles, vessels, trachea found lacerated and second cervical vertebra found 42 small metallic pellets and material recovered from neck.

(II) Fire-arm wound of entry 2 cms. X 2 cms. X through and through over right palm, 2 cms. below base of right thumb, margins inverted, irregular and echymosed.

(III) Fire-arm wound of exit 6 cms. X 3 cms. X through and through over dorsum of right hand-joint below right wrist, margins everted, irregular and echymosed.

17. In the opinion of the said doctor the deceased died due to fire-arm injuries which he sustained on his person before the death. He proved the postmortem report under his hand-writing and signature as Ext. Ka.4. The fire-arm injuries were caused to the deceased by country-made pistol. The death of the deceased was caused on 5.12.2001 at 5 p.m.

18. In his cross examination, the said witness has further stated that the injury no.1 was caused from a distance of 3 feet. The injury no.2 was on the hand of the deceased. Blackening and tattooing was not present on injury no.2. Injury no.1 was caused by first fire and injury no.2 was caused by second fire. In his opinion, it is a case of two shots. He further deposed that the two injuries cannot be caused by single fire.

19. P.W.7 Devendra Pandey, Station Officer of the concerned police station is the I.O of the case. He recorded the statement of witnesses u/s 161 Cr.P.C. And also made spot inspection of the place of occurrence and prepared site-plan as Ext. Ka.11. In his cross-examination the said witness has stated that the case was registered in his presence at the concerned police station and he recorded the statement of Ram Chandra at the Police Station and further reached the place of occurrence near about 11.30 p.m in the night. He further stated that the witness Ram Chandra did not give him statement that the accused Suresh caught Raj Bahadur. The witness Lallu gave statement u/s 161 Cr.P.C. that Suresh taken out country-made pistol and fired on Raj Bahadur.

20. On the basis of aforementioned evidence of the prosecution the trial court has convicted the accused-appellants for the offence u/s 302 IPC and sentenced them for life imprisonment. Aggrieved by the same, the present appeals have been preferred by the aforesaid two appellants.

21. Heard Ms. Soniya Mishra, learned counsel for the appellants and and Ms. Nand Prabha Shukla, learned AGA for the State and perused the record.

22. It has been argued by learned counsel for the appellants that there was no motive to commit the crime by the two accused-appellants. It has been further submitted that there was no dispute between the parties prior to the present incident. The incident has occurred due to sudden provocation on a issue of raising a wall adjacent to the toilet of the informant. The accused-

appellant Suresh as per evidence of P.W.1 Ram Chandra, it is evident that the accused-appellant Suresh is said to have caught-hold of the deceased whereas the accused-appellant Kaptan is said to have fired shot at the deceased which hit him on the neck. Thus the case of accused-appellant Suresh is distinguishable from the case of accused-appellant Kaptan and the conviction of the appellant under Section 302 IPC with the said accused on the basis of evidence of P.W.2 Lallu Ram and P.W.5 Ram Shree by the trial court considering the statement of the witnesses u/s 161 Cr.P.C. that it was the appellant Suresh who also fired at the deceased along with appellant Kaptan with his country-made pistol and the deceased received two injuries on his person, one on the neck and other on the hand is absolutely incorrect as the trial court has misread the evidence of the said two witnesses and convicted the appellant Suresh also under Section 302 IPC which should be set-aside.

23. It was lastly argued that even if the case is taken on it's own face value, the case would not travel beyond Section 304 Part-1 IPC as the incident has taken place on the spur of moment on the issue of raising a wall by the accused persons adjacent to the toilet of the informant on which the deceased is said to have received injuries at the hands of the appellant Kaptan by fire-arm. Therefore, the conviction of the appellant Kaptan under Section 302 IPC and sentence for life imprisonment be set-aside. The accused-appellant Kaptan has already undergone fourteen years of imprisonment, hence he may be released to the period already undergone after conviction under Section 304 Part-1 IPC. Learned counsel for the appellants in her support has relied upon the judgment of the Apex Court in the case of **Murlidhar Shivram Patekar and another Vs. State of Maharashtra reported in 2014(3) JIC 830 (SC).**

24. Learned AGA on the other hand has vehemently opposed the argument of learned counsel for the appellants and submitted that as per the evidence of prosecution led before the trial court, the two accused-appellants who were armed with country-made pistol fired at the deceased who received two injuries on his person and the cause of death as per the postmortem report is shock and hemorrhage as a result of ante-mortem injuries. The ocular testimony of P.W.1, 2 and 3 fully corroborates the prosecution case and the presence of the said witnesses at the place of occurrence appears to be natural, hence the trial court has rightly convicted the appellants for the offence in question.

25. Considered the submissions advanced by learned counsel for the parties and perused the record.

26. Admittedly as per prosecution case set-out in the FIR and by the witnesses before the trial court, it is apparent that the informant and the deceased were constructing a toilet at their house and simultaneously the accused-appellants Kaptan and Suresh also started raising a wall adjacent to the toilet of the informant and the deceased which was objected by them on which the two accused took out their country-made pistol and shot at the deceased who died on account of fire-arm injuries received on his person. From the FIR lodged by the informant P.W.1 Ram Chandra it has been stated by him that the two accused persons fired shot at the deceased who died on account of fire-arm injuries. He has reiterated the prosecution case and in his examination-in-chief, he has deposed that the accused Kaptan and Suresh had took out their country-made pistol and accused Suresh had

caught-hold the son of the informant Raj Bahadur and accused Kaptan fired at the deceased with his country-made pistol which hit him on his neck on account of which he sustained injuries and died on the spot. It further transpires from the cross-examination of the said witness that after the shot was fired by accused-appellant Kaptan on the deceased, he had fallen on the ground and thereafter no person had shot at him or caught-hold the deceased. There is also evidence of P.W.2 Lallu Ram who is also an eye-witness of the occurrence has narrated the prosecution case and had claimed his presence at the place of occurrence. He has also deposed before the trial court in his examination-in-chief that while the accused-appellant were raising the wall adjacent to the toilet of the informant on which they objected, the accused-appellant Suresh had caught-hold of the deceased Raj Bahadur and the accused-appellant Kaptan fired shot with the country-made pistol at him which hit him on his neck and the deceased had fallen on the ground and died on the spot. The other eye-witness P.W.5 Ram Shree, W/o P.W.1 Ram Chandra and mother of the deceased has deposed before the trial court that on hearing of fire shot, she reached the place of occurrence and witnessed the incident and further saw the accused-appellant running from the place of occurrence. According to her she heard three shots of fire-arm whereas P.W.2 Lallu Ram in his deposition before the trial court has stated that he heard two shots. The trial court has considered the evidence of P.W.7 Devendra Pandey, I.O. of the case and further taken into account the statement of the said witness recorded u/s 161 Cr.P.C in which it was stated by them that both the accused persons fired shot at the deceased and on the basis of which the trial court has arrived at a conclusion that from the evidence of three prosecution witnesses, it is clear that both the accused-appellants shot fire at the deceased who received two injuries on his person and died and convicted the appellants.

27. In our opinion though in the FIR it has not been alleged by the informant that it was the accused Suresh who had caught-hold the deceased and the shot was fired by accused-appellant Kaptan at the deceased as in the FIR, it has been stated that both of them had fired at the deceased but subsequently when the P.W.1 Ram Chandra and P.W.2 Lallu Ram were examined by the trial court and they in the examination-in-chief have categorically stated that accused Suresh had caught-hold the deceased and accused Kaptan fired shot at the deceased Raj Bahadur on neck who died on the spot. The conviction of the appellant Suresh on the basis of the statements recorded u/s 161 Cr.P.C of the witnesses P.W.2 and P.W.3 is contrary to their evidence which was recorded by the trial court, does not appear to be correct as it amounts to misreading of their evidence. More so, even if the prosecution case is taken on it's face value, it has come in the evidence of two eye-witnesses i.e. P.W.1 and P.W.2 that the first shot was fired by the accused Kaptan on the deceased which hit him on his neck and the second shot which hit the deceased received on his hand which was injury no.2 and the injury no.3 is communicating injury of injury no.2 cannot be said to be a fatal injury to cause the death of the deceased as the injury no.1 which has been attributed to accused Kaptan was fatal one and caused from a close range and 42 pellets were recovered from the said injury.

28. Thus the participation of the accused-appellant Suresh appears to be doubtful from the evidence on record and the prosecution has failed to prove it's case beyond reasonable doubt against him. He is given benefit of doubt and his conviction and sentence by the trial court is hereby set-aside. He is on bail. He need not to surrender. His bail bonds and sureties are discharged.

29. So far as accused-appellant Kaptan is concerned, the prosecution has proved its case beyond reasonable doubt from the evidence on record and his participation in the incident cannot be ruled out. The injury no.1 which has been caused on the neck of the deceased and is proved to be fatal one, has been attributed to him. The contention of learned counsel for the appellants that it is a case of sudden provocation and the case would not travel beyond Section 304 Part-1 IPC and the accused has already served out fourteen years of imprisonment may be reduced to period already undergone has no substance and the said contention is hereby rejected. No doubt the accused-appellant Kaptan has been in jail for last fourteen years but as he has been convicted under Section 302 IPC and sentenced for life imprisonment by the trial court, the minimum punishment under Section 302 IPC is life imprisonment, therefore, his incarceration for fourteen years in jail is immaterial and he has to serve out the sentence awarded by the trial court for life imprisonment as has been ordered by the trial court. The case law cited by learned counsel for the appellants is distinguishable from the facts and circumstances of the present case. In view of the judgment of the Apex Court in the case of **Gopal Vinayak Godse Vs. State of Maharashtra 1961 (3) SCR 440** wherein it was held that imprisonment for life lasts until the last breath and whatever the length of remission earned the prisoner can claim release only if the remaining sentence is remitted by the Government. The judgment of **Gopal Vinayak Godse (Supra)** was followed by the Apex Court in its recent judgment of **Muthuramalingam and others Vs. State reported in J.T. 2016 (7) SC 1**. Therefore, the conviction and sentence of accused-appellant Kaptan by the trial court under Section 302 IPC for life imprisonment is hereby upheld. He is already in jail, hence shall serve out the sentence awarded by the trial court.

30. The appellant Suresh is on bail. He need not surrender and his bail bonds and sureties stands discharged.

31. Thus, the appeal of appellant **Kaptan** is hereby **dismissed** and the appeal of appellant **Suresh** stands **allowed**.

(2016) 9 ILRA 1818
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No.- 2211 Of 2016

Om Prakash Yadava & Anr. ...Revisionists
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Revisionists:
Ravindra Nath Rai, Ashok Kumar Rai

Counsel for Opposite Parties:
G.A.

Code of Criminal Procedure, 1973 -- Section 301(2) -- Locus of victim/first informant to move application for alteration of charge -- Application for alteration of charge from Section 304/34 I.P.C. to Section 302/34 I.P.C. was moved by the first informant, owner of the petrol pump where the incident occurred, and not by the Public Prosecutor -- Objection raised that such application by a private party was not maintainable -- **Held:** Following Sister Mina Lalita Baruwa v. State of Orissa, J.K. International v. State (Govt. of NCT of Delhi) and Zahira Habibullah H. Sheikh v. State of Gujarat, there is no bar under Section 301 Cr.P.C. against a victim or private person moving an application before the court, more so where the application stood duly forwarded by the Public Prosecutor with the endorsement 'Sir submitted' -- Courts must adopt a participatory role in aid of justice and not remain silent spectators where the prosecution omits a material step.

Code of Criminal Procedure, 1973 -- Section 216 -- Alteration of charge -- Stage of framing charge -- Standard of proof -- Held: At the stage of framing or altering a charge, only a prima facie case, strong suspicion or reasonable doubt as to the commission of the offence is required to be seen; the probative value of the material on record and its sufficiency to prove the case beyond reasonable doubt are matters for trial and not for the charge stage -- Order altering charge, passed after hearing both parties and considering the testimony of the eye-witness supporting the prosecution version, does not suffer from any illegality or irregularity -- Mere alteration of charge to a graver offence does not, by itself, mean that the accused will ultimately be convicted of that offence.

Criminal Revision Dismissed --

Order dated 25.5.2016 passed by Additional Sessions Judge, Court No. 3, Mirzapur in Sessions Trial No. 284 of 2013, State v. Om Prakash and others, altering the charge from Section 304/34 I.P.C. to Section 302/34 I.P.C., upheld.

Case Law Discussed:

1. Sister Mina Lalita Baruwa v. State of Orissa and Ors, AIR 2014 SC 782
2. J.K. International v. State (Govt of NCT of Delhi) and Ors, (2001) 3 SCC 462
3. Zahira Habibullah H. Sheikh and Anr v. State of Gujarat and Ors, (2004) 4 SCC 158
4. Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary and others, 2009 (1) SCC (Cri) 87

5. Soma Chakravarty v. State (through CBI), 2007 (2) SCC (Cri) 514
6. State of Orissa v. Debendra Nath Padhi, 2005 SCC (Cri) 415
7. Omwati v. State, AIR 2001 SC 1507

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Supplementary affidavit filed today by the learned counsel for the revisionists is taken on record.

2. This revision has been preferred against the order dated 25.5.2016, passed by learned Additional Sessions Judge Court No.3, Mirzapur in Sessions Trial No.284 of 2013, arising out of Case Crime No.326 of 2013, State Versus Om Prakash and others, whereby the learned Additional Sessions Judge has altered the charge from Section 304/34 I.P.C. to Section 302/34 I.P.C.

3. Heard learned counsel for the revisionists, learned A.G.A and perused the records.

4. Some background facts in brief are that an F.I.R. was lodged by the owner of a petrol pump to the effect that on 02.7.2013, at about 9.30 P.M. one Jai Prakash Yadav came to the petrol pump, recklessly driving a truck. The truck dashed in the sign board of HP Petrol Pump indicating "HP" causing damage to it. When the Manager of the petrol pump Suresh Kumar Singh (deceased) blamed the truck driver Jai Prakash Yadav, for his recklessness, he started to throw filthy abuses and thereafter went away threatening the Manager of dire consequences and to see him in future. After sometime, the truck driver returned to the petrol pump along with the applicants namely Om Prakash Yadava and Uma Kant Yadava. They assaulted the Manager on his head by a 'Lathi' having an iron ring attached to its upper end, causing grievous injuries on the head of the Manager. He felt unconscious and was taken to the Hospital at Mirzapur from where he was referred to Varanasi. When the Manager was under treatment, the F.I.R. was lodged by the owner of the petrol pump. During the course of investigation, the injured succumbed to his injuries and charge sheet was submitted under Sections 304,504,508,427 and 279 I.P.C. Later on the trial proceeded and the statement of P.W.1 (first informant) was recorded in the trial court who fully supported the prosecution case in his testimony. Thereafter, an application was moved from the prosecution side before the trial Court that charge under Section 302/34 I.P.C. be also framed against the applicants. The accused persons filed an objection against the said application and the court below, after hearing both the parties and on considering the statement of eye witness, P.W.2, who fully supported the prosecution case, framed charges under Section 302/34 I.P.C. against the revisionists.

5. The legality and correctness of the aforesaid order passed by the court below has been challenged by the learned counsel for the revisionists mainly on two grounds:-

6. Firstly, that the application for alteration of charge was moved by the first informant i.e. owner of the petrol pump, who had no locus standi to move such application. While

drawing the attention of this Court to the provisions of section 301 Cr.P.C., learned counsel for the revisionists has contended that section 301 (2) Cr.P.C. provides that only Public Prosecutor or Assistant Public Prosecutor, in charge of the case shall conduct prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, as the case may be. Learned counsel for the revisionists has contended that the application on which the learned trial court has framed charges under Section 302/34 I.P.C., against the revisionists has been moved by the first informant Kaushlendra Singh and not by the Public Prosecutor. In support of his contention, learned counsel for the revisionists has filed certified copy of the aforesaid application, with a supplementary affidavit.

7. The second ground taken by the learned counsel for the revisionists is that the court below has not properly considered the provisions of Section 216 Cr.P.C and the order impugned is not in consonance with the aforesaid section.

8. Learned A.G.A. has opposed the revision by submitting that the impugned order has been passed in accordance with law. He has drawn the attention of this Court to the copy of the application filed by the revisionists, to show that the application for alteration of charge has been duly forwarded by Public Prosecutor.

9. Having heard learned counsel for the parties and having perused the records, there appears no force in the submissions of learned counsel for the revisionists.

10. So far as the first objection relating to Section 301 (2) Cr.P.C. is concerned, the certified copy of the application moved by Kaushlendra Singh, shows that it has been duly forwarded by the Public Prosecutor which is evident from the endorsement of Public Prosecutor, "Sir submitted" made on the margin of the application. Moreover, there is no such bar under Section 301 Cr.P.C. which prohibits the victim of a case to move any application before the court concerned.

11. The same problem arose before the Hon'ble Apex Court in the case of ***Sister Mina Lalita Baruwa Vs. State of Orissa and Ors, AIR 2014 SC 782***. In the aforesaid case before the Hon'ble Supreme Court, the Public Prosecutor having not bothered to take any steps, the application was moved by the victim/appellant herself before the learned trial Judge. However, the learned trial Judge, observing that such an application at the instance of the victim and not having been filed by the Special Public Prosecutor being not maintainable, rejected the application solely on the ground of maintainability. Aggrieved by the said order, the victim/appellant moved the High Court, but the High Court too, making reference to Section 301 Cr.P.C. took the view that the appellant as an informant had a very limited role to play and it was beyond the authority granted to an informant or a private person under Section 301 Cr.P.C. The matter went to Hon'ble Supreme Court and the Hon'ble Supreme Court set-aside both the aforesaid orders passed by the trial court and also by the High Court. Some relevant extracts from the judgment of the Apex Court are quoted below:

"The High Court committed a serious illegality in merely stating that Under Section 301 Code of Criminal Procedure there is no scope for a victim as a private party to take any effective step to rectify a serious fallacy....."

"We are convinced that the grievances as projected by the Appellant, who was a victim of an offence of such a grotesque nature, in our considered view, the trial Court as well as the High Court instead of rejecting the application of the Appellant by simple making a reference to Section 301 Code of Criminal Procedure in a blind folded manner should have made an attempt to reconcile Sections 301 and 311 Code of Criminal Procedure in such peculiar situations and should have ensured that the trial proceeded in the right direction....."

"In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of a vital information placed before it. It can also be said that in the process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain a silent spectator in such situations....."

11A. Likewise, in ***J.K. International Vs. State (Govt of NCT of Delhi) and Ors, (2001) 3 SCC 462***, the Hon'ble Supreme Court considered the extent to which a complainant can seek for the redressal of his grievances in the on going criminal proceedings as under:

"The scheme envisaged in the Code of Criminal Procedure (for short "the Code") indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge-sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance....."

"An aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police...."

12. The same view has been expressed by the Hon'ble Apex Court in ***Zahira Habibullah H.Sheikh and Anr Vs. State of Gujarat and Ors, (2004) 4 SCC 158.***

" the courts have to take a participatory role in a trial. They are not expected to be tape recorders. They have to monitor the proceedings in aid of justice. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or derelection of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

13. In wake of the law laid down by Hon'ble Supreme Court cited above, there does not appear any force in the first objection relating to Section 301 Cr.P.C., raised by learned counsel for the revisionists.

14. The second objection raised by the revisionists, is also baseless. The impugned order clearly shows that the learned court below, after giving opportunity of hearing to both the parties and after considering the objections filed by the accused persons, has framed the charge under Section 302/34 I.P.C., by a well reasoned order, discussing in detail the grounds for alteration of charges.

15. At the stage of framing a charge, only a reasonable doubt or strong suspicion 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 to the hilt. Only the prima facie evidence which is available on record, at the initial stage of framing charges, is to be considered by the court concerned.

16. 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.

17. 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.

18. 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.

19. In ***Omwati v. State; AIR 2001 SC 1507***, it has been held by the Hon'ble Apex Court 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.

20. In the instant case, the charge has been altered after the statement of witness P.W.-1 was recorded during trial, who fully supported the F.I.R. version of prosecution case as narrated above.

21. In view of the aforesaid facts and circumstances, there does not appear any illegality or irregularity in the order impugned, altering the charge from Section 304 I.P.C. to Section 302 I.P.C. It is also to be kept in mind that mere framing of charge under Section 302 or more altering it from Section 304 to Section 302, does not mean that the accused is going to be punished under the Section 302 I.P.C. An accused may be punished for a smaller offence even though charge has been framed under graver offence but he cannot be punished for such offence which is graver than the offence he is charged with. At this stage of framing charge nothing can be said about the ultimate result of trial. The trial may result in punishment of accused for some lesser offence or even in his acquittal. No prejudice is going to be caused to the applicants by alteration of charge.

22. Considering all the facts and circumstances and the legal position, this revision appears to have no force and it is liable to be dismissed at the admission stage itself.

23. The revision is accordingly dismissed.

(2016) 9 ILRA 1824
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No.- 4715 Of 2004

Ravinder Talwar **...Revisionist**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Revisionist:
Samit Gopal

Counsel for Opposite Parties:
Govt. Advocate

Penal Code, 1860 -- Section 21 -- 'Public servant' -- Chairman, Nagar Palika Parishad -- U.P. Municipalities Act, 1916 -- Revisionist, while Chairman of a Nagar Palika Parishad, allegedly caused loss to public revenue in connivance with contractors by inflating tender rates beyond permissible limits; question raised whether sanction under Section 197 Cr.P.C. was necessary for his prosecution on the footing that a Chairman is a 'public servant' under Section 21 I.P.C. -- **Held:** Unlike statutes such as the Rajasthan Municipalities Act, 1959, which by a deeming provision declare every member of a Municipal Board to be a public servant, the U.P. Municipalities Act, 1916 contains no such deeming provision qua a 'Member' or 'President/Chairman' -- Following Ramesh Balkrishna Kulkarni v. State of Maharashtra, State of Tamil Nadu v. T. Thulasingam and State of Maharashtra v. Laljit Rajshi Shah, a Chairman of a Municipal Board under the U.P. Act, 1916 is not a 'public servant' within the meaning of Section 21 I.P.C. -- Manish Trivedi v. State of Rajasthan, resting on the specific deeming provision of the Rajasthan Act, distinguished. (Paras 11-29)
Code of Criminal Procedure, 1973 -- Section 197 -- Sanction for prosecution -- Relevant date -- Held: Following R.S. Nayak v. A.R. Antulay, the relevant date for determining the requirement of sanction under Section 197 Cr.P.C. is the date on which cognizance is taken by the court, and not the date of commission of the offence; since the revisionist had ceased to hold office as Chairman before cognizance was taken, the plea of want of sanction was, in any event, not available to him. (Para 30)
Code of Criminal Procedure, 1973 -- Section 197 -- Sanction -- Mode and sufficiency -- Held: No particular form is prescribed for grant of sanction; an administrative inquiry report followed by a Government order directing initiation of criminal proceedings against the accused sufficiently constitutes sanction. (Para 32)
Criminal Revision Dismissed --
Order dated 03.08.2004 passed by Additional Sessions Judge, Court No. 5, Saharanpur in Criminal Revision No. 131 of 1996, setting aside rejection of the protest petition and directing the trial court to summon the accused-revisionist under Sections 406, 409, 420 I.P.C., upheld; interim order, if any, vacated. (Paras 33-35)

Case Law Discussed:
1. Bhairon Prasad v. Emperor, AIR 1928 All 756
2. Dayachand (Chanchal) Ramdas Jain v. State, 1959 MPLJ 163
3. Maharudrappa Danappa Kesarappanavar v. The State of Mysore, AIR 1961 SC 785

4. Prem Narain and another v. State of U.P., 1975 Cr.L.J. 1783
5. Dilawar Singh v. Parvinder Singh @ Iqbal Singh and another, AIR 2006 SC 389
6. D.T. Virupakshappa v. C. Subash, AIR 2015 SC 2022
7. N.K. Ganguly v. Central Bureau of Investigation, New Delhi, 2016 (2) SCC 143
8. R.S. Nayak v. A.R. Antulay, 1984 (2) SCC 183
9. Ramesh Balkrishna Kulkarni v. State of Maharashtra, 1985 (3) SCC 606
10. State of Tamil Nadu v. T. Thulasingam and others, 1994 (2) SCC (Suppl.) 405
11. Manish Trivedi v. State of Rajasthan, AIR 2014 SC 648
12. State of Maharashtra v. Laljit Rajshi Shah and others, 2000 (2) SCC 699

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

1. This criminal revision under Section 397/401 Cr.P.C. has been filed by Accused-Revisionist, Ravinder Talwar challenging order dated 03.08.2004 passed by Additional Sessions Judge, Court No. 5, Saharanpur in Criminal Revision No. 131 of 1996.

2. Additional Chief Judicial Magistrate-II, Saharanpur, vide order dated 04.01.1996 has rejected protest petition and accepted final report, whereagainst Respondent-2 preferred criminal revision which has been allowed vide impugned judgment and Trial Court has been directed to summon Accused-Revisionist under Sections 406, 409, 420 IPC.

3. Brief facts emerging from First Information Report (*hereinafter referred to as the "FIR")* and record are that Accused-Revisionist who was Chairman, Nagar Palika Parishad, Saharanpur, at the relevant time, in connivance with Contractors and officials of Nagar Palika Parishad got computation of cost increased multifold against sanctioned tender rates and thereafter allotted on such accepted rates though he had no jurisdiction or authority to do so. As per rules there could be no deviation of more than 10% from estimated cost but he got variation done by more than 100%. As per rules he was required to got separate work orders and call for separate tenders, Instead, in an illegal manner and in connivance with Contractors he caused misfeasance of public funds for personal interest by getting revised work done from Contractors on earlier rates. FIR further states that in some construction work, amount was paid to Contractors, 400 times above approved original tender amount. It further gives details of various financial irregularities and illegalities committed by Accused-Revisionist in wasting public fund.

4. After registering FIR as Case Crime No. 315 of 1992 under Sections 406, 409, 467, 468, 420 IPC at Police Station Kutub Sher, District Saharanpur, investigation was made by police and ultimately final report was submitted on 11.10.1993.

5. Dissatisfied with submission of final report, Complainant-Executive Engineer, Nagar Palika Parishad, Saharanpur filed a protest petition in the Court of Second Additional Chief Judicial Magistrate, Saharanpur which was registered as Misc. Case No. 12 of 1994. Trial Court vide judgment and order dated 04.01.1996 rejected protest petition and accepted final report. Aggrieved thereto, Complainant-Respondent-2 preferred Criminal Revision No. 131 of 1996 which has been allowed and Revisionist is directed to be summoned to face trial under Section 409, 420, 406 IPC.

6. Sri Samit Gopal, learned counsel appearing for revisionist contended that revisionist was Chairman, Nagar Palika Parishad and hence a "public servant" within the meaning of Section 21 IPC, therefore, without obtaining sanction from Government it was not open to Court below to take cognizance of an offence and initiate criminal proceedings against him. It is said that since no sanction under Section 197 Cr.P.C. has been obtained, therefore, impugned order passed by Revisional Court is bad in law. He placed reliance on **Bhairon Prasad Vs. Emperor, AIR 1928 All 756; Dayachand (Chanchal) Ramdas Jain Vs. State, 1959 MPLJ 163; Maharudrappa Danappa Kesarappanavar Vs. The State of Mysore, AIR 1961 SC 785;** and**, Prem Narain and another Vs. State of U.P., 1975 Cr.L.J. 1783.** On the question of applicability of Section 197 Cr.P.C. learned counsel for the revisionist relied on three decisions **Dilawar Singh Vs. Parvinder Singh @ Iqbal Singh and another, AIR 2006 SC 389; D.T. Virupakshappa Vs. C. Subash, AIR 2015 SC 2022; and, N.K. Ganguly Vs. Central Bureau of Investigation, New Delhi, 2016(2) SCC 143**.

7. Sri Syed Ali Murtaza, learned Additional Government Advocate, per contra, submitted that at the time when criminal proceedings were initiated, revisionist was not holding any public office, hence Section 197 Cr.P.C. is not attracted in the case in hand.

8. Revisionist held office of Chairman, Nagar Palika Parishad, Saharanpur from 08.02.1989 to 08.02.1991 as stated in para 17 of memo of revision. During this period it is alleged that he caused loss to public revenue of Nagar Palika Parishad by colluding with Contractors, awarding contracts to them in an illegal manner, paying huge amount than it was actually payable and thus committed offence under Sections 406, 409, 467, 468, 420 IPC.

9. Matter was enquired on administrative side by City Magistrate, Saharanpur and he submitted report on 21.06.1990. State Government vide order dated 02.09.1992 directed District Magistrate, Saharanpur to initiate criminal proceedings against revisionist, whereupon Additional District Magistrate (Executive) directed Circle Officer to proceed and as a result thereof FIR was lodged by Circle Officer at Police Station Kutub Sher on 19.10.1992 being Case Crime No. 315 of 1992 under Sections 406, 409, 467, 468, 420 IPC.

10. Revisionist challenged FIR in Writ Petition No. 37035 of 1992. This Court vide order dated 30.10.1992 stayed arrest of revisionist but directed Investigating Officer to proceed with investigation. Investigating Officer then submitted final report, whereagainst Executive Officer, Nagar Palika Parishad suubmitted protest petition which was rejected by Magistrate but now the matter has been reversed by Revisional Court.

11. First question to be considered in this case is, whether a "Chairman, Nagar Palika Parishad" is a "public servant" as defined under Section 21 IPC.

12. Section 21 IPC, relevant and the part relied by revisionist, reads as under:

*"21. "**Public servant**".--The words "public servant" denote a person falling under any of the descriptions hereinafter following; namely:*

.....

Ninth**--Every **officer** whose duty it is, as such officer, to take, receive, keep or expand any property on **behalf of the Govern-ment**, or to make any survey, assessment or contract **on behalf of the Government,** or to execute any revenue process, or to investigate, or to report, on any matter **affecting the pecuniary interests of the Government**, or to make, authenticate or keep any document relating to the pecuniary **interests of the Govern-ment**, or to prevent the infraction of any law for the protection of the **pecuniary interests of the Government;

***Tenth**-- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenti-cate or keep any document for the ascertaining of the rights of the people of any village, town or district;*

***Eleventh**--Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an elec-toral roll or to conduct an election or part of an election;*

***Twelfth**--Every person--*

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

*(b) **in the service or pay of a local authority**, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956." (emphasis added)*

13. In **Bhairon Prasad Vs. Emperor (supra)** District Magistrate, who at that time also had judicial powers, proceeded against a 'Member' of Municipal Board alleging that he has contravened Section 82(1) of U.P. Municipalities Act, 1916 (*hereinafter referred to as the "U.P. Act, 1916*"), hence committed an offence under Section 168 IPC. Court held that sanction under Section 197 Cr.P.C. was necessary. In aforesaid judgment which has been rendered by an Hon'ble Single Judge, I do not find that any dispute was raised, whether a 'Member' of Municipal Board is a "public servant" or not within the meaning of Section 21 IPC and it appears that Court proceeded as if he is, as agreed by the parties. Aforesaid judgment, in my view, is not an authority on the question raised, whether Chairman, Nagar Palika Parishad is a "public servant" under Section 21 IPC or not, since this issue was neither raised nor argued nor decided so as to constitute a precedent but in that case parties proceeded on assumption that Member of Municipal Board is a public servant.

14. In **Dayachand (Chanchal) Ramdas Jain (supra)** an Hon'ble Single Judge of Madhya Pradesh High Court had an occasion to consider, whether "Chairman, Municipal Board", Tikamgarh is a "public servant" within the meaning of Section 21 IPC or not. Court noticed that Clause Tenth of Section 21 covers a Municipal Commissioner as a "public servant". In **Nanhe Vs. The Municipal Committee, Jubbulpore, 25 NLR 194** and **Suganchand Vs. Naraindas, AIR 1932 Sind 177** it was held that Municipal Commissioner, an archaic expression, would include a member of Municipal Committee. However, in the case before Sindh High Court provisions of C.P. Municipalities Act, 1922 were considered and Section 46 thereof specifically provided that every 'member' of a committee shall be deemed to be a "Municipal Commissioner" within the meaning of any enactment for the time being in force. Madhya Pradesh High Court in **Dayachand (Chanchal) Ramdas Jain (supra)** considering provisions of Sections 3(20), 39 and 267 of Rewa Municipalities Act, 1946 held that "Chairman" is an "officer of Board" and, therefore, a "public servant" within the meaning of Section 21 IPC. In the aforesaid judgments of Sindh and Madhya Pradesh High Courts, since provincial statutes declare under that a Member of Municipal Committee shall be deemed to be a Municipal Commissioner and Municipal Commissioner is an officer and in service of local authority by virtue of deeming clause, Court held him to be a "public servant" under Section 21 IPC. There is no bar that legislature by making a specific provision can create a fiction by a deeming clause in respect of something which is not there otherwise. Therefore, aforesaid judgments also would not help revisionist to hold that he is/was a "public servant" under Section 21 IPC.

15. In **Maharudrappa Danappa Kesarappanavar**, Court considered similar question. Accused person was a "Municipal Counselor" and "Chairman" of Managing Committee of Navalgund Municipality. The provisions of Bombay District Municipal Act, 1901 were applicable in that case. Court held that since as "Chairman" he could spent money of Municipality by ordering payment of bills and, therefore, is a "public servant" as defined in Clause Tenth of Section 21 IPC. Court while upholding the view taken by High Court that he was a "public servant" held as under:

"9. The aforesaid power is conferred on the Chairman for the benefit of the persons who have served the Municipality and have got the right to receive their pay or money for articles provided. There may arise circumstances when any delay in payment may affect those persons adversely. The pay is due on the first day of the month and it may not be convenient to fix a meeting of the Committee at a date for early payment of the pay due. A meeting already fixed may have to be adjourned for want of quorum. The passing of the pay bills, in the circumstances, is more or less a formal matter and therefore ***the rules empower the Chairman of the Managing Committee to order payment of the pay bills in anticipation of sanction by the Committee. The Chairman can exercise this power for the benefit of the employees voluntarily or when requested by those persons to exercise it****. The mere fact that this power of the Chairman was to be exercised only with respect to fixed recurring charges and in anticipation of the Committee passing the bills for those charges therefore does not affect the question in any way.* ***Clause ten of Section 21 of the Indian Penal Code merely requires that the person should have the duty to expend property for certain purposes****. It is not restricted to such cases only where there is no limitation on the exercise of that power of expending property****. The Chairman has the duty to order payment and to spend the***

***money of the Municipality in certain circumstances**. We therefore hold that the appellant was a 'public servant' when the alleged offence was committed." (emphasis added)*

16. This judgment was rendered by analyzing provisions of Bombay District Municipal Act, 1901 and since it has not been brought to this Court whether provisions of said Act are pari materia with statutory provisions of U.P. Act, 1916, therefore, it is difficult to hold that for the reasons stated therein, in the present case also a Chairman can be held a "public servant" under Section 21 IPC.

17. In the context of U.P. Act, 1916, question related to Municipal Commissioner was considered by a learned Single Judge in **Prem Narain (supra).** The discussion made in paras 4 and 5 read as under:

*"4. **There is no dispute about Mayaram being a public servant. Section 84 of the U. P. Municipalities Act provides that every officer or servant of a Board shall be deemed to be public servant within the meaning of the Indian Penal Code. There was a controversy on the point whether Prem Narain in the capacity of Municipal Board Commissioner was also a public servant or not. Illustration to Section 21 (12th) of the I.P.C. clearly indicates that a Municipal Commissioner is a public servant**, The Rajas-than High Court in the case of State v. Bansilal Luhadia held that the word 'Commissioner' in this Illustration has been used in the sense of Municipal member or councillor and not in the sense of an officer in the employment of a Municipality who is sometimes designated by that name. A learned single Judge of this Court also held in the case of Bhairaon Pd. v. Emperor AIR 1928 All 756 : 30 Cri LJ 62 that a member of the Municipal Board was covered by the definition of public servant and sanction of the local Government under Section 197, Cr. P. C. was necessary for prosecuting him. Their Lordships of the Supreme Court also held in the case of Maharudrappa Danappa Kesarappanavar vs. State of Mysore that, the Chairman of a managing committee of the Municipal Board is a public servant within Clause (10) of Section 21, I.P.C.*

*5. **Section 40 of the U. P. Municipalities Act provides that a member of the Municipal Board can be removed by the State Government only.** In my opinion, there is no doubt that a member of the Municipal Board when he is entrusted with certain duties and he acts in discharge of those duties, he does act as a public servant. It is not disputed that he is being prosecuted for acts done by him in the discharge of his duties as & member of the Municipal Board. Sanction of the State Government was, therefore, necessary for his prosecution. Similarly, sanction of the State Government was necessary for prosecution of Mayaram applicant No. 2. His service too is now centralised; the appointing and removing authority being the State Government. The entire proceedings were, therefore, vitiated in the absence of sanction. It was held by the Supreme Court in the case of R.P. Kapoor v. State that the entire proceedings are liable to be quashed under Section 561-A, Cr. P. C. if there was lack of legal sanction." (emphasis added)*

18. This court finds nothing in U.P. Act, 1916 to show that a Municipal Commissioner is same as Chairman of Municipality. The term "servants of Municipality" is defined under Section 2(22) of U.P. Act, 1916 as under:

"(22) "Servant of the Municipality" ***means any person in the pay and service of the Municipality."***

19. Composition of Municipality is provided under Section 9 comprising of a President, who shall be its Chairman and elected and other members as stated in Section 9. The process of bringing in 'President' is election vide Section 43 of Act, 1916. It clearly provides, if a Member is elected as 'President' also, he shall cease to be a Member except as provided in Section 49. Section 49 provides that 'President' shall be ex-officio Member of Municipality. Therefore, the term 'Member' as such does not include 'President' since Member is elected as Member and 'President' is elected as 'President' directly on the basis of adult suffrage by electors in municipal area. In certain circumstances, provided in Section 48, a President can be removed from office by State Government. Functions and additional duties to be performed by a 'President' are provided in Sections 50 and 51 of Act, 1916. There is no term like "Municipal Commissioner" used in Act, 1916. Section 84 declares "officers" and "servants" of a Municipality to be deemed "public servants" but looking to the definition of "officers" and "servants" under Section 2(12) and (22) it cannot be said that the same would include a Member or President of Municipality.

20. It is no doubt true that in the context of U.P. Act, 1916 in **Prem Narain (supra)** a learned Single Judge specifically considered the question, whether Prem Narain, a Municipal Commissioner is a "public servant" or not but nothing is shown for U.P. Act, 1916 that it is the President of Municipality and both are interchangeable. Prem Narain being a Municipal Commissioner was held to be a "public servant" hence aforesaid judgment also would not help revisionist. It is true that in para 5 of judgment, Court has observed that a Member of Municipal Board when entrusted with certain duties, acts as a "public servant" but that was not an issue before Court.

21. In the later decisions, however, I find that there is a different view taken and they also need be noticed hereat.

22. A Constitution Bench in **R.S. Nayak Vs. A.R. Antulay, 1984(2) SCC 183** had an occasion to consider a question, whether a Member of Legislative Assembly is a "public servant" under Section 21 IPC or not. Court framed two issues in this respect as under:

"(d) Is M.L.A. a public servant within the meaning of the expression in Sec. 21(12)(a) IPC?

(e) Is M.L.A. a public servant within the meaning of the expression in Sec.21(3) and Sec. 21(7) IPC?"

23. Court held that, "one can justifiably say that M.L.A. could not be comprehended in any of the clauses of Sec. 21 to be a public servant when the Indian Penal Code was enacted in 1860." Then changes brought in Clauses (9) and (12) of Section 21 IPC were considered and Court held that expression 'Government' in Section 21 (12)(a) clearly denotes the Executive and not Legislature. M.L.A. is certainly not in the pay of Executive. Therefore, even if he receives pay and allowances, can not be said to be in the pay of Government i.e. Executive. Similarly, it also cannot be said that he is remunerated by fees for performance of any public duty by Government, i.e., Executive. It ultimately held:

"74. If M.L.A. is not in the pay of the Government in the sense of Executive government or is not remunerated by fees for performance of any public duty by the Executive Government, certainly he would not be comprehended in the expression 'public servant' within the meaning of the expression in Clause (12) (a). He is thus not a public servant within the meaning of the expression in Clause (12) (a). This conclusion reinforces the earlier conclusion reached by us after examining the historical evolution of Clause (12) (a)."

24. For answering Question (e) Court held that Section 21(3) and (7) are not applicable to M.L.A.

25. A specific question came up for consideration, whether a Municipal Councilor is a "public servant" or not, in **Ramesh Balkrishna Kulkarni vs. State of Maharashtra, 1985(3) SCC 606**. Relying on the decision in **R.S. Nayak Vs. A.R. Antulay (supra)** Court held that a "Municipal Councilor" is a person different from the concept of a "public servant". It observed:

"..... we are of the opinion that ***the concept of a 'public servant' is quite different from that of a Municipal Councilor. A 'public servant' is an authority who must be appointed by Government or a semi-governmental body and should be in the pay or salary of the same. Secondly, a 'public servant' is to discharge his duties in accordance with the rules and regulations made by the Government.*** *On the other hand, a Municipal Councilor does not owe his appointment to any governmental authority.* ***Such a person is elected by the people and functions undeterred by the commands or edicts of a governmental authority. The mere fact that a MLA gets allowance by way of honorarium does not convert his status into that of a 'public servant'****. In Antulay's case (supra), the learned Judges of the Constitution Bench have referred to the entire history and evolution of the concept of a 'public servant' as contemplated by Section 21 of the IPC." (emphasis added)*

26. This decision was followed in **State of Tamil Nadu vs. T. Thulasingam and others, 1994(2) SCC (Suppl.) 405** and in para 76 of judgment, Court held that "Councilors" are not "public servants" and for that purpose relied on earlier decision in **Ramesh Balkrishna Kulkarni (supra).**

27. In a matter went from judgment of **Rajasthan High Court to Supreme Court, i.e. Manish Trivedi vs. State of Rajasthan, AIR 2014 SC 648** the authorities in **Ramesh Balkrishna Kulkarni (supra)** and **T. Thulasingam (supra)** have been distinguished and it is held that a

member, officer or servant of Municipality shall be a "public servant". The reason being that there was a specific provision in Section 87 of Rajasthan Municipalities Act, 1959 declaring that every Member, Officer or Servant etc. shall be deemed to be "public servant". Referring to specific provision contained in Section 87 of Rajasthan Municipalities Act, Court held that since every member of Municipality was specifically declared to be a deemed public servant, decisions in Ramesh Balkrishna Kulkarni (supra) and its follow up would not apply to the case governed by Rajasthan Municipalities Act. Court further held that case before it relates to prosecution under Prevention of Corruption Act, 1988 and since there is a separate definition of "public servant" under Section 2(c), the matter has to be looked into in the light of such definition and not under Section 21 IPC. It was held that under Prevention of Corruption Act there is a wide definition of "public servant" with a purpose to purify public administration and such widened scope cannot be restricted as that would be against spirit of statute. Court distinguished judgments **in Ramesh Balkrishna Kulkarni (supra), R.S. Nayak Vs. A.R. Antulay (supra)** and **T. Thulasingam (supra)** by observing as under:

"20. Now we revert to the authorities relied on by ***Mr. Adhiyaru i.e. R.S. Nayak (supra), Ramesh Balkrishna Kulkarni (supra)*** *and* ***T. Thulasingam (supra).*** *In all these decisions, this Court was considering the scope of Section 21 of the Indian Penal Code which defines 'public servant'. It was necessary to do so as Section of the Prevention of Corruption Act, 1947 defined 'public servant' to mean as defined Under Section 21 of the Indian Penal Code.* ***A member of the Board, or for that matter, a Councillor per se, may not come within the definition of the public servant as defined Under Section 21 of the Indian Penal Code but this does not mean that they cannot be brought in the category of public servant by any other enactment. In the present case, the Municipal Councillor or member of the Board does not come within the definition of public servant as defined Under Section 21 of the Indian Penal Code, but in view of the legal fiction created by Section of the Rajasthan Municipalities Act, they come within its definition."*** *(emphasis added)*

28. The decision in **Ramesh Balkrishna Kulkarni (supra)** was also followed in **State of Maharashtra vs. Laljit Rajshi Shah and others, 2000(2) SCC 699.**

29. In view of above discussion and finding that no specific provision like I find in Rajasthan Municipalities Act, 1959 declaring a Member or Chairman as "public servant" exist in U.P. Act, 1916, I am of the opinion that a Chairman of Municipal Board under Act, 1916 is not a "public servant" and for this purpose follow law laid down in **Ramesh Balkrishna Kulkarni (supra); T. Thulasingam (supra);** and**, Laljit Rajshi Shah (supra)**.

30. However, even otherwise I find that objection regarding sanction in the present case is wholly irrelevant for the reason that order taking cognizance and summoning revisionist has been passed by Magistrate on 04.01.1996 when revisionist had already ceased to hold office of Chairman, Nagar Palika Parishad. As already said he functioned as Chairman, Nagar Palika Parishad from February, 1989 to February, 1991. In **R.S. Nayak Vs. A.R. Antulay (supra)** a question has been considered as to what is the relevant date with reference to a sanction as a pre-

requisite for prosecution of a "public servant". The same has been answered by observing that it is the date on which cognizance is taken by Court. Court has said:

"...terminus a quo for a valid sanction is the ***time when the court is called upon to the cognizance of the offence.*** *If therefore, when the offence is alleged to have been committed, the accused was a public servant but by the time the court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be public servant, no sanction would be necessary for taking cognizance of the offence against him.* ***..... If he has ceased to be a public servant in the meantime, this vital consideration ceases to exist."*** *(emphasis added)*

31. In the present case also on the date when cognizance was taken revisionist was not holding office of Chairman, Nagar Palika Parishad and, therefore, plea of lack of sanction is not available. For this reason also objection raised by revisionist against summoning order passed by Court below, assailed in this revision, deserves to be rejected.

32. Even on the question of sanction I find that there is no specific mode or manner prescribed following whereto State Government is required to grant sanction. Sanction normally means that permission should be granted by State to initiate criminal proceedings against a person where such sanction is required by any statutory provision. In the present case City Magistrate, Saharanpur made an inquiry and submitted report, whereupon State Government passed order on 02.09.1992 to initiate criminal proceedings against revisionist. I find no reason not to treat said document as a sanction granted by Government for initiating criminal proceedings against revisionist. Therefore, even otherwise it cannot be said that there is no sanction of Government.

33. In the result, I find no merit in revision. Dismissed accordingly.

34. Interim order, if any, stands vacated.

35. Certify this judgment to the lower Court immediately.

(2016) 9 ILRA 1834
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 4986 Of 2005
&
Connected With Other Cases

Hatam Singh & Ors. **...Petitioners**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for Petitioners:
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Counsel for Respondents:
C.S.C., Mahendra Pratap, and others

Land Acquisition Act, 1894 -- Sections 4, 6 & 17 -- U.P. Urban Planning and Development Act, 1973 -- Jurisdiction of Development Authority -- Effect of creation of new Revenue District -- Notifications dated 16.10.2004 (Section 4) and 28.11.2005 (Section 6) issued for acquisition of 229.5390 acres in village Mohiuddinpur Kanawani for 'Planned Development' at instance of Ghaziabad Development Authority (GDA) -- Petitioners contended that the village, having become part of Revenue District Gautambudh Nagar carved out in 1997, and having been declared a Gram Panchayat, fell outside jurisdiction of GDA/District Ghaziabad -- **Held:** A 'development area' declared under Section 3 of U.P. Act, 1973 is not confined to a Revenue District and creation of a new Revenue District under U.P. Act, 1901 does not affect the territorial jurisdiction of a Development Authority already constituted over that area -- Declaration of a village as Gram Panchayat under U.P. Act, 1947 has no bearing on its inclusion within a 'development area' under U.P. Act, 1973 -- Village Mohiuddinpur Kanawani, though excluded from Ghaziabad Development Area upon its inclusion in NOIDA vide notification dated 18.05.1978 under U.P. Act, 1976, stood restored to GDA's jurisdiction upon supersession of that notification by notification dated 11.07.1989, which did not include the village -- GDA held to have jurisdiction to acquire the land. (Paras 35-58)

Land Acquisition Act, 1894 -- Section 17(1)/(4) -- Dispensation of Inquiry under Section 5A -- Existence of Urgency -- Power under Section 17 is an exception to normal procedure of acquisition and can be invoked only where there exists a real and bona fide urgency, not as a matter of course or in a mechanical manner -- Right to file objections under Section 5A is a substantive right akin to a facet of Articles 14 and 19 -- **Held:** Deliberation for acquisition of the land commenced as far back as 29.06.2001 and declaration under Section 6 was made only on 28.11.2005, i.e. more than four years later, with the process between Section 4 and Section 6 notifications alone taking over a year -- Such prolonged and leisurely process negates existence of genuine urgency -- No material or bona fide justification for dispensing with inquiry under Section 5A was demonstrated by respondents -- Exercise of power under Section 17(1) and (4) held illegal and arbitrary. (Paras 60-88)

National Capital Region Planning Board Act, 1985 -- Section 40 -- Sub-Regional Plan -- Approval of NCRPB -- Mandatory Compliance -- Acquisition of land situated within National Capital Region for 'Planned Development' requires that the Sub-Regional Plan of the participating State be in conformity with the Regional Plan and cleared by NCRPB, failing which it can neither be implemented nor enforced -- **Held:** Following the Full Bench decision in **Gajraj Singh v. State of U.P., 2011 (11) ADJ 1**, mere vague and general averment of compliance is insufficient; no material placed to show that a Sub-Regional Plan was formulated by GDA and submitted for NCRPB's consideration -- Change of user of acquired land (from recreational to residential under the Master Plan) without approval of NCRPB is impermissible -- Acquisition proceedings held not in conformity with the mandatory requirement of Act, 1985. (Paras 89-96)

Land Acquisition Act, 1894 -- Section 6(1) proviso (ii) -- Limitation for Declaration -- Effect of Corrigendum and Interim Stay -- Declaration under Section 6 must be made within one year of publication of notification under Section 4, the relevant date being the last of the modes of publication -- **Held:** Notification under Section 4 was published in Gazette on 16.10.2004, in newspapers on 22.10.2004 and Munadi carried out on 02.12.2004; substantial corrigenda were published on 19.01.2005 and 02.08.2005 correcting the notification -- Declaration dated 28.11.2005 computed from the last date of publication/corrigendum, and after excluding the period during which interim stay operated from 22.10.2005, is within limitation. (Paras 97-110)

Land Acquisition Act, 1894 -- Colourable Exercise of Power -- Acquisition for Private Builders -- Plea that acquisition was a colourable exercise since acquired land was largely transferred to private builders -- **Held:** In absence of specific pleading and material showing that acquisition was made for the benefit of an identified private person/company without compliance of law, and the scheme being one of Planned Development permitting participation of private builders in development, the plea cannot be accepted. (Paras 111-112)

Writ Petitions Allowed -- Notifications dated 16.10.2004 under Section 4 and 28.11.2005 under Section 6 of Land Acquisition Act, 1894, set aside qua the land of the petitioners in all connected writ petitions, for illegal dispensation of inquiry under Section 5A and non-compliance of National Capital Region Planning Board Act, 1985 -- Relief confined to petitioners who approached the Court -- Costs of Rs. 5,000/- for each set of writ petitions awarded against respondents 1, 2 and 3. (Paras 115-117)

Case Law Discussed:

1. Nandeshwar Prasad v. U.P. Government, AIR 1964 SC 1217
2. Munshi Singh v. Union of India, (1973) 2 SCC 337
3. State of Punjab v. Gurnail Singh, 1980 (1) SCC 471
4. Shyam Nandan Prasad v. State of Bihar, (1993) 4 SCC 255
5. Om Prakash v. State of U.P., (1998) 6 SCC 1
6. Union of India v. Mukesh Hans, (2004) 8 SCC 14
7. Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai, (2005) 7 SCC 627
8. Essco Fabs Pvt. Ltd. v. State of Haryana, (2009) 2 SCC 377
9. Anand Singh v. State of U.P., (2010) 11 SCC 242
10. Radhe Shyam (Dead) through Lrs. v. State of U.P., 2011 (5) SCC 553
11. Dev Saran v. State of U.P., (2011) 4 SCC 769
12. Darshan Lal Nagpal (Dead) By Lrs. v. Govt. of NCT of Delhi, (2012) 2 SCC 327
13. Ramdhari Jindal Memorial Trust v. Union of India, (2012) 11 SCC 370
14. Kamal Trading Private Limited v. State of West Bengal, (2012) 2 SCC 25
15. Surinder Singh Brar v. Union of India, (2013) 9 SCC 403
16. Union of India v. Shiv Raj, (2014) 6 SCC 564
17. Urban Improvement Trust, Udaipur v. Bheru Lal, (2002) 7 SCC 712
18. Sriniwas Ramnath Khatod v. State of Maharashtra, AIR 2002 SC 187
19. Mohan Singh v. International Airport Authority of India, (1997) 9 SCC 132
20. Ram Kumar v. State of U.P., 2015 (6) ADJ 273 (DB)

21. Anil Kumar Gupta v. State of Bihar, (2012) 12 SCC 443
22. Mahavir Sahkari Avas Samiti Ltd. v. State of U.P., 2006 (8) ADJ 203
23. Gajraj Singh v. State of U.P., 2011 (11) ADJ 1

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

1. Petitioners in all these writ petitions have assailed notifications dated 16th October, 2004 published under Section 4(1) of Land Acquisition Act, 1894 (hereinafter referred to as 'Act, 1894') and dated 28th November, 2005 published under Section 6 (1) of Act, 1894, proposing to acquire 387-0-5 bighas (229.3828 acres) of land, comprising a large number of khasras in Village-Mohiuddinpur Kanawani, Pargana Loni, District Ghaziabad for the purpose of "Planned Development", (for construction of residential colonies) at the instance of Ghaziabad Development Authority (hereinafter referred to as 'GDA'), in public interest. State Government also exercised powers under Section 17(1) and (4) and dispensed with inquiry contemplated under Section 5A of 'Act, 1894'.

2. Details of petitioners and respective plots belong to them, which are in dispute and subject matter of acquisition in question, are as under:

Sl. No.	Writ Petition	Petitioners' name	Details of Kharsa/Gata no.	Area (in bigha/ hectare/ sq yd)
1	4986 of 2005	1. Hatam Singh 2. Jagat Singh 3. Khajan Singh 4. Deepak Singh 5.Devendra Singh 6.Shakuntala Devi	256/2 299 381 457/1 450	1-1-5 (3214.06 sq yd) 2-0-0 (6050 sq yd) 1-17-0 (5596.25 sq yd) 0-10-0 (1512.05 sq yd) 1-0-0 (3025 sq yd)

2	35668 of 2005	Smt. Deepa Garg	153M 154M 155M 152 147M 147M	0-9-0 (1361.25 sq yd) 0-14-0 (2117.5 sq yd) 0-12-8 (1875.496 sq yd) 0-14-0 (2117.5sq yd) 0-5-0 (756.25 sq yd) 0-13-0 (1966.25 sq yd)
3	39171 of 2005	M/S Shri Nemi Nath Foundation	278 279	1-4-7 (3/5th share (3682.934 sq yd) 0-10-0 (1512.5 sq yd)
4	76749 of 2005	1.Sri Dharam Singh 2.Sri Karan Singh 3.Smt. Mayawati 4.Smt. Kisan Dai 5.Sri Bool Chand 6.Sri Chatar Singh 7.Sri Kabool Singh 8.Sri Kishan Lal 9.Sri Layak Ram	454 455 463 303 304 289 291 437 438 495 491 453	300 sq. yard 1-6-0 (3932.5 sq yd) 0-18-0 (2722.5 sq yd) 1-10-0 (4537.5 sq yd) 0-13-0 (1966.25 sq yd) 2-8-0 (7260 sq yd) 1-1-0 (3176.25 sq yd) 0-8-0 (1210 sq yd) 0-16-0 (2420 sq yd) 0-17-0 (2571.2 sq yd) 0-12-0 (1815 sq yd) 1-2-0

		10.Sri Dheeraj Singh 11.Sri Deep Chand 12.Sri Mahendra Singh 13.Sri Ravinder Kumar 14.Sri Surinder Kumar 15.Smt. Raj Kali 16.Sri Sukhbir Singh 17.Sri Tej Singh 18.Sri Khajan Singh 19.Smt. Harkali 20.Sri Suraj Singh 21.Sri Chander Singh 22.Sri Bed Ram 23.Sri Prem Raj 24.Sri Jabar Singh 25.Sri Nawal Singh	452 451M 454M 501 259 510 514 515 454M 455M 440	(3327.5 sq yd) 0-11.5-0 (1739.375 sq yd) 1-10-5 (4775.31 sq yd) 0-8-0 (1210 sq yd) 0-6-0 (907.5 sq yd) 1-0-0 (3025 sq yd) 0-17-0 2571.25 sq yd) 1-10-0 4537.5 sq yd) 0-2-15 (415.93 sq yd) 0-15-10 (9830 sq yd) 2-3-10 (6589.37 sq yd)

		26.Sri Kanwar Singh. 27.Sri Bhanwar Singh 28.Sri Vir Singh		
5	76751 of 2005	1.Pushpendra Kumar Singh 2.Dharmendra Kumar Singh 3.Jitendra Kumar Singh	407	250 sq. yards
6	77647 of 2005	1.Anoop Singh 2.Khem Chand 3.Udai Singh 4.Bhagwat Singh 5.Smt. Shanti Devi 6.Rajender Singh 7.Fateh Singh	511 456 257 516	0-17-0 (2571.25 sq yd) 0-15-5 (2382.18 sq yd) 0-15-0 (2268.75 sq yd) 0-16-0 (1/3rd (2420 sq yd)
7	77668 of 2005	Smt. Devki Singh	380 382	3-6 1/4-0 (19057.5 sq yd) 1-6-0 (3932.5 sq yd)
8	77670 of 2005	1. S.M. Chopra 2. Kiran Chopra	300 383	1-12-0 (4840 sq yd) 1-12-0 (4840 sq yd)

9	77902 of 2005	1. Raj Singh 2. Babu Lal	395	0-17-0 (2571.25 sq yd)
10	78873 of 2005	1.Rita Devi 2.Brij Kishore 3.Ram Singh 4.Moti Pandit 5.Abdul Wahid 6.Indu Devi 7.Ganga Prasad 8.Devi Das 9.Sanjay Kumar Chorisya 10.Veer Singh 11.Umesh Kumar 12.Parmila Devi 13.Brij Lal Verma 14.Vinod Kumar Pandey 15.Sharmila Thakur 16.Ishwar Dayal 17.Vishnu Kumar Sharma	482 483 226/5	6-13-0 (20116.25 sq yd) 0-3-10 (1966.25 sq yd) 10-0-12 (30340.744sq yd)

		18.Desh Raj 19.Pushpa Devi 20.Kalpana Upadhya 21.Shahnaj 22.Nakul Thakur 23.Kavita 24.Rakesh Kumar 25.Rupa Devi 26.Satish Pandit 27.Pradeep Kumar Thakur 28.Laxman 29.Smt. Asha Devi 30.Raj Kumar 31.Amina Khatoon 32.Saroj Sanju 33.Kripal Singh 34.Shiv Shankar Tiwari 35.Dinesh Kumar Yadav		

		36.Rameshwar Shah 37.Kuldeep Kumar 38.Munim 39.Ram Vilash 40.Subhan 41.Pratap Singh 42.Suresh Yadav 43.Bindeshwari Prasad 44.Ram Pal 45.Mool Chand 46.Salleddin Ansari 47.Surendra Gupta 48.Manohar Lal 49.Ranesh Kumar 50.Mantoon Mahto 51.Rachna Devi 52.Sonia 53.Sunil		

		54.Veer Singh 55.Bhupendra 56.Vinod Sharma 57.Vishnu Dev Mahto 58.Golik Kumar Mohanti 59.Karan Singh 60.Rajesh Thakur 61.Om Prakash Thakur 62.Ram Ashrey 63.Ashok Kumar 64.Ramesh Devi 65.Ram Dev Sharma 66.Raj Kumari 67.Shiv Prasad Singh 68.Omi 69.Anita 70.Rajesh Singh 71.Anju Sharma		

		72.Sarju Prashad 73.Leelawati 74.Mamta Devi 75.Maya Devi 76.Nand Kishore 77.Munni Lal 78.Radhe Shyam 79.Radhe Shyam 80.Anuj Gautam 81.Laxmi Devi 82.Rajesh Kumar Chaoudhary 83.Munnu Singh 84.Mansori Rai 85.Asha Devi Srivastava 86.Rattan Singh Pal 87.Prayag 88.Prem Singh Bist 89.Anil Kumar Mahto		

		90.Shiv Mohan Yadav 91.Jagdish Mahto 92.Raj Dulari 93.Manju Devi 94.Madhulika Singh 95.Champa Devi 96.Jyatri Devi 97. Badri Prashad 98.Ram Kewal 99.Chanchal Dhiman 100.Ravinder Nath 101.Guddu Verma 102.Ravi Shankar Mishra		
11	363 of 2006	1.Sri Ratan Singh 2.Sri Dayanand 3.Sri Brahmanand 4.Sri Likhi Ram	240 411 413 517 497	0-4-0 (605sq yd) 1-5-0 (3781.25sq yd) 0-7-0 (1058.75sq yd) 1-0-0 (3025sq yd) 1-4-0

			454	(3630sq yd)
		5.Jagdish Prasad		1-4-0
			494 & 495	(3630sq yd)
		6.Sri Mithan Singh		855 sq yard
			447, 448, 449	
			502	4-9-0
		7.Sri Braham Singh		(13461.25sq yd)
			488	0-6-0
				(907.5sq yd)
		8.Sri Rajbeer Singh	419	1-0-0
				(3025sq yd)
			504	1-15-0
		9.Sri Jai Ram		(5293.75sq yd)
			440	0-18-0
		10.Sri Jai Pal Singh		(2722.5sq yd)
			419	3-14-2
				(11207.624sq
		11.Sri Kishan	504	yd)
				1-15-0
		12.Sri Beer Singh	419	(5293.75sq yd)
				0-18-0
			504	(2722.5sq yd)
		13.Sri Bhim Raj		1-15-0
			420	(5293.75sq yd)
		14.Sri Suraj Singh		0-18-0
			440	(2722.5sq yd)
				0-8-0
		15.Sri Ajab Singh	419	(1210sq yd)
				3-14-2
				(11207.624sq
		16.Sri Mahendra Singh	504	yd)
				1-15-0
			420	(5293.75sq yd)
		17.Sri Jagmal		
			440	0-18-0
		18.Sri Dharam Singh		(2722.5sq yd)
			441	0-8-0
				(1210sq yd)
		19.Sri Mahendra Singh	494 & 495	3-14-2
				(11207.624sq
			441	yd)
		20.Sri Sattan Singh		2-5-0
			285	(6806.25sq yd)

		21.Sri Mani Ram 22.Sri Des Raj 23.Sri Ant Raj 24.Sri Ram Prakash 25.Sri Brij Pal 26.Sri Satveer 27.Sri Kavinder 28.Sri Narender 29.Sri Indra Raj 30.Sri Ishwar 31.Sri Naresh 32.Sri Dharmender 33.Smt. Jagwati 34.Sri Jabar Singh 35.Sri Nawal Singh 36.Sri Kanwar Singh 37.Sri Bhawarn Singh 38.Sri Beer	487 539 516 488 418 458	0-8-7 (1262.934sq yd) 2-5-0 (6806.25sq yd) 0-14-0 (2117.5sq yd) 2-6-0 (6957.50sq yd) 1-6-0 (3932.5sq yd) 2400 sq yard 2-0-0 (6050sq yd) 1-0-0 (3025 sq yd) 0-12-0 (1815sq yd)

		Singh 39.Sri Mahesh 40.Sri Raj Kumar 41.Sri Manoj 42.Sri Vinod Kumar 43.Sri Tek Chand 44.Sri Sant Ram 45.Sri Hansa Ram 46.Sri Kara Singh 47.Sri Budh Ram 48.Sri Jai Pal 49.Sri Rampat Singh 50.Ratan Singh 51.Sri Braham Singh 52.Sri Jatan Singh 53.Sri Jagdish Singh 54.Sri Prem		

		Singh 55.Sri Dharam Singh 56.Sri Charan Singh 57.Sri Bhagat Singh 58.Sri Chaman Singh 59.Sri Jagat Singh 60.Sri Desh Raj Singh 61.Sri Velu 62.Sri Satish 63.Sri Sita Ram 64.Sri Shree Pal 65.Sri Satender 66.Smt. Kanika Saraswat 67.Deewan Chand 68.Smt. Suresh 69.Sri Misri Lal 70.Sri Pyare Lal 71.Sri Om Beer		

		72.Smt. Biro Devi 73.Sri Bablu 74.Sri Narender 75.Sri Kavinder 76.Smt. Ram Kali 77.Sri Charan Singh 78.Sri Bhule Ram		
12	1622 of 2006	1.Madhuban Sahkari Awas Samiti Ltd. 2.Anuradha 3.Smt. Mina Devi	315 348 347 349 350 351 310 344 345	0-11-0 (1663.75sq yd) 0-19-0 (2873.75sq yd) 0.5310 (6350.71sq yd) 0.2910 (3480.33sq yd) 0.2780 (3324.85sq yd) 0.6070 (7259.6sq yd) 0.3160 (3779.33sq yd) 0.1520 (1817.90sq yd) 0.3160 (3279.33sq yd)
13	5495 of 2006	1.Dhan Pal 2.Ram Pal 3.Sardar Singh 4.Munshi 5.Ram Kishan 6.Pappu	237 406 432/2	0.291 (3480.33sq yd) 0-13-0 (1966.25sq yd) 0.253 (3025.85sq yd)

		7.Raje 8.Raj Pal 9.Mannu 10.Jagga 11.Smt. Sona Devi		
14	5503 of 2006	1.Gaggan Deep Gandhi 2.Param Jeet Ghandhi	156 157 279 169	0.0380 h (454.48sq yd) 0.3670 h (4389.28sq yd) 0.2400 (2870.38sq yd) 0.1640 (1961.42sq yd)
15	5505 of 2006	1.Anita Babbar 2.Rajani Babbar 3.Ashok Sachdeva	280 284 285	0-14-0 (2117.5sq yd) 1-1-19 (3319.928sq yd) 1-8-1 (4242.562sq yd)
16	52592 of 2006	1.S.B.H. Sahkari Avas Samiti Limited 2.Dr. R.P. Singh	276	0-17-0 (2571.25sq yd)
17	56295 of 2006	Jagat Singh	298 306	1400.125 sq yard 1663.75 sq yard
18	56588 of 2006	1.Daya Nand Sharma 2.Brahma Nand Sharma 3.Lakhi Ram Sharma 4.Jagdish Sharma 5.Ram Chandra 6.Raj Veer	412 415/2M 392 393 414	0.0510 (609.95sq yd) 0.5190 (6207.18sq yd) 0.4430 (5298.24sq yd) 0.3290 (3934.81sq yd) 0.3410 (4078.32 sq yd)

		Singh 7.Bhram Singh 8.Sri Chand 9.Kailash Chand 10.Janduva 11.Vijay Pal 12.Bheem Raj 13.Dilva 14.Suraj Singh 15.Chander Singh 16.Palm Ram Singh 17.Ved Ram Singh 18.Ramey Chand 19.Prem Singh 20 Rajesh Kumar Singhal	409M 413M 416/2 409M 410 415M 417 229 400 439 523 524 447 449 448 490 522 482 165 239 259	11-4-15 (33993.43sq yd) 1-10-0 (4537.5sq yd) 0-15-2 (2283.874sq yd) 0.0160 (1913.58sq yd) 0.1640 (1961.42sq yd) 0.0130 (155.47sq yd) 0.2280 (2726.85sq yd) 1-3-0 (3478.75sq yd) 0-18-0 (2722.5sq yd) 2-16-0 (8470sq yd) (1-6-0)/2 3932.5sq yd) (1-6-0)/2 (3932.5sq yd) (0-13-0)/2 (1966.25sq yd) (2-9-0)/2 (7411sq yd) 1-6-0 (3932.5sq yd) 1-5-0 (3781.25sq yd) 0-14-0/2 (2117.5sq yd) 0-3-0 (453.75sq yd) 1-14-3 (5165.186sq yd) 1-3-0 (3478.75sq yd) 0-6-0 (907.5sq yd)

19	47797 of 2009	Shri Anil Kumar Jain	149 151	0.1260 (1506.95sq yd) 0.0130 (155.48sq yd)
20	47339 of 2010	1.Ram Veer 2.Bhopal Singh 3.Mahesh Chand 4.Suresh Chand 5.Sanjay 6.Suresh Singh 7.Ratani 8.Hem Chand 9.Sukhpal 10 Kesh Ram 11.Sripal 12.Prem Singh 13.Zila Singh 14.Kishon Devi 15.Kheemraj 16.Khairati 17.Ratan Singh 18.Heera Lal 19.Tulsi Ram 20.Fateh Singh 21.Jagan 22.Parmal 23.Satish 24.Prem Singh 25.Brahm Prakash 26.Brijesh 27.Neeraj 28.Praveen 29.Pramod 30.Lala	249	0.5690 (6805.18 sq yd))
21	4566 of 2011	Bhuley Ram	389 390	160 mtr 2120 mtr
22	36270 of 2011	M/S S.V. Liquor (India) Ltd.	406	0.8290 h (9914.75sq yd)
23	2476 of 2012	Balwant Rai	300	0-2-0

		Kathuria	302	(302.5 sq yd) 1-5-0 (3781.25 sq yd))
24	28223 of 2012	Amarjeet Kaur Gandhi	290	0-14-0 (2117.5 sq yd)
25	37492 of 2012	1.Shyam Lal 2.Ram Kishan 3.Babu Ram 4.Dharam Veer 5.Chatar Singh 6.Bhoop Singh @ Pappu 7.Karan Singh 8.Smt. Leelawati 9.Gyano 10.Anoj 11.Kailash 12.Bhram Singh 13.Rampat 14.Jatan Singh 15.Ratan Singh 16.Jagdish 17.Prem Singh 18.Dharam Singh 19.Dhanpal 20.Rampal 21.Sardar Singh 22.Munshi 23.Bheem Singh 24.Bheem Saran 25.Maharaj Singh 26.Hem Chand @ Kalwa 27.Sukh Lal	237M 195 & 196 183 187 188 389 390 202 436 201 435 167 168 262 265 267 269 270	.2446 h (2925.39sq yd) .0418 h (499.92sq yd) .0890/2 h (1064.43sq yd) .2530/2 h (3025.85sq yd) .1900/2 h (2272.38sq yd) .0160 (191.35sq yd) .2220 (2655 sq yd) .2660 (3181.33 sq yd) .2280 (2726.86 sq yd) .4170 (4987.28 sq yd) .3410 (4078.33 sq yd) .1260/2 (1506.95 sq yd) .1260/2 (1506.95 sq yd) .2400/2 (2870.38 sq yd) .3540/2 (4233.80 sq yd) .0510/2 (609.95 sq yd) .1770/2 (2116.90 sq yd) .1770/2 (2116.90 sq yd)

			272 273 275 167 168 262 265 267 269 270 272 273 275 230	.2910/2 (3480.33 sq yd) .1530/2 (1829.86 sq yd) .2660/2 (3181.33 sq yd) .1260/2 (1506.95 sq yd) .1260/2 (1506.95 sq yd) .2400/2 (2870.38 sq yd) .3540/2 (4233.80 sq yd) .0510/2 (609.95 sq yd) .1770/2 (2116.90 sq yd) .1770/2 (2116.90 sq yd) .2910/2 (3480.33 sq yd) .1530/2 (1829.86 sq yd) .2660/2 (3181.33sq yd) .3290 (3934.81sq yd)
26	16390 of 2013	1.Surendra Singh 2.Devendra Singh 3.Vijendra Singh 4.Sanjay 5.Smt. Bala Devi	26 255 261	1-13-0 (4991.25 sq yd) 2-3-0 (6503.75 sq yd)
27	17162 of 2013	1.Smt. Vimlelsh Bansal 2.Ankit Nagar 3.Anuj Nagar 4.Mahipal Singh 5.Surendra Pal Singh	285	25568.14 sq. mtr

28	21562 of 2013	1.Sunil Sachdev 2.Harish Sachdev 3.Janak Sachdev 4.Naresh Chand 5.Jadish 6.Sitaram 7.Sripal 8.Satendra 9.Achaya 10. mt. Rajrani 11.Sanjay Singh 12.Meghraj 13.Smt. Krishna Devi 14.Rajpal 15.Veerpal 16.Ranveer 17.Manveer 18.Mahipal	159 164 183 187M 188 195 196M 197	1-11-0 (1663.75 sq yd) 1-11-10 (1739.37 sq yd) 0-7-0 (1058.75 sq yd) 0-13-0 (1966.25 sq yd) 0-15-0 (2268.75 sq yd) 0-18-0 (2722.5 sq yd) 0-19-0 (2873.75 sq yd) 0-7-0 (1058.75 sq yd)
29	21565 of 2013	1.Ratan Singh 2.Heera Lal 3.Tulsiram 4.Fateh Singh 5.Jagan 6.Parmal 7.Dayachand 8.Harbeer 9.Smt. Jagwati 10.Susrendra Singh 11.Devendra Singh 12.Vijendra Singh 13.Sanjay 14.Smt. Bala Devi 15.Sukhbir Singh Gusiya 16.Manjeet	161 274 459M	0-8-0 (1210 sq yd) 1-5-0 (3781.25) 0-9-0 (1361.25 sq yd)

		Singh Gusiya		
30	35161 of 2014	1.Desh Raj 2.Ant Raj 3.Braj Pal 4.Satyabir 5.Hansa Ram 7.Karan Singh	296	

3. With the consent of parties, Writ Petition no. 4986 of 2005 (Hatam Singh and others vs. State of U.P. and another) has been made leading case and a combined paper book of the aforesaid writ petitions including respective pleadings of parties has been filed which has been referred by respective counsels in all connected writ petitions during course of arguments.

4. Writ Petition no. 35161 of 2014 has been filed by some petitioners who had already filed Writ Petition no. 363 of 2006, challenging acquisition notifications and subsequent writ petition is in respect of subsequent action being taken by respondent-authority i.e. GDA, by publishing auction notice dated 11.07.2014, and therefore, it is connected with the same.

5. GDA required certain land for "Planned Development". On the requisition sent by GDA, forwarded by Collector, Ghaziabad, State Government published notification dated 16th October, 2004 under Section 4(1) of Act, 1894, proposing to acquire 387-0-5 bighas land at Village Mohiuddinpur, Kanawani, Pargana-Loni, District Ghaziabad. State Government, exercising powers under Sections 17(1) and (4), also declared that land in question is needed urgently, therefore, inquiry under Section 5A of Act, 1894 shall stand dispensed with. Thereafter, declaration was made under Section 6 (1) of 'Act, 1894' vide notification dated 28th November, 2005, published in daily newspapers 'Dainik Jagran' dated 1st December, 2005.

6. In respect of some petitioners, who have claimed that there already existed certain constructions, GDA issued notices under Section 27(1) and 28(1) of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'U.P. Act, 1973') alleging that constructions have been raised without any permission/ approval by GDA and being unauthorised constructions should be removed by owners, failing which, penal action would be taken under Section 26 read with Section 14 of 'U.P. Act, 1973'. Notices issued to petitioners in leading writ petition have been filed as Annexure 3A to writ petition.

7. Before proceeding to consider rival submissions and our discussions in the matter, it would be appropriate to have, in brief, pleadings in concerned writ petitions so as to have advantage of factual aspects as available on record.

8. Leading Writ Petition no. 4986 of 2005 has come up at the instance of 6 petitioners, who claimed to be owners of plots numbers 256/2, 299, 381, 457/1; Khata no.358 and Khasara no. 450

situate in village Mohiuddinpur Kanawani, Pargana-Loni, Tehsil Dadri, District Gautambudh Nagar. All these plots have been mentioned in the notification dated 16th October, 2004, published under Section 4(1) of 'Act 1894' and dated 28th November, 2005, published under Section 6(1) of said Act. Petitioners have also received notices dated 06.12.2004, issued by GDA under Section 27(1) and 28(1) of 'U.P. Act, 1973', stating that constructions existing over plots mentioned therein are unauthorised and illegal, having been raised without sanction of map by GDA, under Section 15 of U.P. Act, 1973, therefore, should be removed else the same shall be demolished. Petitioners responded to aforesaid notices vide replies dated 21st December, 2004, stating that constructions are 10 to 12 years old and old Abadi of village. Village Mohiuddinpur Kanawani, is part of Village Panchayat, 'Bisrakh' and has been so declared as Panchayat under Article 243 E of Constitution of India. A separate Revenue District, Gautambudh Nagar was created vide notification dated 11.05.1997, whereupon jurisdiction of Ghaziabad District in respect of area notified under new Revenue District, Gautambudh Nagar ceased to be part of District Ghaziabad and officials of District Ghaziabad also ceased to have any jurisdiction over area which was brought within the jurisdiction of Gautambudh Nagar. Village Mohiuddinpur Kanawani is part of revenue area of District Gautambudh Nagar, as a result of creation of the said District. Respondent 2 i.e. Collector, Ghaziabad, had no authority or jurisdiction with respect to village Mohiuddinpur Kanawani, on and after 11th May, 1997. The said village ceased to be a part of 'Development Area', under Section 3 of 'U.P. Act, 1973'.

9. GDA was constituted for 'Planned Development' of Ghaziabad city, exercising jurisdiction over area declared as "development land" through Government notification dated 9th March, 1977, under Section 3 of 'U.P. Act, 1973' only for District Ghaziabad, hence disputed plots of petitioners situate in village, Mohiuddinpur Kanawani, being part of District Gautambudh Nagar, cannot be developed by GDA. Disputed plots of petitioners over which residential houses are constructed, are old Abadi of village, having been declared 'Abadi' under Section 143 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'U.P. Act, 1950'), by competent authority, hence stand regularised as residential constructions raised by petitioners over agricultural plots and cannot be termed unauthorised by GDA. District Gautambudh Nagar was disbanded by State, vide notification dated 30.01.2004, issued under Section 11(2) of U.P. Land Revenue Act, 1901 (hereinafter referred to as 'U.P. Act, 1901'). The said notification was quashed by this Court vide judgment dated 21st May, 2004 in Rajesh Kumar Sharma vs. State of U.P. and others [2004 (3) AWC 2234], as a result whereof, Distirct Gautambudh Nagar continued and petitioners' village also continued to be part thereof. State of U.P. has not applied its mind while issuing notification under Section 4(1) of 'Act, 1894' that village, Mohiuddinpur Kanawani, is not part of District Ghaziabad but is a part of Gautambudh Nagar, hence aforesaid notification to this extent is apparently illegal and bad. Power has been exercised under Section 17, so as to dispense with inquiry under Section 5A of 'Act, 1894' without any material, without any application of mind and without forming opinion on the basis of any inquiry or material. Acquisition notifications have been issued mechanically without any relevant material and to curtail statutory rights of petitioners to file objections under Section 5(A) of Act, 1894.

10. Right to file objections under Section 5A is protected as a fundamental right guaranteed under Articles 14 and 19 of Constitution and same cannot be taken away under Section 17(4) of Act, 1894, without forming specific opinion based on relevant material on record about existing of urgency in interest of public at large. GDA has not deposited total amount of compensation to be awarded before declaration under Section 6(1), hence declaration under Section 6 of Act, 1894 is unsustainable in law. Collector has not tendered 80% compensation for the land of petitioners till the date of filing of petition as required under Section 17 (3A) of Act, 1894, hence Collector is not entitled to take possession of petitioners' land. State has not produced documents relevant to reports of concerned authorities regarding existence of urgency. State can not acquire land either for development or construction of residential houses when Abadi already exist at the site. GDA has no jurisdiction or authority to issue notices under Sections 27 and 28 of 'U.P. Act, 1973' and such notices are illegal and void ab initio.

11. GDA has contested writ petition by filing a counter affidavit, sworn by Sri Manoj Kumar Mishra, Assistant Engineer. It is alleged that writ petition is pre-mature, since it was filed challenging only notification under Section 4(1). Constructions raised by petitioners over plots in dispute without sanction of GDA are illegal. In respect to notices issued to petitioners under Section 27 and 28(1), they have alternative remedy of appeal before Chairman, GDA under Section 27 of U.P. Act, 1973. Constructions, as alleged, are not old but were started only in December, 2004. However, even if, the same is 12 years old, at that time also, GDA was there and hence, constructions raised without permission or sanction of map by GDA are illegal.

12. Factum that village, Mohiuddinpur Kanawani, is part of village Panchayat or not is irrelevant. Vide notification dated 29.01.1972, issued under Section 3(1) of U.P. (Regulation of Building Operations) Act, 1958 (hereinafter referred to as 'U.P. Act, 1958'), certain areas were declared 'Regulated Area'. Notification included several villages which were part of Districts Meerut and Bulandshahr, besides entire area within Nagarpalika limit of District Ghaziabad. A copy of the notification is annexure-1 to Counter Affidavit. It shows that 118 villages of District Meerut, and 19, villages of District Bulandshahr were notified as 'Regulated Area, Ghaziabad'. The name of village, Mohiuddinpur Kanawani, is at serial no.47, since at that time it was part of District Meerut. Subsequently, GDA was created under U.P. Act, 1973 and State Government published notification dated 9th March, 1977 under Section 3 of the said Act, stating that entire area declared as 'Regulated Area, Ghaziabad' vide notification dated 29.01.1972 shall be "Ghaziabad Development Area" under 'U.P. Act, 1973', except the area which is a cantonment, in the ownership of Central Government, for the use of National Territorial Army and owned by Central Government or acquired or taken on lease.

13. It is said that "Ghaziabad Development Area" was entire area which was notified as "Regulated Area, Ghaziabad" vide notification dated 29.01.1972, and therefore, village in dispute came to be notified within functional area of GDA. Once area is notified as "development area" for any development authority, the same would continue unless denotified or merged with another Development Authority. At the time of filing of counter affidavit, in March, 2005, GDA had operational area in some revenue villages of Districts Meerut, Bagpath and Bulandshahr. Mere

creation of new district would make no difference to already notified 'development area' of a Development Authority. It is not correct that GDA has also been created for only 'Planned Development' of Ghaziabad city but it is for development of area notified under Section 3 of U.P. Act, 1973. It is also said that constructions raised by petitioners have been demolished after serving of notices upon them.

14. In Rejoinder Affidavit filed by petitioners in leading writ petition replying to the Counter Affidavit filed by GDA, it is said that after creation of Revenue District Gautambudh Nagar, State Government published a notification, under Section 3 read with Section 11 of U.P. Panchayat Raj Act, 1947 (hereinafter referred to as 'U.P. Act, 1947'), as amended in 1994, and revenue village, Mohiuddinpur Kanawani, has been declared a Gram Panchayat, hence it ceased to be a "Development Area" under GDA. State Government, therefore, cannot acquire area for development by GDA. Petitioners have not received any demolition order and are still running a school named 'Vande Matram Academy', established in the year 1992, on disputed plots. It is wrong to allege that constructions have been demolished. Notification under Section 3 of 'U.P. Act, 1958' was issued when Ghaziabad was a Sub-division of District Meerut. After District Gautambudh Nagar came into existence, village, Mohiuddinpur Kanawani, is within jurisdiction of new district and having been constituted a separate village Panchayat, it stands exempted from jurisdiction of GDA. Notification under Section 3, issued on 9th March, 1977 ceased to apply to those areas which become part of a new District Gautambudh Nagar, after its creation in 1997 and also when a separate village Panchayat was created under U.P. Act, 1947. GDA was created for "Planned Development" of District Ghaziabad, hence it had jurisdiction only within limit of District Ghaziabad. Parliament has enacted National Capital Region Planning Board Act, 1985 (hereinafter referred to as 'Act, 1985'). It comprises whole Union Territory of Delhi, some parts of State of Haryana, Uttar Pradesh and Rajsthan. It includes entire Districts Ghaziabad, Bulandshahr and Meerut. GDA, therefore, cannot acquire land for residential purpose in contravention of sub-regional and project plan, prepared by National Capital Region Planning Board (hereinafter referred to as 'NCRPB')unless its permission is obtained under Section 29 of Act, 1985. Provisions of Act, 1985 have overriding effect over U.P. Act, 1973.

15. A Supplementary Rejoinder Affidavit has been filed appending therewith a notification dated 18th May, 1978 issued by State Government under Section 3 of U.P. Industrial Area Development Act, 1976 (hereinafter referred to as U.P. Act, 1976'), declaring "Industrial Development Area", constituting "New Okhala Industrial Development Area" (hereinafter referred to as 'NOIDA'). The same comprised of 14 villages of District Ghaziabad, including village, Mohiuddinpur Kanawani, area 917 acres. It is said that since village, Mohiuddinpur Kanawani, has now been notified as a part of "Industrial Development Area" under U.P. Act, 1976, hence the said village ceased to be within the jurisdiction of Development Area of GDA.

16. On behalf of respondent 1 also a separate Counter Affidavit has been filed, sworn by Sri Shiv Janam Chaudhary, Under Secretary, Housing and Urban Planning Department. It has also referred to notifications dated 29th January, 1972 issued under U.P. Act, 1958' and dated 9th March, 1977 issued under U.P. Act, 1973' and averred that village, Mohiuddinpur Kanawani, is part

of "Development Area" placed within the jurisdiction of GDA. State Government is competent to declare an area to be a "Development Area" irrespective of whether it is part of a district or beyond that. A "Development Authority" under Section 4 is created for any Development Area and it is not with respect to any particular Revenue District, therefore, acquisition notification dated 16.10.2004, under Section 4(1) is valid, since the disputed village in question is within Development Area of GDA. It is said that District Gautambudh Nagar was abolished vide notification dated 13.01.2004, which was quashed by High Court vide judgment dated 21.05.2004 but due to inadvertent mistake into notification dated 16.10.2004, village in question was shown in District Ghaziabad, hence corrigendum was issued on 28.09.2005, wherein it was said that in place of 'Ghaziabad', it shall be read as 'Gautambudh Nagar'. Aforesaid clerical mistake would not affect validity of acquisition notification.

17. Very strangely, however, we find that no specific reply has been given by State Government in respect of assertions made by petitioners about non-existence of urgency and arbitrary and illegal exercise of power under Section 17(1) and (4) for dispensing with inquiry under Section 5A of 'Act, 1894'. There is only a bare denial but no details have been given to show that there actually existed some urgency.

18. In Rejoinder Affidavit, petitioners have reiterated their averments as already discussed.

19. Then a Supplementary Counter Affidavit has been filed by GDA, stating that by notification dated 6th May, 1997, under Section 11 of U.P. Act, 1901 a new Revenue District, Gautambudh Nagar, was created comprising of 185 revenue villages of Tehsil Dadari, District Ghaziabad, 159 revenue villages of Tehsil Sikandarabad and 105 revenue villages of Tehsil Khurja, District Bulandshahr. The aforesaid notification dated 6th May, 1997 was modified vide notification dated 6th September, 1997 making certain changes of revenue villages, which were earlier notified so as to comprise 'District Gautambudh Nagar'. Thereafter, vide notification dated 13.01.2004 issued under Section 11(2) of U.P. Act, 1901, District Gautambudh Nagar was abolished by superseding notification dated 6th May, 1997 but a judgment of this Court, dated 21st May, 2004, quashed abolition notification dated 13.01.2004. Principal Secretary, Revenue issued an order dated 25.06.2004 informing all the authorities that abolished districts are continuing since abolition notification has been quashed, and, shall function as they were already working. Consequently, proposal for acquisition of land for village, Mohiuddinpur Kanawani, was sent by GDA to District Magistrate, Gautambudh Nagar on 04.10.2002, after making necessary inquiry. Additional District Magistrate (Land Acquisition) [hereinafter referred to as 'ADM(LA)'], Gautambudh Nagar, made recommendation to State Government whereupon notification dated 16.10.2004 under Section 4(1) of Act, 1894 was issued. Since therein District Ghaziabad was mentioned, ADM (LA), Gautambudh Nagar requested Government to issue a corrigendum vide letter dated 23.09.2005, which was issued correcting District 'Ghaziabad' as District 'Gautambudh Nagar'. It is said that revenue village, Mohiuddinpur Kanawani, is part of 'Development Area' of GDA, and therefore, GDA has rightly proceeded to acquire land thereat. It is also clarified that proposal for acquisition of land was received by District Magistrate, Gautambudh Nagar from GDA vide letter dated 04.10.2002 and matter was pending when District Gautambudh Nagar was

abolished on 13.01.2004, as a result whereof, District Ghaziabad proceeded in the matter. After quashing of notification dated 13.01.2004, again District Magistrate, Gautambudh Nagar got jurisdiction but State Government's notification dated 16.10.2004 committed mistake by mentioning "District Ghaziabad". Since it was quite in vicinity to period when judgment was delivered by this Court and Revenue Secretary issued letter, hence, District Magistrate, Gautambudh Nagar requested for corrigendum and actually it was issued.

20. There is another Counter Affidavit filed on behalf of State of U.P. along with which an inspection report of joint survey, made by staff of GDA and Collector, Ghaziabad has been filed as Annexure CA 1. It gives details of construction, trees etc. existing on the land proposed to be acquired.

21. Petitioners have filed a Supplementary Affidavit sworn on 10th September, 2013 by Sri Deepak Singh, petitioner 4 stating that circle rates for village, Mohiuddinpur Kanawani, are being determined by Collector, Gautambudh Nagar which show that the said village is within District Gautambudh Nagar and not Ghaziabad. GDA has no authority to exercise development work thereat. It is also said that GDA has transferred substantial part of acquired land to private builders by way of auction.

22. GDA has replied the same by filing Supplementary Counter Affidavit sworn by Sri Anil Kumar Singh, Tehsildar, GDA, stating that revenue village, Mohiuddinpur Kanawani, is part of 'Development Area' of GDA, though as a revenue village, it is part of District Gautambudh Nagar. That is why village Mohiuddinpur Kanawani has been notified in Ghaziabad Master Plan, 2012 under 'U.P. Act, 1973'.

23. In the rejoinder affidavit, petitioners have virtually reiterated whatever they have already said.

24. There is a Supplementary Counter Affidavit on behalf of respondent 1-State giving following details:

(a). Notification under Section 4(1) Act, 1894 for acquiring 229.5390 acres of land was published in two daily newspapers "Dainik Jagran" and "Amar Ujala" on 22.10.2004 and a Public Munadi was made on 02.12.2004.

(b). Declaration under Section 6(1) of Act, 1894 was made vide notification dated 28.11.2005. It was published in Gazette (Extraordinary), of the same date, and in two newspapers "Dainik Jagran" and "Amar Ujala" on 01.12.2005. Public Munadi was also made in the locality on 01.12.2005.

(c). Notification under Section 9 of Act, 1894 was issued on 19.01.2006.

(d). Possession of 113.5918 acres of land was taken on 14.09.2006.

(e). Collector made award determining compensation on 21.04.2012.

(f). Land owners, who have not accepted/received compensation, the same has been deposited in court under Section 31 of 'Act, 1894'.

(g). Village Mohiuddinpur Kanawani was declared part of 'Regulated Area, Ghaziabad' vide notification dated 29.01.1972. Thereafter it became part of 'Development Area' of Ghaziabad.

(h). The said village admittedly is revenue village of District Gautambudh Nagar but still part of 'Development Area' of GDA.

25. Petitioners, in rejoinder affidavit filed in reply to the aforesaid Supplementary Counter Affidavit of respondent 1, have said that State has not taken actual possession of land owned by petitioners.

26. There is a Second Supplementary Affidavit filed by petitioners, wherein it is said that GDA had deposited Rs. 2,54,97,000/- on 13.05.2003 and again similar amount i.e. Rs. 2,54,97,000/- on 01.07.2003 with ADM(LA), Gautambudh Nagar. Collector, Gautambudh Nagar issued letter to Directorate, Land Acquisition/ Board of Revenue on 11.12.2003 recommending issue of acquisition notification under Section 4(1)/17(1) of 'Act 1894'. No recommendation was made by Collector for invoking urgency clause under Section 17(1) and (4) and without such report, Government invoked aforesaid provisions and dispensed with inquiry under Section 5A. A fake document has been filed by Government in Counter Affidavit in Writ Petition No. 46055 of 2011, and therein, some justification for urgency has been mentioned but said document neither contains any Date nor Village, Pargana, Tehsil and District nor even signature of Collector, hence aforesaid document has no legal sanctity and consequence at all. Munadi was made under order of ADM(LA), Ghaziabad dated 30.11.2004. One Ram Narayan was authorised for Munadi by beating of drum in village on 02.12.2004 for which he received Rs.2500/- in cash. It is said that such Munadi is illegal, inasmuch as, no cash payment is permissible under Rules. Declaration under Section 6(1) has been issued on 28.11.2005 i.e. after expiry of one year from the date of notification under Section 4(1), hence it is barred by time. Notification under Section 4(1) was published in Gazette (Extraordinary) on 16.10.2004 and in newspapers on 22.10.2004 while declaration under Section 6(1) was published on 28.11.2005 i.e. after one year.

27. In reply to aforesaid Supplementary Affidavit, GDA has filed Second Supplementary Counter Affidavit admitting that 10% expenditure towards acquisition and 10% towards advance compensation was deposited by GDA. Document filed as SSA-3 justifying urgency was report of GDA and agreeing therewith, Collector, Gautambudh Nagar recommended for acquisition, hence it was not necessary to repeat same thing in Collector's letter. After notification dated 16.10.2004, a corrigendum was issued on 07.01.2005 and another corrigendum was issued on 28.09.2005 and declaration was made on 28.11.2005, hence there is no violation of Section 6 with respect to period. It is also said that Munadi of preliminary notification was done on 02.12.2004. Petitioner-1, Hatam

Singh has executed sale deed of plot nos.298, 299, 306 and 307 in favour of M/s Sparsh Wildwel Pvt. Ltd., Nayaganj, Kanpur and in revenue record mutation has taken place on 17.07.2009, pursuant to Tehsildar's order dated 10.12.2007. Similarly, petitioner-3, Khajan Singh has executed sale deed to one Surendra Mohan Chopra and Kiran Chopra, wife of Surendra Mohan Chopra and their names have been entered into revenue record on 02.07.2010 and 15.07.2010 pursuant to Tehsildar orders dated 13.06.2010 and 23.12.2010.

28. Similarly, a Second Supplementary Counter Affidavit has been filed by respondent 1 stating that Collector, Gautambudh Nagar satisfied with proposal of GDA, sent a letter dated 11.12.2003 to Directorate of Land Acquisition/ Board of Revenue for proceeding with acquisition along with proposal. Reasons for invocation of urgency provisions were also communicated and it was part of proposal. District Magistrate, Gautambudh Nagar, since has given consent to the entire proposal of GDA, it would not be proper to disconnect reasons contained in report of GDA which was part of record and was accepted by Collector and forwarded to Directorate, Land Acquisition. Report was part of proposal and hence facts were not repeated separately.

29. In Supplementary Rejoinder Affidavit, petitioners have reiterated facts which were already stated.

30. A third Supplementary Affidavit dated 11.04.2012 has been filed stating that neither possession of petitioners' land has been taken nor award has been made, therefore, acquisition proceedings in respect thereto have lapsed by virtue of Section 11E. It is also said that respondents are acting arbitrarily, inasmuch as, some land, acquired by impugned notifications, has been denotified/regularised/exempted in favour of some private colonizers, namely 'Jai Prakash Housing Corporation' and 'Indrason City Vikas Samit'. Some land has been auctioned in his favour of 'M/s Gaur Builders' for construction of Residential Group Housing which shows that acquisition is for the benefit of private builders.

31. There are some additional pleadings in other writ petitions also which we propose to refer/ discuss later on whenever occasion will arise.

32. Acquisition notifications under Sections 4 and 6 have been challenged basically on the ground that village Mohiuddinpur Kanawani is part of District Gautambudh Nagar, which was created vide notification dated 11.05.1997, under Section 11(2) U.P. Act, 1901, therefore, District Authorities at Ghaziabad as also GDA would have no jurisdiction to acquire land which is part and parcel of District Gautambudh Nagar; there is no material or justification to dispense with inquiry under Section 5A, and to this extent, impugned notifications invoking under Section 17(1) and (4) and dispensing inquiry under Section 5A of 'Act 1894' are illegal; there is no compliance of publication of notifications in two newspapers and also publicity in locality which is a mandatory requirement; declaration was made under Section 6 beyond one year, hence barred by limitation; disputed acquired land is part of area declared as "National Capital Region' and unless permission/approval is obtained from 'NCRPB' under the provisions of Act, 1985, any development and acquisition of land for development is invalid and illegal; the land, though claimed to have

been acquired for "Planned Development" by GDA, but immediately after taking possession, it has been transferred to private builders, showing that acquisition in question is for the benefit of private/individual builders and this is a colourable exercise of power in the garb of public interest, therefore, vitiated in law; the village in question is part of village Panchayat 'Bisarakh' declared under Article 243 B read with 243 C, therefore, could not have been acquired by GDA as GDA has no power to interfere with area which is to be developed by local Panchayat.

33. The arguments have been mainly advanced by Sri Manish Goel which have been adopted by other counsels namely Sri W.H. Khan, Senior Advocate assisted by Sri G.H. Khan, Advocate Sri B.B. Singh, Sri J.N. Sharma, Sri Pankaj Dubey and Sri G.K. Singh. Besides, some learned counsels have also buttressed their contentions by referring to various authorities which we shall refer and deal with while discussing matter on respective issues.

34. Sri C.B. Yadav, Additional Advocate General assisted by Sri Shankar Shekhar Singh, and Sri Mahendra Pratap, Advocates have advanced submissions on behalf of respondents and GDA respectively. They have contested all the aforesaid issues and argued that area of operation of GDA is not confined to a district but to the area notified under Act, 1973 and village, Mohiuddinpur Kanwani, is included therein, hence, there is no illegality in exercise of power of acquisition by District Administration, Gautambudh Nagar at the instance of GDA. It is further contended that demand of residential accommodation was very heavy and looking to urgent need, inquiry under Section 5A was dispensed with. Other aspects have also been denied by them and it is said that there is substantial compliance of standards, therefore, there is no justification to interfere with the impugned acquisition notification and writ petition deserves to be dismissed.

35. The first issue relates to validity of acquisition of land at village Mohiuddinpur Kanawani at the instance of GDA. This question would be examined by by considering the matter on following three angles:

(a) Whether village Mohiuddinpur Kanawani part of Revenue District Gautambudh Nagar could have been acquired by GDA ?

(b) Whether revenue village Mohiuddinpur Kanawani continued to be part of 'Development Area' of GDA so as to authorise GDA to proceed for acquisition of land therein irrespective of fact as to under which Revenue District it falls ?

(c) Whether the factum that revenue village, Mohiuddinpur Kanawani, was declared a village panchayat under U.P. Act, 1947, would make any difference or would have any legal consequence in acquisition proceedings initiated by GDA in respect of the same ?

36. We proceed to consider all the aforesaid three issues together.

37. After independence and declaration of Delhi as National Capital, construction activities started at great pace at Delhi and areas in its vicinity which were part of adjacent States. Finding

tendency of people to go for haphazard building constructions in growing colonization and township, causing difficulty in providing facilities of drainage, water supply public sanitation etc., Government of India felt it necessary to regulate such activities, hence promulgated Delhi (Regulations of Buildings Operation) Act, 1955. Ghaziabad was an adjoining city to Delhi and there also construction activities had started in haphazard manner. This was also being followed in some other bigger cities, like Kanpur, Agra etc. The U.P. State legislature thus proceeded to enact 'U.P. Act, 1958'. It was enacted to provide for regulation of buildings operations with a view to prevent haphazard development in urban and rural areas. U.P. Act, 1958 received Presidential assent on 8th October, 1958 and published in U.P. Gazette (Extraordinary) dated 16.10.1958. It came into force then on.

38. 'Regulated Area' was defined under Section 2(d) as an area in respect to which a declaration under sub-section 1 of Section 3, is, for the time being in force.

39. Section 3 of 'U.P. Act, 1958' as amended in 1963 and 1976, reads as under:

"3(1) If in the opinion of the State Government any area within U.P. requires to be regulated under this Act with a view to the prevention of bad laying out of land, haphazard erection of buildings or growth of sub-standard colonies or with a view to the development and expansion of that area according to proper planning, it may, by notification in the Official Gazette, declare the area to be regulated area.

(2) The operation of Chapter XIII of the Uttar Pradesh, Nagar Mahapalika Adhiniyam 1959, [Sections 178, 179, 180, 180-A. 181, 182, 183, 184, 185, 186, 203, 204, 205, 206, 207, 208, 209, 210 and 222 of the United Provinces Municipalities Act, 1916] (or the said sections as extended under Section 338 thereof or under Section 38 of the U.P. Town Areas Act, 1914), Sections 29, 30 and 32 of the U.P. Town Improvement Act, 1919, or, as the case may be of Sections 162 to 171 of the Uttar Pradesh Kshettra Samities and Zila Parishads Adhiniyam, 1961, shall in respect of a regulated area remain suspended for the, period during which the declaration relating to it under Sub-section (1) remains in force, and the provisions of Section 6 of the U.P. General Clauses Act, 1904, shall apply in relation to such suspension as if the suspension amounted to repeal of the said enactments by this Act]".

40. A perusal of various provisions of U.P. Act, 1958 shows that a 'Regulated Area' declared under Section 3 need not be confined to a Tehsil or Sub-division or one local body or a district but it could have been beyond that. Section 17 of U.P. Act, 1958 gave overriding effect to its provisions over any other law containing inconsistent provisions in force at the time of commencement of the U.P. Act, 1958.

41. In 1972, Ghaziabad was a part of Sub-division/ Tehsil of District Meerut. Since it was near National Capital, New Delhi, there was huge influx of people causing rapid constructions of residential, commercial and industrial buildings. However, in absence of provision for "Planned Development", those activities went on in a haphazard, irregular and unregulated manner. State

Government in order to regulate such activities issued a notification dated 29.01.1972 declaring "Regulated Area, Ghaziabad" which comprised of entire territorial limit of local body i.e. Nagarpalika Ghaziabad, 118 villages of District Meerut which were outside territorial limit of Nagarpalika, Ghaziabad and 19 villages of District Bulendshahr. This entire area as a whole was constituted and termed as "Regulated Area, Ghaziabad" under Section 3 of U.P. Act, 1958. Village Mohiuddinpur Kanawani, which fell in Block Loni, District Meerut, was mentioned at serial 47 in the aforesaid notification dated 29.01.1972 and thus it became part of "Regulated Area Ghaziabad" with effect from 29.01.1972.

42. Then comes the enactment of U.P. Act, 1973. The reasons given for aforesaid enactment in the preparatory note of Bill are that in the developing areas of State of U.P., problem of town planning and urban development need to be tackled resolutely. Existing local bodies and other authorities, in spite of their best efforts, were not able to cope up with problem to the extent to bring about improvement in the situation. Government found it expedient that in such developing areas, 'Development Authorities' on the pattern of 'Delhi Development Authority', be established.

43. The term "development area" and "Development Authority" are defined under Sections 2(f) and (g) of U.P. Act, 1973, read as under;

"(f) "development area" means any area declared to be a development area under Section 3;

(g) "the Development Authority" or "the Authority", in relation to any development area, means the Development Authority constituted under Section 4 for that area;"

44. Section 3 authorises State Government to make declaration by notification in an area to be a 'development area' and also constitutes a 'Development Authority' for any development area under Section 4.

45. Section 59 of U.P Act, 1973 provides for suspension of various statutes or certain provisions thereof in respect of 'development area' and that would be governed by provisions of 'U.P. Act, 1973'.

46. State Government published a notification under Section 3 of U.P. Act, 1973 on 9th March, 1977, declaring entire area notified as 'Regulated Area, Ghaziabad' vide notification dated 29.01.1972, as Ghaziabad Development Area excluding cantonment area or any area for the purpose of Naval, Army or Air Force owned by Central Government or acquired or taken on lease by it. The notification dated 9.3.1977 described 'Ghaziabad Development Area' to constitute as under:

उत्तर प्रदेश (निर्माण कार्य विनियमन) अधिनियम, 1958 (उत्तर प्रदेश अधिनियम संख्या 34. 1958) की धारा 3 के अधीन सरकारी अधिसूचना संख्या 1447/37-3-21 (6)-63/67. दिनांक 29 जनवरी 1972 के अन्तर्गत अधिसूचित विनियोजित क्षेत्र,

गाजियाबाद, में सम्मिलित क्षेत्र, जिसमें कैन्टूनमेन्ट क्षेत्र और नाविक, सैनिक या वायुसेना के किसी प्राधिकारी के प्रयोजनार्थ केन्द्रीय सरकार के स्वामित्व में या उसके द्वारा अधिगृहीत या पट्टे पर ली गई भूमि सम्मिलित नहीं है।

"The Regulated Area, Ghaziabad notified vide Government Notification No. 1447/37-3-21 (6)-63/67, dated 29th January 1972 under Section 3 of The U.P. (Regulations of Building Operations) Act, 1958 (U.P. Act XXXIV of 1958), not including cantonment area and any land owned, acquired or taken on lease by the Union Government for the purpose of any authority of the Navy, the Military or the Air Force."

(English translation by Court)

47. Thus, with effect from 9th March, 1977, when notification under Section 3 of U.P. Act, 1973 was issued, entire 'Regulated Area, Ghaziabad' became 'Ghaziabad Devleopment Area'. The provisions of U.P. Act, 1958 stood suspended in respect of 'Ghaziabad Development Area' on and after 9th March 1977. It is very clear that Village Mohiuddinpur Kanawani which continued to be 'Regulated Area Ghaziabad' up to 09.03.1977 became part of 'Ghaziabad Development Area' on 09.03.1977 and thereafter had to be governed by the provisions of U.P. Act, 1973. GDA was constituted by notification dated 9th March, 1977 for undertaking development in 'Ghaziabad Development Area' notified under Section 3 by notification dated 9th March, 1977, meaning thereby village Mohiuddinpur Kanawani came within the functional territorial jurisdiction of GDA by virtue of notification dated 9th March, 1977 issued under Section 3 of U.P. Act, 1973.

48. The next statutory enactment is U.P. Act, 1976. It was enacted for the constitution of an Authority for development of certain areas in the State into Industrial and Urban Township and for matters connected therewith. Section 3 provides for constitution of such 'Industrial Area Development Authority' by State Government. Through a notification dated 18.05.1978 in exercise of power under Section 2(d) read with Section 3 of U.P. Act, 1973 about 14 villages with specified area of Tehsil Dadari, District Ghaziabad along with others were declared to constitute 'Industrial Development Area' as NOIDA. It reads as under:

"No.342 HI/XVIII-11

In exercise of the powers under clause (d) of Section 2 read with section 3 of the Uttar Paradesh Industrial Area Development Act, 1976 (U.P. Act no.6 of 1976), the Governor is hereby pleased to declare that the area comprising the villages mentioned hereunder shall be an industrial development area' constituting the "New Okhla Industrial Development Area"

District	*Tehsil*	*SI. No.*	*Village*	*Area (in acres)*
Ghaziabad	*Dadri*	*1*	*Hoshiyarpur*	*561-00*
		2	*Asgapur Jagir*	*737-00*
		3	*Besai Bariuddin Nagar*	*408-00*

		4	*Shahpur Govardhanpur Khadar*	*393-00*
		5	*Chhalera Khadar*	*873-00*
		6	*Chaksalarpur*	*256-00*
		7	*Rasulpur Nawada*	*575-00*
		8	*Hasanpur Bhogpur*	*581-00*
		9	*Makanpur*	*2929-00*
		10	*Hajratpur Wajidpur*	*213-00*
		11	***Moiuddinpur Kanawali***	***917-00***
		12	*Chhajarasi*	*772-00*
		13	*Khonda*	*1054-00*
		14	*Lalpur*	*144-00*

49. The said notification included village Mohiuddinpur Kanawani, area 917 acres as part of NOIDA. Section 17 of U.P. Act, 1976 gives overriding effect to the provisions of said act over 'U.P. Act, 1973' and reads as under;

"17. Overriding effect of the Act.- *Upon any area being declared an industrial development area under the provisions of this Act, such area, if included in the master plan or the zonal development plan under the Uttar Pradesh Urban Planning and Development Act, 1973, or any other development plan under any other Uttar Pradesh Act, with effect from the date of such declaration be deemed to be excluded from any such plan".*

50. Thus, as a result of declaration of NOIDA vide notification dated 18th May, 1978 which included village, Mohiuddinpur Kanawani, the same stood excluded from 'Ghaziabad Development Area' which was under GDA. To this extent, we have no hesitation in making such observation and if this position would have continued, what was argued on behalf of petitioners that GDA had no authority to acquire land for development in village, Mohiuddinpur Kanawani, should have been upheld but in view of subsequent events, we find that things had gone material change which went to the root of the matter.

51. Another notification was issued on 11th July, 1989 under Section 21 of U.P. General Clause Act read with Section 2(d) of U.P. Act, 1976, superseding earlier notifications issued under U.P. Act, 1976 that is 17th April, 1976, 18th May, 1978 and 26th September, 1978. The Government declared another list of villages of Tehsil Dadri, District Ghaziabad which would form "Industrial Development Area" and part of NOIDA. This notification covered 53 villages but village, Mohiuddinpur Kanawani, was not mentioned therein. It may be noted that 45 villages mentioned in the notification dated 11th July, 1989 whose area mentioned in column 5 in general were included and remaining 8 villages in notification mentioned specific khasra number and area separately. We need not go in detail of all the villages mentioned therein and suffice for us to notice and reiterate that 'village Mohiuddinpur Kanawani' was not mentioned. Hence, it stood not included in "Industrial Development Area of NOIDA". Since notification dated 11.07.1989 superseded,

along with others, notification dated 18th May, 1978 also, therefore, reliance placed on notification dated 18th May, 1978 is thoroughly misconceived and has to be rejected.

52. The effect and consequence of notification dated 11th July, 1989 is that only such villages and areas as were mentioned in the said notification, constituted part and parcel of NOIDA which were to be governed by U.P. Act, 1976. Rest of villages of District Ghaziabad or others were to be governed by respective provisions and notifications issued under different statutes. It restores the status of GDA in respect of village Mohiuddinpur Kanawani as a part of 'Development Area of GDA'.

53. Moreover, notification issued under Section 3 of U.P. Act, 1973 bringing village Mohiuddinpur Kanawani within 'Development Area of Ghaziabad' has never been revoked and cancelled. In fact, after notification dated 18th May, 1978, under Sections 2(d) and 3 of U.P. Act, 1976, by virtue of Section 17, village Mohiuddinpur Kanawani was deemed to have been excluded from the application of U.P. Act, 1973 but when notification dated 18th May, 1978 stood superseded by notification dated 11.07.1989, and villlage Mohiuddinpur Kanawani was not included therein as part of NOIDA, the deeming provision under Section 17 disappeared, restoring earlier position that is reviving notification dated 9th March, 1977 issued under Section 3 of U.P. Act, 1973 and village, Mohiuddinpur Kanawani, continued to be a part of 'Ghaziabad Development Area' to be developed by GDA. Thus, we are clearly of the view that after issue of notification dated 11th July, 1989, village Mohiuddinpur Kanawani continued to be within territorial jurisdiction of GDA being part of 'Ghaziabad Development Area' by virtue of notification dated 9th March, 1977 which was never revoked or cancelled and restored its efficacy on and after notification dated 11th July, 1989.

54. Now comes to be seen what is effect of creation of Revenue District, Gautambudh Nagar, and declaration of village, Mohiuddinpur Kanawani, as Gram Panchayat. First we consider the effect and consequence of creation of new District Gautambudh Nagar and village Mohiuddinpur Kanawani becoming part of new District, that is separated from district Ghaziabad.

55. Under U.P. Act, 1901 power to create, alter and abolish divisions, districts, tehsil and sub-divisions is vested in State Government, which reads as follows:

"11. Power to create, alter and abolish divisions, districts, tahsil and sub-divisions.- *(1) The State Government may create new or abolish existing divisions or districts.*

(2) The State Government may alter the limits of any division, district, or tahsil, and may create new or abolish existing tahsil, and may divide any district into sub-divisions, and may alter the limits of sub-divisions.

(3) Subject to the orders of the State Government under sub-section (2), all tahsils shall be deemed to be sub-divisions of districts."

56. State Government in exercise of aforesaid power, by issuing notification dated 11th May, 1997 created a new Revenue District, Gautambudh Nagar, carving out certain areas from District Ghaziabad, District Meerut and District Bulandshahr. Village Mohiuddinpur Kanawani also became a revenue village under Revenue District Gautambudh Nagar in view of aforesaid notification issued Section 11 of U.P. Act, 1901. The aforesaid notification, in our view, did not affect the area of operation and function of GDA comprising those villages which were notified under notification dated 9th March, 1977, under Section 3 of U.P. Act, 1973 declaring the same to be Ghaziabad Development Area, inasmuch as, a "development area" has not been shown so as to confine to a particular city/district etc. A 'Development Area' under Section 3 of U.P. Act, 1973 may comprise of one city, more than one city, one local body, more than one local body and may also extend to areas, falling in different districts. It is evident from the notification dated 9th March, 1977, when Ghaziabad Development Area was constituted, it included villages which were within two different districts, namely, Meerut and Bulandshahr, besides the municipal city limit of Ghaziabad. Therefore, it was extended beyond Ghaziabad city at initial stage and that situation continued thereafter irrespective of creation of a new Revenue District. Creation of Revenue District is for different purpose and has nothing to do with functioning of a 'development area' under U.P. Act, 1973. Since aforesaid Act clearly shows that a 'Development Authority' may be constituted irrespective of whether an area declared as 'development area' falls in one city, one district or beyond that, therefore, any change in structure of Revenue District under U.P. Act, 1901 would have no effect and consequence on the 'development area' governed by notification issued under Section 3 of U.P. Act, 1973. In our view, creation of Revenue District Gautambudh Nagar and bringing village Mohiuddinpur Kanawani within the revenue jurisdiction of Gautambudh Nagar would make no difference and village Mohiuddinpur Kanawani, as it was already declared separately as a part of 'Ghaziabad Development Area, would continue to have retained the same status so far as GDA is concerned.

57. Now comes the last submission about declaration of village Mohiuddinpur Kanawani as Gram Panchayat. Such a declaration is made under provisions of U.P. Panchayat Raj Act, 1947 (hereinafter referred to as U.P. Act, 1947). Such declaration is for the purpose of governance of Gram Panchayat in general by the provisions of U.P. Act, 1947, but there is nothing on record or contained in the said statute to show, if certain land or the entire area of a Gram Panchayat is declared as a part of a 'development area' in a notification under Section 3 of U.P. Act, 1973, it will be bad or would infringe U.P. Act, 1947 or that U.P. Act, 1947 would override U.P. Act, 1973. We have not been pointed out any provision under U.P. Act, 1947 which may show, if an area of Gram Panchayat is notified to be a part of 'development area' of Development Authority under U.P. Act, 1973, it would be inconsistent and in the teeth of functioning of Gram Panchayat under U.P. Act, 1947. The aforesaid submission, therefore, is also rejected.

58. The three questions (a), (b) and (c) noticed above with respect to correctness of proceedings initiated at the instance of GDA for acquisition of land in village, Mohiuddinpur Kanawani, are answered against the petitioners and in favour of respondents.

59. Now we come to other substantial issues with regard to validity of impugned acquisition notifications, i.e.:

(i) Whether dispensation of inquiry under Section 5A of Act, 1894 is illegal, arbitrary and founded on no material to show existence of actual urgency?

(ii) Whether permission or sanction of NCRPB is mandatory. If so, whether respondents have complied with the said requirement?

(iii) Whether the notification under section 6 is barred by time having been published beyond one year from the date of preliminary notification under Section 4?

(iv) Whether acquisition for "Planned Development" i.e. for construction of residential colonies, at the instance of GDA, is a colourble exercise of power, since acquired land mostly is being handed over and transferred to private builders?

Issue- I : Regarding dispensation of inquiry under Section 5A of Act, 1894.

60. As already noticed, nothing substantial has been stated by the respondents in counter affidavit and supplementary counter affidavit etc. to demonstrate existence of actual urgency justifying dispensation of inquiry under Section 5A. However, original record pertaining to acquisition in question has also been placed before us. We have examined the same and it discloses following facts:

(a) GDA vide resolution dated 29.06.2001, resolved to acquire 400 acres of land at village, Mohiuddinpur Kanawani, and constituted a Committee to select appropriate land. Meeting of Committee was held for the first time on 7th January, 2002. 'Site Selection Committee' visited village Mohiuddinpur Kanawani on 10.01.2002. It found that land selected by it, besides individual tenure holders, was also registered in the name of Societies, Farm Houses; some land belong to Gram Samaj and some part of land on which constructions existed was, where, maps were already sanctioned but for non deposit of development fee, sanctions granted stood lapsed. Details of selected land as mentioned by Site Selection Committee in its report, read as under :

1- काश्तकारो की भूमिः-	327-12-4-17 बीघा
2- वह भूमि जिस पर समितियो के नाम दर्ज है:	97-19-12-0 बीघा
3- वह भूमि जिस पर फार्म हाउस दर्ज है:-	49-3-19-0 बीघा
4- ग्राम समाज की भूमिः	32-18-12-18 बीघा
5- मानचित्र अस्वीकृत होने के उपरान्त सूचि में सम्मिलित भूमि-	96-7-5-10 बीघा
	604-7-14-6 बीघा

1.Land of the cultivators	327-12-4-17 Bigha
2.Land registered in the name of Societies	97-19-12-0 Bigha
3.Land registered in the name of Farm House	49-3-19-0 Bigha
4.Land of Gram Samaj	32-18-12-18 Bigha
5.Land included in the list after disapproval of the map	96-7-5-10 Bigha
	604-7-14-6 Bigha

(English translation by Court)

(b) Site Selection Committee also mentioned in its report that proposed land, as per 'Master Plan, 2001', was a recreation site, and therefore, conversion of land use as residential would also be necessary.

(c) Report was considered by GDA in its meeting dated 07.06.2002 and it resolved to proceed to acquire land belong to Individual Tenure Holders, Societies, Gram Samaj and Farm Houses.

(d) GDA sent a letter dated 14.01.2003 to Collector, Ghaziabad.

(e) GDA submitted application dated 17th May, 2003, requesting Collector to proceed for acquisition of 229. 3828 acres of land in village Mohiuddinpur Kanawani; regarding possession, whether immediately required or not, it mentioned in said application as under:

" Immediately. Because this scheme is to be completed for public interest and for "planned development" of the city."

(f) GDA also deposited Rs. 2,54,97,000/- vide Cheque no. 951945 dated 01.07.2003, payable at Vijay Bank, Ghaziabad, in Treasury, vide receipt dated 11th July, 2003.

(g) ADM(LA) vide letter dated 28.08.2003 enquired from Ceiling Authority whether proposed land is within the ambit of Ceiling Act or not. A clearance certificate was issued by Competent Authority in the office of Collector, Gautambudh Nagar, on 08.12.2003.

(h) On the directions of Collector, Tahshildar Dadri, Gautambudh Nagar also submitted report on 10.12.2003.

(i) Collector, Gautambudh Nagar also issued 'No Objection Certificate' and for recommending dispensation of inquiry under Section 5A by exercising power under Section 17, mentioned following reason:

"गाजियाबाद विकास प्राधिकरण की यह एक अत्यन्त महत्वपूर्ण योजना है जिसमें भूमि की तत्काल आवश्यकता है परियोजना व क्षेत्र के सुनियोजित विकास के महत्व को दृष्टिगत रखते हुए इस भू अर्जन प्रकरण में अर्जन की कार्यवाही भूमि अर्जन अधिनियम की धारा 4 व 6 के साथ पठित धारा 17 के अन्तर्गत करने हेतु संस्तुति की जाती है।"

"This is a very important scheme of the Ghaziabad Development Authority, in which the land is required urgently. Keeping in view the project and the importance of planned development of the area, proceedings for acquisition of land, in this land acquisition case, are recommended to be taken u/s 4 and 6 of Land Acquisition Act read with Section 17."

(English translation by Court)

(j) Requisite certificate under paragraph 14 schedule 2 of Land Acquisition Manual, 1988 was issued by ADM(LA) and Collector Ghaziabad on 16th March, 2004.

(k) Proposal for acquisition of land was submitted by Collector, Ghaziabad vide letter dated 27th May, 2004 to Director, Land Acquisition, Lucknow (hereinafter referred to as 'DLA').

(l) There were certain errors which 'DLA' got rectified and thereafter vide letter dated 26.06.2004, it requested Government i.e. Secretary, Housing and Urban Planning, Lucknow to proceed for issue of notification under Sections 4(1) and 17 of Act, 1894.

(m) Notification under Sections 4(1)/17 was published in the Gazette (Extraordinary) dated 16.10.2004.

(n) Noting on File No.14782/PSMM/05 of State Government starts with page 1 containing a note dated 25.06.2004/30.06.2004 which is in reference to DLA's letter dated 26.06.2004 and justification mentioned in the said note for dispensation of inquiry under Section 5A is contained in paragraph 13 of the said note which reads as under:

"13- प्रस्तावित भूमि का अर्जन की योजना में विलम्ब होने पर अनधिकृत निर्माण की संभावना है। प्रश्नगत योजना जनहित की है। अतः अर्जन हेतु भूमि अध्याप्ति 1894 की धारा 4 व 6 की विज्ञप्ति जारी कराने के लिए धारा-17 के प्राविधान लागू किया जाना आवश्यक है।"

"13. There is likelihood of construction of unauthorised constructions in case of delay in acquisition of the proposed land. The scheme in question is for public welfare. Hence, in order to get notification for acquisition of land, issued, u/s 4 and 6 of the Land Acquisition Act, 1894, it is necessary to invoke provisions of Section 17."

(English translation by Court)

(o) In the aforesaid notification, Revenue District was mentioned as Ghaziabad. Total land proposed to be acquired mentioned in the aforesaid notification was 367-0-5 bigha (229.3828) acres.

(p) Subsequently, it came to notice that certain Khasra numbers and area of land were wrongly mentioned in preliminary acquisition notification, hence a corrigendum was issued on 05.01.2005, published in the Gazette (Extraordinary) dated 05.01.2005 making following corrigendum:

1- खसरा संख्या352 एम0 में अर्जित क्षेत्रफल2-19-0 के स्थान पर2-19-10 पढ़ा जाए ।

2-खसरा संख्या406 एम0 में अर्जित क्षेत्रफल3-5-18 के स्थान पर3-5-16 पढ़ा जाए।

3-खसरा संख्या522 में अर्जित क्षेत्रफल1-14-0 के स्थान पर0-14-0 पढ़ा जाए।

4-खसरा संख्या153 में अर्जित क्षेत्रफल0-9-0 के स्थान पर0-14-0 पढ़ा जाए।

5-कुल योग229.3828 एकड़ के स्थान पर229.5390 एकड़ पढ़ा जाए।

1. 2-19-10 be read in place of the acquired area 2-19-0 in Khasra No. 352 M.

2. 3-5-16 be read in place of the acquired area 3-5-18 in Khasra No. 406 M.

3. 0-14-0 be read in place of the acquired area 1-14-0 in Khasra No. 552 M.

4. 0-14-0 be read in place of the acquired area 0-9-0 in Khasra No. 153 M.

5. 229.5390 acres be read in place of grand total of 229.3828 acres.

(English translation by Court)

(q) It was also published in two daily newspapers 'Amar Ujala' and 'Dainik Jagran' on 22nd October, 2004.

(r) ADM(LA) sent a letter dated 23rd September, 2005 requesting Government to issue another corrigendum so as to mention District "Gautambudh Nagar" instead of "Ghaziabad" in the notification dated 16.10.2004.

(s) Consequential corrigendum notification was issued on 28th September, 2005.

(t) Notification under Section 6(1) was published in the Gazette (Extraordinary) dated 28th November, 2005.

61. We may also place on record to find out a kind of fraud and misrepresentation played by GDA with Court by filing a second supplementary counter affidavit dated 06.04.2016, sworn by Sri Rajendra Tayagi, Legal Assistant, GDA, stating that documents and communication amongst GDA, Collector and State Government relating to acquisition proceedings are collectively being filed as Annexure SCA-1. When we perused the aforesaid documents, we find that the same pertains to acquisition of land in village Sadarpur, Pargana-Dasana, Tahsil and District Ghaziabad and has nothing to do with acquisition in question which relates to village Mohiddinpur Kanawani. A bulky documents, running in about 70 pages (photostat), have been filed collectively as SCA-1 which consumed our sufficient time in going through documents but we find the same are wholly irrelevant for the purpose of present writ petitions, since these documents filed by GDA along with second supplementary counter affidavit pertains to some others village and have no connection and relation with acquisition in question.

62. Above facts show that deliberation and requirement of acquisition of land in dispute at village, Mohiuddinpur Kanawani, commenced as long back as on 29.06.2001 and ultimately declaration under Section 6 was published on 28th November, 2005. Even between preliminary notification under Section 4 and declaration under Section 6, there is difference of more than an year. When process of acquisition could conveniently take four years and more, we find it difficult to hold that it was a case where there existed a genuine and bona fide urgency justifying exercise of power under Sections 17(1) and (4) so as to dispense with inquiry under Section 5 of Act, 1894. In taking the aforesaid view, we are heavily supported by a catena of decisions on this subject, some of which may fruitfully be referred hereinafter:

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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 right can be taken away as if by a side wind".

70. In **Munshi Singh and others vs. Union of India (1973) 2 SCC 337**, which is a decision of three judges bench, Court stressed 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".

71. 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.

72. 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".

73. In **Om Prakash vs. State of U.P., (1998) 6 SCC 1**, Court observed that:

"Inquiry under Section 5-A is not merely statutory but also has a flavour of fundamental rights under Articles 14 and 19 of Constitution though right to property is no longer remained a fundament right, at least, observation regarding Article 14 vis-a-vis Section 5-A would remain apposite".

74. 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 ....."

75. 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.

76. 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.

77. 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".

78. 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."

79. 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 should 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 inquiry 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 the 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.

80. In **Dev Saran and Others vs. State of U.P. and others, (2011) 4 SCC 769**, Government proposed to acquire land for construction of District Jail at Shahjahanpur, as usual, inquiry under Section 5A was dispensed with by taking recourse to Section 17(4) of Act, 1894. Court found that purpose for which land was required, admittedly was a public purpose but dispensation of inquiry on the ground of urgency was not justified on the basis of facts of that case. Therein matter for acquisition was initiated vide Government Letter dated 04.06.2008; meeting for selection of suitable site was held on 27.06.2008; proposal for acquisition and construction was forwarded to 'DLA' on 02.07.2008, who, in turn, forwarded to State Government on 22.07.2008; notification under Section 4 along with 17 was issued by State Government on 21.08.2008; it was published in local newspapers on 24th September, 2008, proposal for declaration under Section 6 was forwarded to 'DLA' by Collector on 19.06.2009; 'DLA' in turn forwarded to State Government on 17.07.2009 and ultimately declaration was issued under Section 6 on 10.08.2009 and published in local dailies on 17.08.2009, observing that there was a gap of 11 months and 23 days in publication of notifications under Section 4 read with section 17 and Section 6 shows that Government machinery has actually functioned with slow pace and there was no actual urgency, warranting recourse to Section 17(4) of Act, 1894. The relevant observation in this regard contained in paras 37, 38 and 39 of the judgment, read as under:

"37. Thus the time which elapsed between publication of Section 4(1) and Section 17 notifications, and Section 6 declaration in the local newspapers is 11 months and 23 days i.e. almost one year. This slow pace at which the government machinery had functioned in processing the acquisition, clearly evinces that there was no urgency for acquiring the land so as to warrant invoking Section 17(4) of the Act.

38. In paragraph 15 of the writ petition, it has been clearly stated that there was a time gap of more than 11 months between Section 4 and Section 6 notifications, which demonstrates that there was no urgency in the State action which could deny the petitioners their right under Section 5-A. In the counter which was filed in this case by the State before the High Court, it was not disputed that the time gap between Section 4 notification read with Section 17, and Section 6 notification was about 11 months.

39. The construction of jail is certainly in public interest and for such construction land may be acquired. But such acquisition can be made only by strictly following the mandate of the said Act. In the facts of this case, such acquisition cannot be made by invoking emergency provisions of Section 17. If so advised, the Government can initiate acquisition proceeding by following the provision of Section 5-A of the Act and in accordance with law."

81. 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."

82. In **Ramdhari Jindal Memorial Trust vs. Union of India and others, (2012) 11 SCC 370** after referring to a large number of earlier precedents on the aforesaid questions including Anand Singh and another (supra) Court said that:

"Government when invokes urgency power under Sections 17(1) and (4) for the public purpose like "planned development of city" or "development of residential area" or "residential scheme", initial presumption does not arise in favour of Government. On the contrary, heavy burden lies on the Government to prove that use of power is justified and dispensation of inquiry was necessary. Power of urgency under Section 17 for a public purpose like "development of a housing scheme" or "residential scheme" cannot be invoked as a matter of rule or in a mechanical manner or by simply referring to language of the statute but is to be exercised as an exception".

83. In **Kamal Trading Private Limited vs. State of West Bengal and others, (2012) 2 SCC 25,** Court said that "proceedings under Act, 1894 are based on the principle of eminent domain and Section 5 is only protection available to a person whose lands are sought to be acquired. It is minimal safeguard afforded to him by law to protect himself from arbitrary acquisition by pointing out to the concerned authority, inter alia, important ingredient namely "public purpose" is absent in the proposed acquisition or that acquisition is otherwise malicious. The Act, 1894 being an ex-proprietary legislation, its provisions will have to be strictly construed". Court further said in paras 15 and 16 as under:

"15. Hearing contemplated under Section 5-A(2) is necessary to enable the Collector to deal effectively with the objections raised against the proposed acquisition and make a report. The report of the Collector referred to in this provision is not an empty formality because it is required to be placed before the appropriate Government together with the Collector's recommendations and the record of the case. It is only upon receipt of the said report that the Government can take a final decision on the objections. It is pertinent to note that declaration under Section 6 has to be made only after the appropriate Government is satisfied on the consideration of the report, if any, made by the Collector under Section 5-A(2). As said by this Court in Hindustan Petroleum Limited (supra), the appropriate Government while issuing declaration under Section 6 of the LA Act is required to apply its mind not only to the objections filed by the owner of the land in question, but also to the report which is submitted by the Collector

upon making such further inquiry thereon as he thinks necessary and also the recommendations made by him in that behalf.

16. Sub-section (3) of Section 6 of the LA Act makes a declaration under Section 6 conclusive evidence that the land is needed for a public purpose. Formation of opinion by the appropriate Government as regards the public purpose must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. It is, therefore, that the hearing contemplated under Section 5-A and the report made by the Land Acquisition Officer and his recommendations assume importance. It is implicit in this provision that before making declaration under Section 6 of the LA Act, the State Government must have the benefit of a report containing recommendations of the Collector submitted under Section 5-A(2) of the LA Act. The recommendations must indicate objective application of mind.

84. In **Surinder Singh Brar and others vs. Union of India and others, (2013) 9 SCC 403,** Court observed that "satisfaction recorded by appropriate Government that particular land is needed for a public purpose and declaration made under Section 6(1) will be devoid of legal sanctity, if statutorily engrafted procedural safeguards are not adhered to by the authority concerned. An attempt on the part of respondents made to argue that declaration under Section 6(1) is conclusive and satisfaction recorded therein cannot be subject to judicial review." A similar argument was negatived in Surendra Singh Brar and others (supra) in para 87 of the judgment. Court said that "satisfaction of an appropriate Government envisaged in Section 6(1) must be preceded by consideration of the report prepared by Collector after considering objections filed under Section 5A and hearing the objectors. In the present case, this inquiry was itself dispensed with in a most arbitrary, whimsical and mechanical manner by invoking Section 17(4) illegally and inflagrant disregard of exposition of law laid down in various binding authorities, some of which are discussed above.

85. 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".

86. Right of hearing under Section 5-A has been held to be a fundamental/ substantive right, not to be deprived of unless a clear case of existence of urgency on the basis of relevant material on record is made out.

87. The facts of the present case with which we are concerned, are worse than those in above authorities. Here the matter commenced in 2001 and ultimately declaration came to be published in September, 2005. More than 4 years and 3 months period has been consumed by respondents and still they have attempted to justify such urgency in the matter so as to dispense with inquiry under Section 5A, depriving bare minimum opportunity of hearing available to land owners enabling them to make their submissions against proposed acquisition and pursue land acquiring authorities not to acquire their land.

88. Above question is, therefore, answered in favour of petitioners and we hold that respondents illegally exercised power by invoking Section 17(4) of Act, 1894, so as to dispense with inquiry under Section 5A.

Issue-II: Permission or Sanction of NCRPB

89. In writ petition no. 2476 of 2012 (Balwant Rai Kathuria vs. State of U.P. and others) NCRPB has been impleaded as respondent no.5. It has been pleaded that no approval has been obtained from NCRPB under Act, 1985. In paras 24, 25 and 26, it has been averred that GDA has not formulated any 'Sub-Regional plan' in accordance with 'Regional' and 'Functional Plan' as per Section 17(3) of Act, 1985. Sub-Regional plan has to be in conformity with 'Regional' and 'Functional Plan' as per Section 20 of Act, 1985. NCRPB has complete control over 'Sub-Regional Plan' prepared by participating States and 'Sub-Regional Plan' can neither be implemented nor enforceable without approval of NCRPB. Provisions of Act, 1985 has overriding effect over any other inconsistent law. The land in question has been acquired without confirming Plan prepared by NCRPB and acquisition is contrary to Section 40 of Act, 1985.

90. In Supplementary Counter Affidavit sworn on 6th April, 2016 by Sri Rajendra Tayagi, Legal Assistant, GDA, it has been said in paragraph 3 that Master Plan, Ghaziabad was approved and came into force on 14.07.2005 whereas Regional Plan of National Capital Region (hereinafter referred to as 'NCR') came into force on 17.09.2005. Master Plan, 2021 was considered in Regional Plan by NCR on 17.09.2005 and there was no requirement of approval of Master Plan, 2021 by NCRPB.

91. Act, 1985 was enacted by parliament on the resolution passed by Legislature of State of Haryana, Rajsthan and Uttar Pradesh under Article 252 of the Constitution of India. It is on the subject included in State List, Seventh Schedule of Constitution.

92. No counter affidavit separately has been filed in the aforesaid Writ Petition No. 2476 of 2012 but in general supplementary counter affidavit on behalf of GDA, it has made a brief statement and it would be appropriate to refer the same as under:

'3. That, master plan Ghaziabad was approved and came into force on 14.07.2005 whereas the regional plan of NCR came into force on 17.09.2005. The matter plan Ghaziabad 2021 was considered in regional plan of NCR dated 17.09.2005. There was no requirement of approval of master plan of 2021 by the NCR board."

93. We find that applicability and extent to which Act, 1985 is applicable has been considered in detail by Full Bench of this Court **in Gajraj Singh and others vs. State of U.P. and others, 2011 (11) ADJ 1. Court** has observed in paragraph 249 that "Sub-Regional Plans are to be prepared by each participating State and is required to be submitted to NCRPB and Board communicate within 60 days its observation with regard to Sub-Regional Plans and thereafter participating State after consideration of observation would finalise Sub-Regional Plans after ensuring that it is in conformity with the Regional Plan and thereafter it can be implemented under Section 20 of the Act, 1985. In other words, Sub-Regional Plan has to be in conformity with the "Regional Plan and Functional Plans". After examining Sections 7 and 17 of Act, 1985,

the Court observed that unless the directions of the Board are implemented in Sub-Regional Plan, the same cannot be implemented. Hence the provisions of Act, 1985 have to be interpreted to mean that there is a complete control over the 'Sub-Regional Plans' prepared by participating State and mechanism provided is such that unless Sub-Regional plan is completely cleared by Board, the same can neither be implemented nor would be enforceable.

94. Then examining Section 40 of Act, 1985, Court has further observed that purpose of Section 40 is to promote the object of Act, 1985 when land used in NCR is controlled by various plan as contemplated by Act, 1985 acquisition of land and has to be in line and conformity with aforesaid Act. There is no averment made by respondents in any of the affidavits that Sub-Regional Plan that GDA has formulated any Sub-Regional Plan and same has been submitted to NCRBP for consideration and procedure as discussed above, has been undergone. A very vague and general reply in para 3 of supplementary counter affidavit as noted above, has been given. We have also noticed above that though land in question under Master Plan, 2001 was a recreation site and conversion of land to be used as 'residential' was necessary. Without approval of NCRPB of altered plan, this was not permissible. We find that a similar aspect in form of illustration has been noticed in **Gajraj Singh and others (supra)** and Court has held that change of user's acquired land without approval of NCRPB is prohibited. The said observation contained in para 265 is reproduce hereinunder;

"265. Now.....

Section 40 of the NCRPB, 1985 has to be interpreted in a manner so as to promote the object of the Act. When the land use in the NCR Region is controlled by various plans as contemplated by the NCRPB Act, 1985 the acquisition of land has also to be in line and conformity with the aforesaid Act, 1985. This can be illustrated by giving a small example i.e. supposing an area in the NCR is reserved for agricultural use and actual agricultural is taking place in the said area, any exercise by the Authority to acquire land for residential purpose shall be simply prohibited. The Authority in the present cases have indiscriminately proceeded to acquire the land in the name of Planned Industrial Development. In event where agriculture is the reserved purpose acquiring the land of the agriculturist shall be with no object since the Authority itself shall not carry on agriculture and there shall be no purpose to create hindrance in the right of the agriculturists to carry on their agriculture in the said area."

(emphasis added)

95. In **Gajraj Singh and others (Supra)** an attempt was made to argue that requirement of approval or consideration by NCRPB can be complied with subsequently and at the time of acquisition it is not necessary but this has been rejected by Full Bench in paragraph 267, Court said as under;

"Section 40 of the NCRPB Act, 1985 as noticed above has to be given some meaning and purpose. Section 40 of the Act, 1985 has to be read as a precondition for participating State to acquire the land, condition being that acquisition be made in NCR only to give effect to any regional, functional plan, sub-regional plan or project plan framed under the 1985 Act."

96. In view of law laid down in **Gajraj Singh and others (supra)** facts are available in this bunch of petitions. We have no manner of doubt that no clearance has been obtained by GDA from NCRPB though it was mandatory, and therefore, proceedings for acquisition in question are not in conformity with requirement of Act, 1985.

Issue-III: Whether declaration is beyond one year as provided in Section 6(1) proviso (ii) of Act, 1894.

97. As already said, Section 4 notification was published in Gazette (Extraordinary) on 16.10.2004 while Section 6 notification was published in Gazette (Extraordinary) dated 28.11.2005. It is thus pleaded on behalf of petitioners that this delay would result in lapse of entire acquisition proceedings, since Section 6 notification was not published within one year of notification under Section 4.

98. It is pointed out that under Section 6(1)(ii), there is complete embargo on publication of declaration after expiry of one year from date of publication of notification under Section 4(1) of Act, 1894. Reliance has been placed on the decisions in **Padam Sundara Rao (dead) and others vs. State of Tamilnadu and others, (2002) 3 SCC 533, Anil Kumar Gupta vs. State of Bihar and others, (2012) 12 SCC 443, Devendra Kumar Tyagi and others vs. State of Uttar Pradesh and others, (2011) 9 SCC 164 and Division Bench's judgment of this Court in Mahavir Sahkari Avas Samiti Ltd. Vs. State of U.P. and others, 2006 (8) ADJ 203**.

99. Defence of respondents is that notification under Section 4 was published in Gazette dated 16.10.2004; local publication in two newspapers was made on 22.10.2004. There was a substantial error in notification dated 16.10.2004 for which a corrigendum was published on 19.01.2005 and 02.08.2005; publicity in locality by Munadi was made on 02.12.2004 and it is last date of various kinds of publicity of notifications which would count to find out whether official declaration has been made within one year or not. Hence, it is within one year.

100. Sri Manish Goyal, learned counsel for petitioners vehemently contended that no Munadi in accordance with law has taken place and paper book no.239 dated 02.12.2004 appears to have been manufactured, inasmuch as, there is no provision where any payment can be made in cash to a person who is entrusted with duty of Munadi. He further submits that Order 21 Rule 54 is a pari materia provision and law required that there should be a public notice i.e. to all individual persons concerned, hence there is no compliance of law in this regard and the alleged Munadi came to rescue of respondents to show that the final declaration was made within one year.

101. Section 4 contemplates; (i) publication in final Gazette; (ii) publication in two daily newspapers circulating in locality of which at least one should be in regional language; and (iii) public notice of substance of such notifications could be given at convenient places in said locality. Section 4 further clarifies that it is last date of such publication and giving of such public notice which shall be considered to be a date of publication of notification. No specific procedure has been prescribed as to how Collector shall cause substance of notification to be given at convenient place in locality.

102. Question whether there was Munadi or not is a simple question of fact. From pleadings in leading Writ Petition no.4986 of 2005, we find no assertion, whatsoever, that there is non-compliance of Section 4 on the part of Collector by not proceeding to cause public notice in locality concerned. What has been said in paragraph 7 of second supplementary affidavit sworn by Sri Deepak Singh, petitioner-4 is that document dated 02.12.2004 with regard to Munadi is fake for the reason that cash payment is not permissible for Government work. However, he has not stated anywhere that, in fact, no such Munadi has taken place. He has tried to create doubt that, payment since made in cash, it has actually not taken place. Factum whether payment in cash is permissible in Government transaction or not is a different thing. In order to consider validity of compliance of Section 4, it is sufficient, if there is local publicity by Collector by beating of drums i.e. Munadi. Moreover, mere fact that payment is shown to have been made in cash, we do not find per se any illegality therein, and also no provision has been placed before us to show that small amount of Rs.2500/- cannot be given in cash. Petitioner has sworn this paragraph on personal knowledge. There is no statutory or other prohibition in making payment of Rs.2500/- in cash to a person, doing a job of beating of drums, particularly at a time, when opening of account in Bank was quite a difficult task in 2004, though it may not be so in 2016. On sheer conjecture and surmises, we, therefore, find no reason to doubt factum of beating of drum on 02.12.2004 and that being so, it cannot be said that declaration under Section 6(1) is barred by time.

103. In **Urban Improvement Trust, Udaipur v. Bheru Lal and orthers, (2002) 7 SCC 712**, it was held that "if appropriate Government is satisfied that any particular land is needed for the public purpose, a declaration is to be made to that effect within a period of one year from the date of publication of notification under Section 4(1) of Act. Section 6(1), therefore, does not require that such declaration should also be published in official gazette within a period of one year from date of publication of notification under Section 4(1). Time limit of one year is prescribed for declaration to be made that land is needed for a public purpose under signature of a Secretary or authorised officer of such Government. It does not mean publication in gazette or newspaper. Similarly, in **Sriniwas Ramnath Khatod vs. State of Maharashtra and others, AIR 2002 SC 187**, Court observed that "decision to make a declaration is to be taken within a period of one year, and publication can be made subsequently as it is a merely a ministerial act".

104. Record shows that proposal to make declaration under Section 6 (1) was initiated by Special Secretary on 27th July, 2005, whereupon certain queries were made by Chief Minister on 27th October, 2005. These queries were replied vide Secretary, Urban Development's note dated 18.11.2005 and it was approved by Chief Minister on 25.11.2005. It is thus decided to make declaration under Section 6.

105. In order to see, whether there is compliance of Section 6(1)(ii), it is last date when requisite publicity/publication under Section 4(1) has been made and date on which decision for acquisition of land by making declaration under Section 6 is taken.

106. In **Mohan Singh and other Vs. International Airport Authority of India and others, (1997) 9 SCC 132**, Court observed that "notification under Section 4(1) needs three steps; (1) publication in official Gazette; (2) publication in two daily newspapers having circulation in locality; and (3) Public notice of substance of such notification to be given at convenient places in locality. It is also held that last of date of publication shall be relevant for the purpose of computation of limitation of one year under Section 6.

107. Taking into account above discussions and facts of the present case, we find that notification under Section (4) was published in gazette on 16.10.2004; in Newspapers on 22.10.2004; and Munadi was carried out on 02.12.2004. Taking last date for the purpose of limitation, declaration under Section 6 is within limitation.

108. Moreover, counsel for respondents contended that there was substantial mistake in the notification under Section 4(1) and hence corrigendum was published on 19.01.2005 and 02.08.2005. Without such corrigendum, acquisition notification under Section 4(1) could not have been given effect, therefore, from the date of corrigendum also limitation under Section 6 (1) (ii) should be computed and from that point of view also, declaration under Section 6 is within limitation. Reliance is placed on Division Bench judgement **in Ram Kumar Vs. State of U.P. and others 2015 (6) ADJ 273 (DB)**. Per contra, Sri Manish Goyal relied on **Anil Kumar Gupta vs. State of Bihar and others, (2012) 12 SCC 443** and submitted that corrigendum will relate back to date on which notification under Section 4(1) was issued, hence date of notification of corrigendum will not help respondents.

109. We have gone through the decision in **Anil Kumar Gupta (supra)** and find that it was not disclosed therein that corrigendum was published in the manner prescribed under Section 4 i.e. in official Gazette, while in the present case, it is not in dispute that corrigendum was published in official gazettes dated 19.01.2005 and 2.08.2005. Nature of corrigendums show that same are not mere typographical error but substantial mistake committed with regard to district also, which was corrected. Such corrigendum, therefore, would be relevant so as to take last date of notification under Section (4) for the purpose of determining limitation for declaration under Section 6 and in the light of judgment of **Ram Kumar (supra),** we find that declaration under section 6 is within the period of limitation of one year.

109A. There is also one more relevant aspect. The date when stay order is passed has to be ignored for the purpose of computing period of one year. In this bunch, interim order was passed in leading Writ Petition on 22nd October, 2005 and period thereafter will have to be excluded and this also fortifies our inference that notification under Section 6 is not barred by limitation.

110. Some argument has been advanced on the question that corrigendum published subsequently would not extend time to relate back but in view of our findings above, this aspect loses its importance relevance, and therefore, it is not necessary to look into this aspect.

111. Last submission is that the acquisition is colourable exercise of power since acquired land is mostly being handed over to private builders, therefore, it is bad in law.

Issue-IV: Colourable Exercise.

112. Here is not a case where entire land is proposed to be acquired for the benefit of one or two or more identified private builders but for 'Proposed Planned Industrial Development' which includes development of residential colonies also acquisition proceedings have been initiated and thereafter for the purpose of said development, GDA, it appears that, has allowed participation of private builders also by allotting land to them and permitting them to develop for residential buildings. It is not a case where anything

has been brought on record to show that in garb of public purpose, land has been acquired for benefit of any private individual without complying with requirement of law or procedure necessary and acquisition is made for a private person/company. In fact, having gone through all writ petitions, we find that there is no such pleadings and in some, a vague pleading has been made without substantiating the same, therefore, this question, in our view, in absence of pleading of necessary fact, it is not to be gone into. We are not impressed at all. We cannot adjudge validity of impugned acquisition notifications on aforesaid grounds in absence of specific pleading and material to substantiate the same.

113. Lastly, it is argued that award has been made after two years and, therefore, acquisition stands lapsed under Section 11A of Act, 1894. It is not in dispute that in most of writ petitions interim orders have been passed. In leading writ petition itself interim order was passed on 22nd October, 2005.

114. Explanation of Section 11A clearly provides that in computing two years period, during which any action or proceeding to be taken in pursuance of declaration is stayed by Court of law shall be excluded. In view thereof, it cannot be said that acquisition in question can be claimed by petitioners to have lapsed for non-compliance of Section 11A, therefore, this argument is rejected.

115. In the result and in view of our findings dispensation of inquiry under Section 5A by exercising power under Sections 17(1) and (4) was arbitrary and illegal and also there was no compliance of provision of National Capital Region Planning Board Act, 1985 at any stage, impugned acquisition notifications cannot be sustained. Had there been deficiency only with regard to illegal dispensation of inquiry under Section 5A, we could have set aside only final declaration notification issued under Section 6 and permitted respondents to proceed from stage of inviting objection from petitioner tenure holders but since mandatory provisions of Act, 1985 has also not been complied with, in impugned acquisition proceedings, we find no other way but to quash both the acquisition notifications issued under Sections 4 and 6 in respect of land belonging to petitioners in all writ petitions.

116. We are confining relief in these writ petitions to petitioners only in view of law laid down in **Mahavir Sahkari Avas Samiti Ltd. (supra),** wherein Court said in paragraph 15, said as under;

15. There is no dispute to the settled legal proposition that in case the acquisition proceedings are quashed by the Court, it will cover the land of only those persons who had approached the Court by filing the petitions and it would not annul the proceedings in respect of those persons who had not approached the Court.

117. Writ petitions are **allowed.** Impugned acquisition notifications dated 16th October, 2004 and 28th November, 2005 in so far as they relate to the petitioners' land are hereby set aside. Petitioners shall be entitled to cost which we quantify to Rs.5000/- for each set of writ petition against respondents 1, 2 and 3.

(2016) 9 ILRA 1890
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Misc. Writ Petition No.- 17960 Of 2012

Smt. Sangeeta & Ors. **...Petitioners**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for Petitioners:
Mahesh Singh, Sanjeev Singh

Counsel for Respondents:
Govt. Advocate, R.K. Mishra, Rakesh Kumar Mishra

Code of Criminal Procedure, 1973 -- Section 125 -- Maintenance -- Wife residing with husband -- Evidence of joint residence and maintenance -- Wife and children sought maintenance from husband; application rejected by trial court and revision against rejection dismissed by revisional court -- Evidence on record showed that petitioner no. 1 and her children resided in the joint house of the husband, that the address of both parties was the same, and that the son had deposed that the family was being maintained by the husband, who also paid their school fees -- **Held:** Where there is specific evidence that the wife and children reside in the husband's house and are being maintained and their expenses borne by him, and there is no other person maintaining them, no case for grant of maintenance is made out; findings of the courts below on this aspect not shown to be infirm. (Paras 5-6)

Constitution of India -- Article 226 -- Writ jurisdiction -- Scope of interference with concurrent findings of fact -- Held: Writ jurisdiction is not an appellate forum for re-appreciation of evidence; interference is not warranted merely because another view of the evidence is possible -- Where the courts below have appreciated the facts and evidence and arrived at a reasoned and plausible conclusion without any illegality, material irregularity or impropriety, and there is no failure of justice or infringement of any legal right, the writ court will not interfere. (Paras 6-7)
Writ Petition Dismissed --. (Para 8)

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Criminal Misc. Case No. 123 of 2011, Smt. Sangeeta and others Vs. Sunil Kumar under section 125 CrPC was filed by petitioner no.-1 Smt. Sangeeta for herself and her three children namely Manish, Nidhi and Himanshi, for recovery of maintenance from her husband Sunil Kumar Sharma. In said case, trial court had afforded opportunity of hearing to the parties, accepted evidences and after appreciating the same the same, the court of Judicial Magistrate (/Additional Civil Judge, Junior Division), Court No.-2, Bulandshahr had passed judgment dated 18.06.2012 by

which said application u/s 125 CrPC was rejected. Against said judgment of trial court, the Criminal Revision No. 320 of 2012 (Smt. Sangeeta and others Vs. State of UP and Another) was preferred which was heard and dismissed by the judgment dated 7.11.2012 of Additional Sessions Judge, Court No.-17, Bulandshahr. By this judgment, revisional court had confirmed findings of the trial court.

2. Against the aforesaid judgments, petitioner has filed present writ petition by which request was made for quashing the judgments of both the lower courts and for awarding maintenance allowance to petitioner no.-1 from her husband (respondent no.-2).

3. Counsel for the petitioner contended that judgments of lower courts are erroneous and perverse because trial court had not considered the statements of Smt. Sushma, the sister-in-law (Bhabhi) of respondent no.-2, which was given in another criminal proceedings under section 202 CrPC. He further contended that respondent no.-2 (husband) had specifically mentioned in his objection against application before trial court that he is labourer. His contention is that children of petitioner no.-1 and respondent no.-2 are carrying out their studies in a public school and a labourer cannot afford fees and maintenance of such studies, so his objections should not be relied. His further contention is that judgment of lower court, especially of the trial court, are factually incorrect and perverse, and therefore those orders should be quashed and writ petition should be allowed.

4. Counsel for respondent no.-2 contended that there is evidence that petitioner no.-1 and her children are residing in a joint house of respondent no.-2. The address of petitioner and respondent no.-2 are same. He further contended that during evidence before the trial court, petitioner had admitted her living in the house of respondent no.-2 (husband). He also submitted that during evidence the son of petitioner no.-1 had given statement that he, his mother, brother and sister are maintained by his father (respondent no.-2), who also pays their fees of School. His submission is that in these circumstances, the writ petition should be dismissed.

5. From perusal of records available before this court,it is found that there has been specific evidence that residence of petitioners is in the joint house of respondent no.-2. There was evidence to the effect that respondent no.-2 maintains them and bear their expenses. In these circumstances, it is immaterial as to whether objection made before trail court by respondent no.-2. was factually correct or not, if there is evidence that petitioner no.-1 is residing in house of her husband (respondent no.-2) with her children and her husband is maintaining them and bearing their expenses. There is no one else who maintains petitioners. In these circumstances there is no justification for granting relief of maintenance to petitioners. These points were properly considered by trial court, and its findings are not infirm.

6. The courts concerned do not appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and orders. It is not an appeal wherein scruitiny of evidence is possible, neither the writ jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. The impugned orders

apparently are presentable, without any such infirmity which may render it completely perverse or unacceptable; and when there is no failure of justice or infringement of any legal right, the interference cannot be had in exercise of writ jurisdiction.

7. A perusal of the impugned judgment reveals that learned Magistrate had appreciated the facts and evidences of the case and then after being satisfied about the facts relating to case, had passed the judgment. From a perusal of the records it appears that conclusions read by learned Magistrate are based on available evidences and logical conclusions. Said judgment was rightly affirmed by the revisional Court. There appears no irregularity in procedure adopted by the trial court. So there is no justification for interference in the impugned judgments.

8. In view of above, writ petition is dismissed.

(2016) 9 ILRA 1893
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE VIPIN SINHA, J.

Writ C/ Civil Misc. Writ Petition No.- 21146 Of 2016

Vivek Sharma & Ors. **...Petitioners**
Versus
State Of U.P. & Ors **...Respondents**

Counsel for Petitioners:
M.A. Qadeer (Sr. Counsel), assisted by Dr. Akhilesh Kumar Sharma

Counsel for Respondents:
Ramesh Upadhyaya, Chief Standing Counsel

Constitution of India, 1950 -- Article 226 -- Land Acquisition -- Possession of agricultural land taken over by the State for construction of a 'Trumpet'/expressway without following acquisition proceedings and without the plots being notified -- Sale deed executed by petitioner no.1 covering only part of the total area of two of the three disputed plots, while excess land, including an entire plot for which no sale deed existed, was also taken possession of and utilised for the project -- Petitioner, on being questioned by the Court, categorically stating at the bar that he sought only compensation and not restoration of possession -- Whether the writ Court should direct restoration of possession or grant of compensation, where substantial development has already taken place and 70 out of 74 similarly situated farmers have already accepted compensation and executed sale deeds -- Held: Where possession of land has been taken for a public infrastructure project without following due acquisition process, but substantial development has already taken place, the majority of affected persons have accepted compensation, and the petitioners themselves seek only compensation, the writ Court, exercising its discretionary jurisdiction under Article 226, will not obstruct development of infrastructure serving larger public interest -- The power under Article 226 should not be exercised so as to hold the entire State machinery to ransom at a belated stage -- Relief moulded to direct payment of compensation to the petitioners at the same rate as paid to the other 70 farmers, rather than restoration of possession, having regard to the statement made at the bar and the extent of development already undertaken. **(Paras 8-16)**

Writ Petition Disposed of With Directions -- Petitioners held entitled to compensation at the same rate as granted and paid by the respondents to the other 70 farmers -- Respondents directed to complete determination of the quantum of compensation within one month from production of a certified copy of the order before the concerned authority, in accordance with law and following due process -- Compensation so determined to be released in favour of the petitioners within the next three months. **(Paras 16-17)**

Case Law Discussed:
1. Syed Maqbool and another v. State of Uttar Pradesh and others, 2011 (4) SCR 238

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

1. Heard Sri M.A. Qadeer, the learned Senior Counsel assisted by Dr. Akhilesh Kumar Sharma, the learned counsel for the petitioner and Sri Ramesh Upadhyaya, the learned Chief Standing Counsel for the respondents.

2. The dispute as raised in the present writ petition is with regard to three plots. The same being (a) Khasra no.572 having an area 1.4500 hectares, (b) Khasra no.580 having an area 0.04945 hectares and (c) Khasra no.1197/572 having an area of 0.0590 hectares.

3. The contention of the learned counsel for the petitioner is to the effect that the aforesaid plots were not notified as they have not been acquired in accordance with law. That they were not included in any notification whatsoever and they have been free from all acquisition proceedings. However, the petitioners' have been dispossessed and the respondents have taken over possession of the said plots and have constructed a road over the said plot.

4. It has further been contended that the petitioners' were unduly pressurised for acquisition by executing a sale deed with regard to certain area of plot no.1197/572 and plot no.580. However, it is being contended that only part of the total area of the said two plots were sold through a sale deed and that too under pressure. However, the respondents have taken over the entire area and the same have been taken possession of including the area of plot no.572 with regard to which there is no sale deed whatsoever on record. That with regard to the area, which has been sold in pursuance of the sale deed is herein as under:-

5. That in plot no.580 only an area of 473.75 sq. mts. was sold as per the sale deed, whereas in plot no.1197/572 an area of 73.75 sq. mts. was sold. Thus, the total sale is only with regard to 547 sq. mts. land in plot no.580 and plot no.1197/572.

6. Sri M.A. Qadeer, the learned Senior Counsel appearing for the petitioner strongly contended that as forcible possession has been taken over of the entire land of plot no.1197/527, plot no.580 and plot no.572 without following any due process of law and without resorting the proceedings under the Land Acquisition Act. Hence, the present writ petition with the following reliefs has been filed:-

"(a) Issue a writ, order or direction in the nature of mandamus commanding the respondents to return back the land of Khasra No.572 area 1.4500 Hectare, Khasra No.580 area 0.9320 Hectare, Khasra No.1197/572 area 0.0590 Hectare situated at village Etmadpur Madra, Tehsil & District Agra, or to petitioners and restore its position and maintain status quo as on the date 19.3.2016.

(b) Issue a writ, order of direction in the nature of mandamus commanding the respondents to grant reasonable damages for dispossession.

(c) In alternative issue a mandamus to respondents to pay compensation and other amount payable to petitioners under the The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

(d) .....
(e) ....."

7. On being pointedly asked by this Court from Sri M.A. Qadeer, the learned Senior Counsel for the petitioner as to what relief does he seeks at the moment as on date, a categorical reply was received from the Senior Counsel for the petitioner that he is seeking compensation for the land, which has been forcefully possessed by the respondents. On being further asked as to who is in possession over the plots in question, the answer was again to the effect that the possession over the plot in question is that of the respondents.

8. Sri Ramesh Upadhyaya, the learned Chief Standing Counsel for the respondents submits that the State of U.P. has undertaken a project for facilitating the industrialisation and growth of the State and for the purposes of transportation a Agra-Lucknow Excess Control Expressway (Green Field) is being constructed and that the total cost of the project is about Rs.14434.64 crores. It has been contended that the said expressway has to join the roads of Agra and the Yamuna Expressway, Agra for which a 'Trumpet' is required to be constructed at the Etmadpur Madra Agra and that the total land required for the purpose of construction of 'Trumpet' at Agra is 15.1130 hectares land and that the said land belongs to 74 farmers. It has further been contended that after finalising the alignment of the 'Trumpet', the district administration of Agra had called for a meeting of all the farmers whose land is likely to be affected on 2nd March, 2015 and that in the said meeting the farmers were duly informed about the construction of the 'Trumpet' and the benefit that will accrue to the farmers with the construction of the said 'Trumpet' and they were also informed that they would be paid four times of circle rate as cost of the land.

9. Sri Ramesh Upadhyaya, the learned Chief Standing Counsel submits that in the said meeting, which was attended by almost all the farmers including Harish Chandra and Bhoori, who are family members of the petitioners', no objection of any sought whatsoever was taken and subsequent to the said meeting a second meeting was held on 7th July, 2015 again between the farmers and the revenue authorities of the district administration of Agra and a decision was taken that as the construction of the 'Trumpet' has already been started, the farmers whose land fall in that particular area where the 'Trumpet' was being constructed will not undertake any agricultural activity whatsoever. It has also been submitted that out of 74 farmers 70 farmers have duly executed the sale deeds by accepting price of the land at the rate of four times circle rate of the agricultural land and that the construction of 'Trumpet' is going on in full swing and a major part of the project is almost completed.

10. At this stage, Sri Ramesh Upadhyaya has pointed out that as far as the contention of the petitioner with regard to plot no.572 being abadi land is concerned, it is submitted that initially an order was passed under Section 143 of the U.P. Zamindari Abolition and Land Reforms Act by means of which the plot no.572 was declared as non agricultural land on 2nd April, 2008. However, subsequent to the declaration under Section 143 of the U.P. Zamindari Abolition and Land Reforms Act it has been contended that the petitioner continued to use the land as agricultural land and that subsequently, the Sub-Divisional Magistrate passed a fresh order on 18th August, 2015 cancelling the declaration of plot no.572 as abadi and thus, as on date it is an agricultural land.

11. It is an admitted position on record that against the order dated 18th August, 2015, no appeal or revision has been filed and thus, as on date the order has become final and plot no.572 continues to be an agricultural land.

12. In the counter affidavit filed on behalf of the respondents, it has been clearly stated that the petitioner no.1 has executed a sale deed for plot no.580 and plot no.1197/572 on 19th August, 2015. A copy of the sale deed has been annexed with the counter affidavit.

13. It is further contended that all the persons including the petitioner no.1 have been paid compensation four times the circle rate of the land for execution of the sale deed, which was being affected on account of construction of 'Trumpet'.

14. It has been accepted in the supplementary counter affidavit filed by the respondents that only 0.05475 hectares land has been purchased in pursuance of the sale deed executed by petitioner no.1. It has further been accepted in para 5 that the land of plot no.572 has also been utilized by the respondents for construction of a 'Trumpet'.

15. Reference in this regard, may be made to paragraph 5 of the supplementary counter affidavit dated 3rd September, 2016.

16. Thus, keeping in view the aforesaid facts and circumstances of the case, the factual matrix as it unfolds is to the effect that land of plot no.572, 580 and 1197/572 has been taken possession by the respondents and the same has been utilized for the construction of a 'Trumpet'/expressway without following the acquisition proceedings and without the plots being notified and it also becomes crystal clear that even though a sale deed was executed with regard to part of plot no.580 and part of plot no.1197/572, the land much in excess thereof has been taken possession and utilized by the respondents.

17. The fact remains that the petitioner no.1 has executed a sale deed and it is also to be appreciated that in a meeting, minutes of which has been annexed with counter affidavit, family members of the petitioners' had participated and none had raised any dispute. It is also to be appreciated that these 74 farmers whose land has been affected by the construction of the expressway/'Trumpet', 70 farmers have already accepted the compensation. It is also an admitted position on record that a huge amount has been invested in the project and the construction work is also almost complete as it has been admitted in the rejoinder affidavit that the road has been constructed over the plot in question. Thus, at this belated stage the petitioners' cannot be permitted to hold the entire State machinery to ransom.

18. The Apex Court in a judgment rendered in the case of **Syed Maqbool and another Vs. State of Uttar Pradesh and others, 2011 (4) SCR 238** has observed herein as under;-

"High Courts should also be cautious in entertaining writ petitions filed decades after the dispossession, seeking directions for acquisition and payment of compensation. It is not uncommon for villagers to offer/donate some part of their lands voluntarily for a public purpose which would benefit them or the community - as for example, construction of an access road to the village or their property, or

construction of a village tank or a bund to prevent flooding/erosion. When they offer their land for such public purpose, the land would be of little or negligible value. But decades later, when land values increase, either on account of passage of time or on account of developments or improvements carried out by the State, the holders come up with belated claims alleging that their lands were taken without acquisition and without their consent. When such claims are made after several decades, the State would be at a disadvantage to contest the claim, as it may not have the records to show in what circumstances the land were given/donated and whether the land was given voluntarily. Therefore, belated writ petitions, without proper explanation for the delay, are liable to be dismissed."

19. Keeping in view the fact that substantial development has already taken place and that the majority of the farmers, in fact 70 out of 74, of the farmers have already sold their land and have executed sale deeds and have received compensation, this Court at this stage finds no substantial ground to exercise its equitable jurisdiction under Article 226 of the Constitution of India. The Apex Court has time and again held that the power under Article 226 of the Constitution should not be exercised so as to obstruct development of infrastructure, which will serve larger public interest. Instead, the relief could be moulded so as to compensate the writ petitioners. In the present case, it may be observed that the land is part and parcel of a larger area and thus, in view of the substantial development having taken place the plea of the writ petitioners could not be considered in isolation, moreover this Court will have to proceed keeping in mind the statement made at the bar of this Court by the learned Senior Counsel appearing for the petitioner.

20. In view of the aforesaid facts and circumstances and also in view of the admitted factual position that possession over the plots in question have been taken by the respondents and in fact excess land has been taken possession of than what was sold by petitioner no.1 by executing a sale deed with regard to plot no.580, 1197/572 this Court deems it fit to dispose of the writ petition with certain directions herein as under:-

(a) The petitioners' are entitled for grant of compensation at the same rate as has been granted and paid by the respondents to the other 70 farmers.

(b) This exercise of determination of quantum of compensation with regard to the land over which possession has been taken by the respondents shall be completed by the respondents within a period of one month from the date of production of a certified copy of this order before the concerned authority in accordance with law and following due process of law.

(c) The quantum of compensation so determined shall be released in favour of the petitioners' within the next three months.

21. With the aforesaid observations, the writ petition stands disposed of.

(2016) 9 ILRA 1898
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 21500 Of 2015

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

Counsel for Applicant:
Sri S.A. Imam

Counsel for Opposite Party:
Government Advocate, Sri B. Pant

Bail -- Sections 364, 302, 201, 120B, 34 I.P.C. -- Circumstantial Evidence -- Omission of Applicant's Name in F.I.R. -- Recovery from House of Co-Accused -- Prosecution case is that applicant was last seen with the deceased on a motorcycle, followed by recovery of a country made pistol and a knife at the joint pointing out from the house of co-accused Nasir -- objectionable photographs of the wife of the deceased, said to have been recovered, also relate to co-accused Nasir with whom she is alleged to have been carrying an illicit relationship -- witnesses named in the F.I.R. are stated to have identified only co-accused Nasir, and not the applicant, as having been seen with the deceased on the motorcycle when shown the photographs -- name of the applicant surfaced only at a subsequent stage of investigation -- confessional statement recorded by the police at the time of recovery of the weapon also indicates that it was co-accused Nasir who had shot the deceased -- case being one of circumstantial evidence, the chain of circumstances against the applicant is stated to be incomplete -- applicant in jail since 5.4.2015 -- **Bail Application Allowed --** after taking an overall view of all the facts and circumstances of case, the nature of evidence, the period of detention already undergone the unlikelihood of early conclusion of trial.

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

1. Heard Sri V.K. Chandel, Advocate holding brief of Sri S.A. Imam, learned counsel for the applicant, learned AGA and perused the record.

2. Submission of learned counsel for the applicant is that the evidence against the applicant is that of being last seen with the deceased on the motorcycle and then also the recovery of one country made pistol and a knife at the joint pointing out from the house of co-accused Nasir. Further submission is that the objectionable photographs of the wife of the deceased said to have been found are also relating to co-accused Nasir. Further submission is that co-accused Nasir has been nominated as accused in the FIR along with the wife of the deceased with whom co-accused Nasir is said to have been carrying illicit relationship. Emphasis has been laid by the learned

counsel for the applicant that it was alleged in the FIR that one witness Sakir son of Sartaj Khan and witness Firasat are said to have seen the deceased with the applicant and the co-accused Nasir going on a motorcycle but the version that was given in the FIR mentions only co-accused Nasir as the person, who was seen by the aforesaid two witnesses on the motorcycle with the deceased. Further submission is that had the applicant been also seen by the aforesaid two witnesses going on the motorcycle along with co-accused and the deceased, then such facts must have found mentioned in the FIR positively. According to the FIR, it was alleged that when these witnesses were shown the photographs of the wife of the deceased and co-accused Nasir then they had told the first informant to have seen the co-accused Nasir going along with the deceased on the motorcycle. At that stage, they did not disclose the name of the applicant. Further submission is that this omission is of vital importance and goes a long way to discredit the evidentiary value of subsequently introduced name of the applicant as accused. Further submission is that the alleged recovery has also been made from the house of co-accused and the confessional statement recorded by the police at the time of recovery of weapon also indicates that it was co-accused Nasir, who had shot the deceased. Further submission is that conspicuous omission of the applicant's name in the FIR makes the case of the applicant distinguishable from the case of the co-accused Nasir, who appears to be principal offender in the case and who appears to have eliminated the deceased in order to perpetrate the liaison with the wife of the deceased. Further submission is that this case being of the circumstantial evidence, the link of circumstances appears to be incomplete and incapable to give rise to any indefinite inference of the guilt against 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 5.4.2015 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

4. 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.

5. Let the applicant- Shahid, involved in Case Crime No. 272 of 2015, u/ss 364, 302,201, 120B and 34 IPC, P.S.-Mussoorie, District- Ghaziabad 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.

6. 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.

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.

(2016) 9 ILRA 1901
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 26175 Of 2016

Vijay Prakash Shukla **...Applicant**
Versus
State Of U.P. & Ors. **...Opposite Parties**

Counsel for Applicant:
Sri Ashwani Kumar Pathak

Counsel for Opposite Parties:
Government Advocate

Criminal Procedure -- Section 482 Cr.P.C. -- Defamation -- Section 499 I.P.C., First and Fourth Exceptions -- Newspaper Report of Court Proceedings -- News item published regarding issuance, and subsequent recall, of a warrant against the applicant under Section 138 N.I. Act by a court at Fatehgarh Sahib, Punjab -- applicant, a former Minister in the Government of Uttar Pradesh, filed a complaint case alleging defamation against the Editor and Chief Editor of the newspaper -- trial court dismissed the complaint under Section 203 Cr.P.C. holding that publication of correct facts regarding court proceedings does not amount to defamation -- revisional court affirmed the said order -- applicant challenged both orders under Section 482 Cr.P.C. contending that since the warrant stood recalled by the time of publication, the news item was defamatory -- Held: the contention is unacceptable as it is admitted that correct facts regarding the court proceedings were published -- under the first exception to Section 499 I.P.C., imputation of truth made for the public good is not defamation, and under the fourth exception, substantially true reporting of court proceedings is not defamation -- activities of a person in public life, particularly relating to court proceedings, may legitimately affect public opinion in the selection of public representatives, and publications concerning such persons, if correct, are for the public good -- no incorrect publication having been found, and the first and fourth exceptions to Section 499 I.P.C. having been rightly applied by the courts below, there is no illegality, infirmity or impropriety warranting interference in exercise of inherent jurisdiction. (Paras 1-6)

Application U/S 482 Cr.P.C. Dismissed -- Application under Section 482 Cr.P.C. challenging order dated 22.2.2014 passed by the trial court (J.M.-III, Gorakhpur) dismissing the complaint case under Section 203 Cr.P.C., and order dated 22.09.2014 passed by the revisional court in Criminal Revision No. 509 of 2014 affirming the same, dismissed. (Para 6)

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. One news item was published in newspaper Rastriya Sahara on 27.11.2013 regarding proceedings of complaint case filed against the applicant in District Fatehgarh Sahib, Punjab, in which court of A.C.J.M, Fatehgarh Sahib had issued warrant for prosecution of applicant under

Section 138 N.I. Act. Said warrant was recalled, when applicant surrendered in court of Fatehgarh Sahib and he was enlarged on bail. But news item of issuance of said process against the applicant was published in news paper. Applicant felt aggrieved by said news item and filed complaint case against persons responsible for news item including Editor and Chief Editor of newspaper.

2. After considering evidences under Sections 200 and 202 Cr.P.C. The trial court (J.M.-III, Gorakhpur) had dismissed the complaint case on 22.2.2014 under Section 203 Cr.P.C. with observation that publication of correct facts regarding proceedings of court cannot be treated as defamation. Against the order dated 22.2.2014, Criminal Revision no. 509 of 2014 (Vijay Prakash Shukla Vs. State of U.P. & Others) was preferred. Said revisional court had afforded opportunity of hearing and held that publication of correct facts regarding proceeding of Court is not defamation, so there is no error or illegality in order dated 22.09.2014 of trial Court. With these findings the revisional court had dismissed the said revision. Challenging said orders of trial court and lower revisional court present application u/s 482 Cr.P.C. has been preferred.

3. Learned counsel for the applicant contended that at the time of publication of news item in said newspaper the warrant was already recalled against the applicant, therefore said news item was defamatory. This contention was refuted by learned AGA.

4. Said contention of learned counsel for the applicant is found unacceptable. Admittedly correct facts were published in newspaper regarding proceedings of court case. Applicant claims to be a social worker, who opposes corruption. He has been holding a public office and was Minister in Government of Uttar Pradesh. His activities relating to court's proceedings were published.

5. The first execption of section 499 IPC is that the imputation of truth, which public goog requires to be made is not defamation, if publication in that regard is not incorrect. Forth exception of this section is that substantially true reporting of proceedings of court is not defamation. The activities of person in public life, especially relating to court proceedings, may have effect on public opinion for taking appropriate decision regarding selection of representative in public bodies and constitutional institutions. Such publications, relating to people of public life especially who intend to be public representative, should be accepted as the one made for public good, if they are correct.

6. In present matter no incorrect publication of court proceeding was found. After considering these facts, the first and fourth exception of Section 499 of IPC was taken into account by lower courts and impugned orders were passed, in which there appears no illegality, infirmity or impropriety. In these circumstances, there is no occasion for this court to exercise inherent jurisdiction of this court and interfere in orders under challenge. Accordingly this application is dismissed.

(2016) 9 ILRA 1903
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ A No.- 37146 Of 1996

Amal Kumar Ganguly **...Petitioner**
Versus
State Of U.P. & 0rs. **...Respondents**

Counsel for Petitioner:
Km. Usha Kiran, K.C. Vishwakarma, Ramsheel Sharma

Counsel for Respondents:
S.C., S.P. Gautam

Constitution of India -- Article 309 -- Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991 -- Nature and Scope -- Requirement of 'Notified Order' -- Petitioner, employed as Junior Office Assistant-cum-Typist in Auto Tractors Limited (ATL), a Government company, was retrenched on closure of the unit with effect from 1989-90 -- Government Order dated 11.11.1993 provided for absorption of retrenched employees of ATL subject to qualification and eligibility, and Absorption Rules, 1991 were framed under proviso to Article 309 empowering the State Government, by a notified order, to require absorption of retrenched employees in any post or service -- **Held:** a 'notified order' under Rule 3(1) of the Absorption Rules, 1991, read with Section 4(29-A) of the U.P. General Clauses Act, 1904, means an order published in the Gazette and partakes the character of a 'statutory instrument' -- no such notified order having been shown to exist in respect of ATL, the Government Order dated 11.11.1993 did not by itself confer any right of absorption but only prescribed eligibility criteria and relaxations for retrenched employees. (Paras 15-20)

U.P. Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 -- U.P. Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act, 2009 -- Retrospective Rescission -- Saving Clause -- Absorption Rules, 1991 were rescinded by the Rescission Rules, 2003 with effect from 8.4.2003, and thereafter, by the Rescission Act, 2009, deemed to have been rescinded with effect from 9.5.1991, the date of their original notification -- limited protection was saved under Section 3(2) of the Rescission Act, 2009 in favour of (i) retrenched employees already absorbed prior to 8.4.2003, whose absorption and pay protection was not to be withdrawn, and (ii) unabsorbed retrenched employees, who were entitled only to relaxation in the upper age limit for direct recruitment to Group 'C' and 'D' posts outside the purview of the Public Service Commission -- **Held:** Section 3(1)(a) of the Rescission Act, 2009 expressly extinguishes the right of any retrenched employee, not already absorbed by 8.4.2003, to claim absorption under the Absorption Rules, 1991 or under any Government Order issued thereunder -- no such right survives in favour of the petitioner, who was admittedly never absorbed. (Paras 21-29)

Absorption -- Posts within the Purview of the Public Service Commission -- Claim for Absorption as District Programme Officer/Child Development Project Officer -- Petitioner's request for

absorption on the posts of District Programme Officer and Child Development Project Officer, being Group 'B' posts governed by the U.P. Bal Vikas Evam Pushtahar (Samuh 'Ka' Evam Samuh 'Kha') Service Rules, 1996 and falling within the purview of the U.P. Public Service Commission, was rejected -- reliance placed by petitioner on instances of absorption of certain other retrenched employees of ATL held distinguishable and unavailing -- **Held:** Government Order dated 11.11.1993 itself confines the benefit of absorption to posts outside the purview of the Public Service Commission and confers no positive right of absorption in Government service dehors the Absorption Rules, 1991. (Paras 11, 32-33)

Writ Petition Dismissed -- In view of the retrospective rescission of the Absorption Rules, 1991 by the Rescission Act, 2009 with effect from 9.5.1991, petitioner held to have no surviving right to claim absorption -- impugned orders rejecting petitioner's claim for absorption upheld -- writ petition seeking a writ of mandamus directing absorption dismissed -- no order as to costs. (Paras 34-37)

Case Law Discussed:-

1. K.R. Pandey and others v. State of Uttar Pradesh and others, LBESR 1998 (Volume-II) 245
2. Bagheshwari Prasad Srivastava and others v. State of U.P. and others, Civil Misc. Writ Petition No. 17195 of 1998, decided on 24.9.1999
3. Ajit Raizada and others v. State of U.P. and others, 2011 (6) ADJ 511
4. Sunil Kumar Verma and others v. State of U.P. and others, Civil Appeal Nos. 9165 to 9172 of 2010, decided on 09.09.2016

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

1. Petitioner was employed and appointed as Junior Office Assistant-cum-Typist on 22.10.1980 in Auto Tractors Limited (hereinafter referred to as "ATL'), a company registered under Companies Act,1956 (hereinafter referred to as 'Act,1956'), owned by State Government of Uttar Pradesh. He got promotion as Accountant and thereafter Assistant Account Officer.

2. ATL management declared closure of unit vide notice dated 20.11.1990 on the ground of consistent loss and unit was closed with effect from year 1989-90.

3. A Government Order dated 11th November, 1993 was issued stating that retrenched employees and Officers of ATL would be absorbed in Government Service, subject to their qualifications and eligibility in Government service, appointed in ATL on or before 1.10.1986 and were working at the time of closure of the unit. Management of ATL submitted a list to State Government, giving names of its 'retrenched employees', wherein name of petitioner was also shown. Moreover, a certificate dated 11.12.1993 was issued to petitioner verifying that he was a retrenched employee of ATL, having been appointed on 22.10.1980 as Junior Office Assistant/Typist and on 20.11.1990 he was working as Assistant Account Officer.

4. State Government, thereafter, issued various orders on 13.4.1994, 4.5.1994, 2.6.94 and 8.7.1994 to all departments that it has learnt that instead of absorbing retrenched employees of Chal Chitra Nigam, U.P. Hortico Brasware Corporation, Non-Feros Rolling Mill, Mandaliya Vikas Nigam, ATL, etc., the departments are making new recruitments from open market which is not proper, hence 'retrenched employees' of aforesaid Government Bodies should be absorbed.

5. Since no action was taken towards absorption of petitioner, he filed Civil Misc. Writ Petition No. 34296 of 1995 which was disposed of vide judgement dated 29.11.1995, permitting petitioner to make a representation to respondent-government who was directed to decide the same in the light of various Government Orders issued for absorption of retrenched employees of ATL.

6. Pursuant thereto, petitioner submitted a representation dated 9.12.1995 to Chief Secretary, Uttar Pradesh Government, Lucknow, requesting for his absorption on a post equivalent to Assistant Accounts Officer. No action was taken, compelling petitioner to file a Contempt Application wherein a statement was made by Standing Counsel that petitioner's representation was decided on 22.7.1996 and matter has been referred to different departments of Government with relevant Government Orders. Contempt application stood dismissed vide order dated 24.7.1996.

7. Petitioner then further pursued matter for absorption. Ultimately vide order dated 30th April, 2002, request of petitioner for absorption was rejected.

8. Petitioner filed writ petition seeking only a writ of mandamus directing respondents to absorb him in any Government department according to his grade in which he was working in the light of Government Orders dated 11.11.1993, 3.6.1996 and 3.7.1996. Subsequently by way of amendment, orders dated 30th April, 2002 and 26.2.2003 have also been challenged, praying for issuance of a writ of certiorari quashing the same.

9. The request of petitioner to Government departments was, since he was working in pay scale of Rs.850-1660 at the time of retrenchment, therefore, he is entitled for absorption in equivalent grade, that is why, he requested for his absorption on the post of District Programme Officer. Director, Women and Child Development Department has said that this is not permissible since it is a Group "B' post. Vide order dated 30th April, 2002, similar request of petitioner for appointment as District Programme Officer and Child Development Project Officer was rejected on the ground that both are Group "B' posts and recruitment thereon is through Uttar Pradesh Public Service Commission, governed by 'The Uttar Pradesh Bal Vikas Evam Pushtahar (Samuh "Ka" Evam Samuh "Kha") Service Rules, 1996' (hereinafter referred to as " Rules 1996').

10. Learned counsel for petitioner has submitted that petitioner has a right for absorption in view of Government Order dated 11.11.1993 and denial of same is patently illegal and arbitrary.

11. Supplementary affidavit has also been filed giving certain illustrations of absorption of some other retrenched employees of ATL, which is as under:

a) Vipin Chandra Srivastava, who was working as Accounts Officer in ATL, has been absorbed as Assistant Viklang Officer in pay scale of Rs.6500-10500/-.

b) Anukool Prakash was appointed as Zila Pichhada Varga Kalyan Adhikari.

c) Sher Singh was absorbed on the post of Sambhagiya Nirikshak (Pravidhik) in pay scale of Rs.6500-10500/-.

d) One K.R. Pandey was absorbed as Administration Officer in Acharya Narendra Deo Agriculture University, Faizabad and it is a post which comes within purview of Uttar Pradesh Public Service Commission, pursuant to judgement of this Court in **K.R. Pandey and others Versus State of Uttar Pradesh and others, reported in LBESR 1998(Volume-II), 245.**

e) Sanna Ullah Khan, working as Senior Engineer in ATL, was absorbed as Assistant Road Transport Officer, pursuant to the judgement of this Court.

f) Mohan Gupta, working as Accounts Officer in ATL, was absorbed as Special Officer on Duty in Child Development and Women Welfare Department.

12. Respondents-1 and 3 have filed counter affidavit, stating that there is no direction that retrenched employees of Government or Public Corporation in Government Service shall be absorbed in Government service but Government Orders dated 11.11.1993 and 3.6.1996 only provide certain concessions and relaxations for appointment of 'retrenched employees' in Government Service. Petitioner applied for appointment/absorption in Tourism Directorate U.P. Lucknow and office of Commissioner, Rural Development, Lucknow but did not participate in interview.

13. Petitioner, in rejoinder affidavit, has relied on a Single judge judgement of this Court in **Bagheshwari Prasad Srivastava and others Versus State of U.P. and others in Civil Misc. Writ Petition No. 17195 of 1998, decided on 24th September, 1999**, dealing with absorption of an employee of Bhadohi Woolens Ltd., a Government company which was also closed.

14. We have heard learned counsel for the parties and perused the record.

15. Recruitment and appointment on various posts in various departments in Uttar Pradesh are governed by statutory Rules framed under proviso to Article 309 of Constitution of India. Since petitioner is not claiming appointment/absorption in a particular department and on a particular post, therefore, at this stage we are not referring to any particular law or particular set of Rules but would refer to relevant provisions as and when occasion arises in subsequent discussion.

16. Between 1985 to 1990, a number of undertakings/companies owned by Government were closed on account of colossal losses, etc. A large number of employees were retrenched. In some matters judicial orders were passed directing for absorption looking to general public interest and the fact that a large number of employees rendered unemployed due to closure of such Government undertakings. In some matters, Court expressed its doubt that in the teeth of statutory Rules governing recruitment and appointment of 'retrenched employees' of companies or undertakings, not holding a civil post, cannot be directed to be appointed on a civil post or any Government service governed by statutory Rules.

17. Faced with this situation, in exercise of power, under proviso to Article 309 of Constitution of India, Governor promulgated "The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991' (hereinafter referred to as ''Absorption Rules, 1991'), vide Notification dated 9th May, 1991. These Rules came into force immediately. Rules 2 and 3 thereof, read as under:-

"2. Unless there is anything repugnant in the subject or context, the expression-

(a) "appointing authority" in relation to any post for which an employee was retrenched means the authority empowered to make appointment to such post;

(b) "Public corporation" means a body corporate established or constituted by or under any Uttar Pradesh Act except a University or local authority constituted for the purpose of Local Self Government and includes a Government Company within the meaning of section 617 of the Companies Act, 1956 in which the State Government has prepondering interest;

(c) "retrenched employee' means a person who was appointed on a post under the Government or a public corporation on or before October 1, 1986 in accordance with the procedure laid down for recruitment to the post and was continuously working in any post under the Government or such corporation upto the date of his retrenchment due to reduction in, or winding up of, any establishment of the Government or the public corporation, as the case may be and in respect of whom a certificate of being a retrenched employee has been issued by his appointing authority.

(d) "service rules' means the rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive instructions issued by the Government, regulating the recruitment and conditions of service of persons appointed to the relevant service.

3. (1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force, ***the State Government may by notified order require the absorption of the retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment*** *in respect of such retrenched employees.*

(2) The ***provisions contained in relevant service rules shall be deemed to have been modified to the extent of their inconsistency with the provisions made in the notified order*** *referred to in sub-rule (1).*

(emphasis added)

18. Perusal of Absorption Rules, 1991 shows that State Government is empowered to issue a notified order requiring absorption of "retrenched employees' as defined under Rule 2 (c) in any post or services under Government. State Government in the said notified order is also empowered to prescribe procedure for such absorption including relaxation in various terms and conditions of recruitment in

respect of such retrenched employee. Rule 3(2) declares that provisions made in notified order shall prevail over service Rules of relevant post or cadre in which absorption is to be made and the relevant service Rules shall be deemed to have been modified to that extent. The term 'notified order' has been defined under Section 4(29A) of The Uttar Pradesh General Clauses Act, 1904 (hereinafter referred to as U.P. Act, 1904), which reads as under:-

"4 (29-A). "notification" or "public notification" shall mean a notification published in the Gazette of the State, and the word "notified' shall be construed accordingly."

19. Notified order, therefore, when read in the light of Section 4(29-A) of U.P. Act, 1904 would mean an order which is published in Gazette of State. Said order, therefore, would partake the nature of 'statutory instrument' as defined under Section 4(42-B) of U.P. Act, 1904, which reads as under:-

"4(42-B). "statutory instrument" shall mean any notification, order, scheme, rule or bye-law issued under any enactment and having the force of law."

20. Absorption Rules, 1991, therefore, contemplates absorption pursuant to a notified order and not by mere administrative orders issued in exercise of power under Article 166 of Constitution of India. We are not shown any such 'notified order' issued in exercise of power under Rule 3(1) of Absorption Rules, 1991 which may have effect of modifying existing service Rules of respective posts and services in which absorption may be made so as to have effect of modification thereof to the extent of otherwise provisions contained in a 'notified order' and in respect of ATL no such order has been placed before us except Government Order dated 11th November, 1993 which by itself does not provide for absorption but lays down certain relaxation and concessions for "retrenched employees' of ATL for absorption in Government services and posts other than those which are within purview of U.P. Public Service Commission. Be that as it may, subsequent developments have fatal consequences upon petitioner's claim for absorption, hence we may proceed to refer and discuss same hereafter.

21. Absorption Rules, 1991 have been rescinded by promulgating another set of Rules vide Notification dated 8th April, 2003 i.e. "The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003' (hereinafter referred to as "Recession Rules, 2003'). Rule 3 of said Rules, reads as under:-

"3. (1) The Uttar Pradesh Absorption of Retrenched Employees of Government Rescission and Public Corporations in Government Service Rules, 1991 ***are hereby rescinded and as a consequence of such rescission.***

(i) the ***right of a retrenched employee*** *to be considered for absorption accrued under the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service* ***Rules, 1991 but who has not been absorbed till the date of the commencement of*** *The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission)* ***Rules, 2003 shall stand terminated from such date.***

(ii) the ***orders of the Government issued from time to time*** *prescribing the norms of absorption for retrenched employees of a particular Government department or Public Corporation in Government Service and granting of consequential benefits including pay protection,* ***shall stand abrogated from the date of the commencement*** *of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003.*

(2) ***Notwithstanding such rescission:-***

(i) the ***benefit of pay protection granted to an absorbed retrenched employee*** *prior to the date of the commencement of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003* ***shall not be withdrawn.***

(ii) a retrenched employee covered by The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 prior to the date of the commencement of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003, but who has not been absorbed till such date shall be ***entitled to get relaxation in upper age limit for direct recruitment to such Group 'C' and Group 'D' posts which are*** *out aside the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous services in substantive capacity in the concerned Government Department or Public Corporation in completed years."*

(emphasis added)

22. Rescission Rules, 2003 declare to rescind Absorption Rules, 1991. Consequences of such rescission has been provided under Rule 3 (1), stating that right of a "retrenched employee' accrued under Absorption Rules, 1991 but who has not been absorbed till 8th April, 2003 i.e. a date on which Rescission Rules became effective. Such accrued right of "retrenched employee' shall stand terminated from the said date of rescission i.e. 8th April, 2003.

23. Another consequence of Rescission Rules, 2003, stated in Rule 3(1)(ii) is that orders of Government issued from time to time prescribing norms for absorption of "retrenched employees' shall stand abrogated from the date of enforcement of Rescission Rules, 2003 i.e. 8th April, 2003. Having said so, Rule framing authority has also saved certain benefits already granted. Rule 3 (ii) of Rescission Rules, 2003 provides for following protections:-

(i) Benefit of pay protection already granted to an absorbed "retrenched employee' before enforcement of Rescission Rules, 2003, shall remain intact and such employee would continue to avail same and it shall not be withdrawn.

(ii) Retrenched employee covered by Absorption Rules, 1991 as it was upto the date of enforcement of Rescission Rules, 2003 who has not been absorbed till the date of rescission, shall be entitled to get relaxation in upper age limit for direct recruitment in Group "C" and "D" posts which are outside the purview of Uttar Pradesh Public Service Commission. This relaxation in upper age limit is

confined to the extent such a 'retrenched employee' has rendered continuous service in substantive capacity in public corporation in completed years or the Government department as the case may be.

24. Therefore, there are two types of protections which are saved in Rescission Rules, 2003. Firstly, pay protection already granted to those who are already absorbed. Secondly relaxation in the matter of upper age limit to the extent one has served in substantive capacity till the date of retrenchment in public corporation in completed years for the purpose of direct recruitment under relevant Rules to Group "C" and "D" posts which are outside purview of Uttar Pradesh Public Service Commission. No other benefit has been provided or saved and right, which may be claimed by "retrenched employee' governed by Absorption Rules, 1991, has been wiped out with enforcement of Rescission Rules, 2003.

25. Aforesaid Rules, 2003 came into force on 8th April, 2003. Due to different sets of litigation wherein several orders in different manners were issued, State Legislature intervened and issued U.P. Act No.26 of 2009 i.e. "Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act, 2009 (hereinafter referred to as 'Recession Act, 2009'), published in Uttar Pradesh Gazette (extraordinary) dated 27th August, 2009. The statement of 'Object and Reasons' of aforesaid Act says that retrenched employees of Government companies/ undertakings sought their absorption against Group "B' posts which were within purview of Uttar Pradesh Public Service Commission and as per Government policy, absorption against such posts was not permitted and the situation became difficult, as a result whereof, Rules, 1991 were rescinded vide Rules, 2003. Still various Court cases have not rendered the things very clear, therefore, State Legislature decided to promulgate Recession Act, 2009, to deal with the situation.

26. By Section 3 of Recession Act, 2009, Absorption Rules, 1991, have been rescinded and deemed to have been rescinded on 9th May, 1991. The consequences of said rescission and the extent of savings are also provided thereunder. Section 3 of Recession Act, 2009 reads as under:-

"3. Rescission and savings.-(1) The Absorption Rules which was rescinded with effect from April 8, 2003 by the Rescission Rules ***shall be rescinded and be deemed to have been rescinded on May 9, 1991*** *and consequent upon such rescission:-*

(a) the ***retrenched employees except those who were absorbed during the period from May 9, 1991 to April 8, 2003 shall have no claim*** *with regard to their absorption under the said absorption rules or under any Government orders issued in regard thereto and* ***their right regarding absorption accrued under the Absorption Rules shall be deemed terminated.***

(b) the ***orders of the Government issued from time to time*** *prescribing the norms of absorption for retrenched employees of a particular Government Department or Public Corporation in Government Service and granting of consequential benefits including pay protection* ***shall stand revoked ab-initio****.*

(2) Notwithstanding such rescission,-

(a) the ***benefit of absorption provided to the retrenched employees absorbed before April 8, 2003 under the provisions of the Absorption Rules, shall not be withdrawn.***

(b) the ***benefit of pay protection granted to the retrenched employees absorbed prior to April 8, 2003 shall also be maintained.***

(c) a ***retrenched employee*** *covered by the Absorption Rules, but who has* ***not been absorbed till April 8, 2003 shall be entitled to get relaxation in upper age limit for*** *direct recruitment to such Group 'C' and Group 'D' posts which are outside the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous services in substantive capacity in the concerned Government Department or the Public Corporation in completed years."*

(emphasis added)

27. By Section 4, Rules 2003 have been rescinded with effect from 8th April, 2003. Therefore, Recession Act, 2009 in fact has made entire slate clear which was initiated by Rules, 1991 and ended by Rules, 2003. Still litigation continued, hence State Legislature intervened and both the Rules, from the date of their enforcement, have been rescinded. In respect of Rules, 1991, there is a deeming clause, rescinding the same with effect from 9th May, 1991 but subject to some protection in Section 3.

28. Section 3(1)(a) of Recession Act, 2009 clearly declares that except those retrenched employees who were absorbed during 9th May,1991 and 8th April, 2003, all unabsorbed retrenched employees shall have no claim with regard to their absorption under Absorption Rules, 1991 or under any Government Order issued in that regard and their right relating to absorption accrued under absorption Rules shall be deemed terminated. Thus no protection has been made to a person not already absorbed till 8.4.2003. Section 3(1)(a) of Recession Act, 2009 clearly bars any right of absorption to any retrenched employee governed by Rules, 1991, if not already absorbed and now no such right survive.

29. There is a little protection provided under Section 3(2)(c) to retrenched employees who have not been absorbed with regard to relaxations in upper age limit for direct recruitment on Group "C' and "D' posts. Except protection with regard to relaxations in upper age limit given vide Section 3(2)(c), petitioner or any other person like him, after promulgation of Recession Act, 2009, cannot be allowed any absorption as Absorption Rules, 1991 have been rescinded from the date of their promulgation, i.e. 9th May, 1991, leaving no such right open to the petitioner or any person like him.

30. With regard to relaxations, some are even otherwise provided under different Service Rules framed under proviso to Article 309 of Constitution, applicable to different departments and a detailed discussion we find in a Single Judge judgement rendered in **Ajit Raizada and others Versus State of U.P. and others, 2011 (6) ADJ 511**.

31. A decision of Hon'ble Apex Court **in Sunil Kumar Verma and others Versus State of U.P. and others in Civil Appeal Nos.9165 to 9172 of 2010**, decided on 09.09.2016 has been relied upon by Counsel for petitioner but we find that therein incumbents were appointed and Court had no occasion to look into the effect and consequences under Recession Act, 2009. Therefore, in our view, aforesaid judgement has no application to the case of petitioner.

32. Counsel for the petitioner has also argued that impugned orders dated 30th April, 2002 and 26.2.2003, declining absorption / appointment to petitioner on the ground that posts, on which petitioner has sought absorption, were within the purview of Uttar Pradesh Public Service Commission, are bad. Therefore, impugned orders are liable to be set aside but here also we find no merit in the petition. The very Government Order dated 11.11.1993, (Annexure--3 to the writ petition), whereunder, petitioner claims his right for absorption being a 'Retrenched Employee' of ATL, provides in para 2 as under:-

*" **लोक सेवा आयोग की परिधि के बाहर**, अधीनस्थ सेवा चयन आयोग की परिधि के भीतर या बाहर के पदों पर "उपयुक्तता" के आधार पर नियुक्ति हेतु अर्हता मानी जायेगी। ऐसी सेवाओं/पदों हेतु जिनके लिये मती/ चयन के निमित्त किसी सेवा नियमावली / कार्यवाही आदेश में कोई प्रकिया विद्यमान हो, छटनीशुदा कार्मिकों के विषय में उक्त प्रकिया से शिथिलता बरतते हुए. "उपयुक्तता" आंकने के लिये अलग से उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छटनीशुदा कर्मचारियों का सरकारी सेवा मे आमेलन नियमावली 1991 प्रख्यापित की गयी है।"*

*"For the posts **outside the purview of the Public Service Commission**, within or outside the purview of Subordinate Service Selection Commission, qualification for appointment shall be based upon "suitability". For recruitment/selection for those services/posts for which a procedure exists in any service rules/executive order, The **Uttar Pradesh Absorption of Retrenched Employees of Government/Corporations in Government Service Rules, 1991** have been separately promulgated for assessment of "suitability" by relaxing the said procedure in respect of the retrenched employees."*

33. Aforesaid para clearly shows that benefit with regard to absorption was not available against such posts or cadres which were within purview of Uttar Pradesh Public Service Commission. Moreover, a reading of entire Government Order dated 11.11.1993 shows that it declares qualifications and eligibility for retrenched employees subject to certain conditions for Government service but no positive direction has been issued in the said Government Order that retrenched employees of ATL shall be absorbed in Government service, if they satisfy eligibility conditions and qualifications mentioned in said Government Order. For that purpose para 2 has clearly referred to Rules, 1991.

34. Be that as it may, we have already discussed Rules, 1991 in the light of present scenario, where State Legislature has rescinded aforesaid Rules vide Rescission Act, 2009 with deeming clause with effect from 9th May, 1991, i.e. the date on which aforesaid Rules came into force and, in that view of the matter, petitioner has no right now to claim absorption nor any direction in the teeth of Rescission Act, 2009 can be issued.

35. In these facts and circumstances, the impugned orders, in our view, cannot be faulted and relief as prayed for cannot be granted.

36. In the result, the writ petition lacks merit. Dismissed.

37. No order as to costs.

(2016) 9 ILRA 1913
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ A No.- 37396 Of 2012

Shahid Anjum **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Dr. Rajesh Kumar Srivastav, R.K. Srivastava

Counsel for Respondents:
C.S.C., Raghubir Singh, Rajesh Kumar

U.P. Secondary Education Services Selection Board Rules, 1998 -- Rule 12(8), (9) and (10) -- Reserved Category Candidate Selected on Merit in Open/General Category -- Right to Institution of Preference Given as Reserved Category Candidate -- Reference Answered -- Reference made to answer whether an O.B.C. candidate, selected as Lecturer in the general category, can claim as a matter of right the allocation of an institution for which he gave preference as a reserved category candidate, unless it is established that non-allocation has put him in a disadvantageous position -- petitioner, an OBC candidate, indicated preference for five institutions at the interview stage under Rule 12(9) but, having been declared successful in the open category, was allotted an institution other than the one preferred -- **Held:** Rule 12(9) requires a candidate to indicate preference of institutions at the interview stage, and Rule 12(10) mandates allotment of the institution of first preference to the candidate at the top of the merit panel, subject to availability -- a meritorious reserved category (MRC) candidate who secures selection in the open/general category on his own merit does not thereby lose the benefit of the preference exercised by him as a reserved category candidate; he is entitled to be allotted the institution of his choice reserved for his category and is not required to further establish that non-allocation would place him at a disadvantage vis-a-vis less meritorious reserved category candidates -- while computing the percentage of reservation, such a candidate continues to be treated as an open category candidate. (Paras 8-19)

Reservation -- Meritorious Reserved Category Candidate Selected on Merit -- Not to be Counted Against Reserved Quota -- Preference for Institution/Service Preserved -- Reliance placed on Anurag Patel v. U.P. Public Service Commission, (2005) 9 SCC 742, Samta Aandolan Samiti v. Union of India, 2014 (1) AWC 592, Ritesh R. Sah v. Dr. Y.L. Yamul and others, (1996) 3 SCC 253, and Archana Anand v. State of U.P. and others, Laws (All)-2007-4-95 -- **Held:** where a candidate belonging to a reserved category is selected in open competition on the basis of his own merit, he is not counted against the reserved quota, but this does not disentitle him from exercising the choice/preference reserved for his category so as to secure a better placement -- denying such preference to a more meritorious reserved candidate while extending it to a less meritorious candidate of the same category would result in injustice to the former. (Paras 12-13, 19)

Reference Answered -- Reference answered holding that an OBC candidate, selected as Lecturer in the general/open category, can claim as a matter of right the allocation of an institution for which he gave

preference as a reserved category candidate, and is not required to prove that non-allocation of the institution of his choice as a reserved category candidate has put him on a disadvantageous position -- matter directed to be placed before the appropriate Bench for hearing and deciding the writ petition on merits. (Para 20)

Case Law Discussed:-

1. Archana Anand v. State of Uttar Pradesh and others, Laws (All)-2007-4-95
2. Anurag Patel v. U.P. Public Service Commission, (2005) 9 SCC 742
3. Samta Aandolan Samiti v. Union of India, 2014 (1) AWC 592
4. Ritesh R. Sah v. Dr. Y.L. Yamul and others, (1996) 3 SCC 253
5. State of Bihar and others v. M. Neethi Chandra and others, (1996) 6 SCC 36
6. Public Service Commission, Uttaranchal v. Mamta Bisht, 2011 (1) SCC (L&S) 208
7. Union of India v. Ramesh Ram, (2010) 7 SCC 234

(Delivered by Hon'ble V.K. Shukla, J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Under the administrative orders of Hon'ble the Chief Justice dated 10.5.2016 following reference has come up before us to be answered;

"whether an O.B.C. Candidate, who is selected as lecturer in the general category, can claim as a matter of right, the allocation of an institution, for which, he gave preference as reserved category candidate, unless it is established that non allocation of the institution of his choice as a reserved category candidate has put him on a disadvantageous position."

2. The brief background of the reference in question is that Shahid Anjum has applied for the post of Lecturer in Physics pursuant to the advertisement No. 2 of 2010 as OBC category candidate. Petitioner was called for interview and at the point of time when interview took place he indicated preference for appointment in five colleges in case he is finally selected. Thereafter, the result in question was declared on 17.2.2012 wherein petitioner was declared successful in the open category and was placed at serial no. 8 and his name was impanelled for the institution namely Sri Chandan Lal Inter College, Kandhla, Muzaffarnagar instead of institution for which he has given preference as OBC candidate. Petitioner, in this background, has been agitating that he ought to have been given institution of his choice and as nothing was being done he preferred writ petition before this Court and this Court asked the U.P. Secondary Education Service Selection Board to look into the grievance of petitioner. Pursuant to the order dated 3.4.2012 passed by this Court the claim of petitioner has been considered/examined and communication has been sent by informing that petitioner is from OBC category and as he has been selected in open category, the institution meant for open category has been allocated to him and post meant for OBC category cannot be allocated. Thereafter, petitioner in the second round of litigation is once again before this Court by preferring present writ petition and complaining therein that arbitrary treatment has been meted to his candidature and, as such, this Court should intervene in the matter and institution as preferred by him ought to have been allocated to him.

3. On the presentation of the writ petition in question learned Single Judge on 1.12.2015 has proceeded to make a mention that unless and until a candidate of reserved category, who competed with the general category and consequent allotment of an institution not of his choice, establishes that because of such allocation he has been put to some disadvantage as compared to those of reserved category lower in rank to him, he cannot claim as a matter of right for allocation of the institution for which he gave preference as O.B.C. candidate and to that extent disagreement in question has been made qua the judgment in the case of Archana Anand Vs. State of Uttar Pradesh and others, reported in Laws (All)-2007-4-95, and, thereafter, reference has been made.

4. Dr. Rajesh Kumar Srivastava, learned counsel for the petitioner, has submitted before us that the reference in question be answered in negative, inasmuch as, once choice has been asked for in the matter of allocation of institution for which an incumbent has given preference as reserved category candidate, then merit has to be respected while making allocation and the candidate should not be forced to substantiate that he would be on disadvantageous position on account of ignorance of his preference.

5. Sri A.K. Yadav, representing the U.P. Secondary Education Service Selection Board, on the other hand contended that recommendation in question has been made strictly in accordance with the provisions as contained under U.P. Secondary Education Service Selection Rules and, as such, no interference be made by this Court.

6. Arguments to the similar effect has been advanced by Sri Raghuveer Singh, Advocate and learned Standing Counsel has also toed the same lines.

7. In order to answer the issue, that has been so raised before us, the relevant portion of statutory provisions, that hold the field i.e. Sub-rule 4, 5, 8, 9 and 10 of Rule 12 of U.P. Secondary Education Services Selection Board, Rules, 1998 (hereinafter refereed to as the "Rules") are being looked into and same provides for as follows:

12. Procedure for direct recruitment.-

"(1) to (3) .....

4. The Board shall prepare list for each category of posts on the basis of marks obtained in the written examination and marks for special merits as follows:-

(a) 85 per cent marks on the basis of written examination;

(b) 10 per cent marks on the basis of interview which shall be divided in the following manner namely:-

(I) 4% marks on the basis of general knowledge;

(ii) 3% marks on the basis of personality test;

(iii) 3% marks on the basis of ability of expression.

(c) 5 per cent marks on the basis of following special merits namely:-

(i) 2% marks for having Doctorate Degree;

(ii) 2% marks for having Master of Education (M.Ed.) degree;

(iii) 1% marks for bachelor of Education (B.Ed.) degree:

Provided that no marks under this clause shall be awarded to a candidate who has obtained marks under sub-clause (ii),

(iv) 1% marks for the participation in any national level sports competition through state team.

5. The Board shall in respect to the selection for the post of Head Master and Principals, allot the marks in the following manner:-

(i) 60% marks on the basis of quality points specified in Appendix 'D'.

(ii) 16% marks for having experience more than the required experience in the manner that 1% marks shall be awarded for each year of such experience, subject to a maximum of 16% marks.

(iii) 2% marks for research paper published in reputed journals in the manner that 1/2% marks shall be allotted for each research paper subject to maximum 2% marks.

(iv) 7% marks for having Doctorate degree or 3% for Master of Education (M.Ed.) provided that only one degree shall be considered under this clause.

Note.- For the purpose of calculating experience the service rendered as Head Master of Junior High Schools or as assistant teacher in a High School/Intermediate College shall be counted in the case of selection of Head Master and for selection of Principal, the service rendered as Head Master of a High School or as a lecturer shall only be counted.

(v) The Board shall hold interview of the candidates and 15% marks shall be allotted for interview. Marks in the interview shall be divided in the following manner:-

(a) 6% marks on the basis of subject/general knowledge;
(b) 4% marks on the basis of personality test;

(c) 5% marks on the basis of ability of expression."
(6) & (7) .....

(8) The Board then, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under sub-clause (4) or sub-clause (5) above, as the case may be, with the marks obtained in the interview. The panel for the post of Principal or Headmaster shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for the posts in the Lecturers and trained graduates grade, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the quality points are also equal, then the name of the candidate who is older in age shall be placed higher. In the panel for the post of Principal or Headmaster, the number of names shall be three-times of the number of the vacancy and for the post of teachers in the lecturers and trained graduates grade, it shall be larger (but not larger than twenty-five per cent) than the number of vacancies.

(9) At the time of interview of candidates, for the post of teachers in lecturers and trained graduates grade, the Board shall, after showing the list of the institutions which have notified the vacancy to it, require the candidates to give, if he so desires, the choice of not more than five such institution in order of preference, where, if selected, he may wish to be appointed.

(10) The Board shall after preparing the panel in accordance with sub-rule (8), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them, the Board may allocate any institution to him as it may deem fit.

8. A bare reading of sub-rule 4, sub-rule 5 and sub-rule 8 clearly illustrates that after the written examination, the Board is required to prepare the list of each category of posts and to hold an interview. For the posts in the lecturers and trained graduates grade, the Board is required to prepare the list subject-wise and group-wise respectively. After the interview is held, the marks obtained by the candidates as per scheme of the rules are added and the panel in accordance with sub-rule 8 is prepared to allocate the institutions to the selected candidates. Said panel is purely merit based panel. In terms of sub-rule 9 of Rule 12, an incumbent has to give choice of five institutions at the time of the interview. Sub-rule 10 provides that the Board shall prepare the panel in accordance with sub-rule (8), and thereafter, allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the

ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them, the Board may allocate any institution to him as it may deem fit.

9. Perusal of sub-rule 10 shows that after selection, the Board is required to prepare the panel in accordance with sub-rule 8, which provides that Board shall prepare the panel in each category of posts of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under sub-rule (4) or sub-rule (5) above, as the case may be, with the marks obtained in the interview.

10. At this juncture we also proceed to examine the judgment in the case of ***Anurag Patel Vs. U.P. Public Service Commission, 2005 (9) SCC 742***, wherein the facts were that in the year 1990, the Uttar Pradesh Public Service Commission/Upper Public Service Commission (Preliminary) examination was held for selection to various posts such as Deputy Collectors in U.P. Civil (Executive) services, Dy. Superintendent of Police in U.P. Police Services, Treasury Officers/Account Officers in U.P. Finance and Accounts Services, Sales Tax Officers, Asstt. Transport Officers, District Supply Officers and various other posts. List of selected candidates was published in August 1992 to fill-up 358 posts in various categories. The candidates belonging to the backward classes were entitled to get reservation in selection in respect of 57 posts in various categories. The posts in each category of services were filled up by choice of the candidates and the person who secured higher position in the merit list would opt for U.P. Civil (Executive) service and those who cannot get the higher and important category of service have to be satisfied with the posts in services of lesser importance. Some candidates belonging to the Scheduled Caste/Scheduled Tribe and Backward Classes got selected to the seats (posts) earmarked for general candidates as they were treated in general category and were allotted to various services depending upon the rank secured by them in the select list. They got lower rank in the merit list of general candidates, and consequently, they got post in lesser important service. However, the SC/ST and O.B.C. Candidates got selection on the posts of higher importance reserved in each category even though they secured lower rank in the whole select list. On these facts, the Apex Court considered the controversy and held in paragraph 5 as under:

"5. First 10 candidates were appointed on the open merit and thereafter three seats which were reserved for backward classes were filled up by O.B.C. Candidates, who secured rank Nos. 38, 62 and 97. The rank list prepared by the U.P.P.S.C. shows that as many as 9 candidates had secured higher rank than the candidate No. 38, namely, Shri Ashok Chandra who got appointment as Deputy Collector and as against candidate Shri Ramesh Chandra Yadav, who got appointment as Deputy Collector, secured only 62nd place in the select list and there were 15 candidates belonging to backward classes were above him in the rank list. So also the 97th rank holder who was the petitioner in the writ petition before the High Court and the present appellant in C.A. No. 4794 of 1998 also get appointment as Dy. Collector and there were several other backward class candidates in the merit list, who secured higher marks in the selection. This anomaly happened as the candidates above who secured higher marks than the 3rd respondent were adjusted against the vacancies that arose in the general category for various other posts such as Treasury Officers/Account Officers in U.P. Finance and Accounts Services, Sales Tax Officers, Asstt. Transport Officers, District Supply Officers etc. The authorities should have prepared the candidates who are to be appointed on general merit as also

candidates who are to be appointed as against the reserved vacancies and while making appointments the inter se merit of the reserved candidates should have been considered and they must have been given the option treating each service separately. As this exercise was not followed, less meritorious candidates got appointment to higher posts whereas more meritorious candidates had to be satisfied with posts of lower category."

11. In the case of ***Samta Aandolan Samiti vs. Union of India, 2014 (1) AWC 592***, Apex Court considered the controversy with regard to the admission in MBBS course. The facts of the case were that the writ petition under Article 32 of the Constitution of India was filed with the grievance that while making admission in the MBBS course, the All India Institute of Medical Sciences (AIIMS) has not adhered to the reservation policy and made allotment to the candidates of reserved category in such a manner, which resulted in more than 50% reservations of the seats, and observed in paragraphs 15, 17, 18, 19, 21 and 23 as under:

15. There is no quarrel upto this stage. It is now well entrenched principle of law that those members belonging to reserved category who get selected in the open competition on the basis of their own merit have right to be included in the general list/unreserved category and not to be counted against the quota reserved for Scheduled Caste. This was recognized by the Constitutional Bench judgment of this Court in Indira Sawhney (supra) and has been followed in series of judgments thereafter. Thus, when certain persons belonging to reserved category get selected in open competition on the basis of their merit, they are not to be counted in the reserved category against the reserved category quota. It is open to the authorities to fill the posts meant for reserved category candidates from amongst the persons in such categories after excluding those who have found their place in general merit. As a fortiori, while calculating the limit of 50% reservation, those candidates belonging to reserved category who have found their place on the basis of their merit competing with general candidates are not to be taken into consideration. It is also not in dispute that such O.B.C./S.C. candidates who have been included in general category have come in that category on their own merit with no relaxation of the eligibility level i.e. percentage of marks. However, the objection of Mr. Lahoti, learned Counsel for the Petitioner, was to the method of counseling which was adopted in the present case as that has come, no doubt, above to the persons in reserved categories. He submitted that as per para 4 of the counseling letter choice was given to S.C./S.T./O.B.C. candidates who had taken admission in the open competition, to opt for a better Institution of their choice for which he/she would have been eligible as per the rules of reservation. This, according to him, was impermissible as once a candidate in reserved category had taken admission under the open competition, he could not have been given a choice for better Institution on the premise that he/she will be governed by Rules of reservation. For this reason, he took strong objection to the note appended to para 4 of the counseling letter as well which facilitated this process. He, thus, submitted that the counseling letter/circular was opposed to the provision made in the prospectus and was also contrary to the judgment of this Court in Union of India v. Ramesh Ram and Ors. (2010) 7 SCC 234:2010(6) AWC 6348 (SC).

17. We have considered the submissions of counsel of both the parties. At the outset, we would like to point out that in the present case, we are dealing with the case of admission with medical course, and the position which we are going to explain in the subsequent paragraphs is

confined to cases of admissions and not appointment into the service under the Government. Further, this applies only to MBBS Course and not Post Graduate Courses. Further, we are concerned herein admission process in Seven AIIMS only and the position explained does not relate to those cases where their admissions are in different colleges.

18. With this clarification, we proceed to deal with the issue.

19. It is stated at the cost of the repetition that those members who belong to reserved category but get selected in the open competition on the basis of their own merit have a right to be included in the general/unreserved category. Such M.R.C. not to be included in the quota reserved for Scheduled Caste etc. It is an admitted position that if these persons are excluded, the respondents have not exceeded the quota meant for reserved category. The respondents, at the time of counseling, have only accorded a higher/better choice to these meritorious reserved candidates (M.R.C.) who got recommended against general/unreserved seats vis-a-vis those reserved category candidates who are accommodated against their quota. It is, therefore, an inter-se adjustment between the two kinds of persons belonging to reserved category. In their inter-se merit, these persons who have been able to find their place in general list on account of their merit are definitely better placed than those candidates who are selected in the reserved category, though both types of candidates belong to reserved category. Thus, if between these two categories of persons belonging to same class, higher choice is not given to the persons who are better in merit viz. the M.R.Cs., it would clearly be injustice to them. This was precisely the issue which was referred for decision to the Constitution Bench in the case of Ramesh Ram (supra). In paragraph 3 of the judgment, the Constitution Bench stated the question which was referred for its decision and, the same reads as follows:

"Whether candidates belonging to reserved category, who get recommended against general/unreserved vacancies on account of their merit (without the benefit of any relaxation/concession), can opt for a higher choice of service earmarked for reserved category and thereby migrate to reserved category.

21. Dealing with the first question which directly arises in the present case, the Court clarified that a distinction is to be maintained between the cases dealing with the admission to educational institutions and appointment to a service. The Court accepted the general proposition that such a course of action affords a meritorious reserved candidates (M.R.C.), the benefit of reservation in so far as service allocation is concerned, if this is not done, lesser meritorious reserved candidates would be able to secure better discipline. Therefore, this course of action preserves and protects inter-se merit amongst the reserved candidates.

23. The question in that case was whether a reserved category candidate who is entitled to be selected for admission in open competition on the basis of his/her own merit should be counted against the quota meant for the reserved category or should he be treated as a general candidate. The Court reached the conclusion that when a candidate is admitted to an educational institution on his own merit, then such admission is not to be counted against the quota reserved for Schedule Castes or any other reserved category. It was so held in the following words:

"...In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against sets reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate."

12. In the case of ***Ritesh R. Sah vs. Dr. Y.L.Yamul and others, 1996 (3) SCC 253***, in paragraph 17 the Apex Court has held as under:

"17. In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserve category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved category candidates should be considered and they be allotted .seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate." the same question was considered by this Court in State of Bihar and others vs. M. Neethi Chandra and others, 1996 (6) SCC 36."

13. This Court in the case of ***Archana Anand Vs. State of Uttar Pradesh and others, Laws (All)-2007-4-95***, while considering the claim of admission for Special B.T.C. Course, has held in paragraph 8 as under:

"8. Here in the present case factual position which is emerging is to the effect that petitioner had applied for consideration of her candidature from Female/Scheduled Caste/Arts category candidate and she secured 313.91 quality point marks and as her merit position was much higher as such she has been treated as General Category candidate. It has been categorically stated by

petitioner, that allotment of home district was automatic in case candidate was having merit for the same, and apart from the same three options had been exercised namely District Kaushambi, Pratapgarh and Fatehpur. The first candidate who was placed at serial no. 1 and had 301.06 quality point marks namely Anita Bharti from Female/Scheduled Caste/Arts category was allocated home district i.e. Allahabad. Last selected candidate from Female/Scheduled Caste/Arts category candidate namely Sushila had secured 293.31 quality point marks and she has been placed at serial no. 26 and home district has been allocated to her with Code No. 31. Once candidates who had applied for consideration of their claim from Female/Scheduled Caste/Arts category have been given placement as per their choice i.e. their respective home district then there is no reason to deny and deprive the petitioner her place of choice merely because on account of higher merit, she was treated as Female/General/Arts category candidate. Ranking has to be given due respect on the basis of her merit and more meritorious amongst them has to be given first choice of posts. In the present case ground on which claim of the petitioner has been non-suited is that present selection is in respect of single cadre. The view taken in unsustainable by all logics as when said principles have been made applicable, when there are different cadres, by giving due weight to merit of reserve category candidate then same principles will apply with full force, even when there is single cadre. Placement of selected candidate has to be done as per the option exercised. Petitioner cannot be put to disadvantageous position, on account of higher merit and petitioner in all eventuality has to be given first choice of post. The claim of the petitioner is clearly covered by the ***Anurag Patel case (supra)."***

14. On the parameters of the aforementioned provisions, that have been quoted above, and the judicial pronouncement, that has been taken note of, the consistent view has been that a candidate who has proceeded to apply as a reserve category candidate and in case he/she proceeds to find place on the basis of merit competing with open category candidate, then his/her rights cannot be defeated and the candidate with less merit in the reserved category could not be put to a much advantageous position. A reserved category candidate who has got place for himself/herself on the basis of merit though belonging to reserved category cannot be considered to be recommended/empanelled against the post reserved for reserve category candidate but as provision has been made for providing preference in the matter of selection of institution, then as at the point of time when interview has taken place his/her candidature has been considered as a reserved category candidate and option has been given, accordingly, then his/her candidature in question will have to be considered on the same parameters at the time of preparation of panel based on merit and choice of institution and if such a view is not taken then it would be writ apparent that an incumbent, even though he/she belongs to the same category, if between these two category of person belonging to same class, choice is not given to person who are better in merit, same would certainly be injustice to the said class, however, while computing percentage of reservation, he/she will be treated as an open category candidate with an additional option to move to reserved category for getting preferred placement. Apex Court in the case of ***Public Service Commission, Uttaranchal Vs. Mamta Bisht, 2011 (1) SCC (L&S) 208,*** has clarified the legal position by mentioning that in case of vertical reservation, reserve category candidates may compete for non-reserved post and if they are appointed to non-reserved posts on their own merit, their number will not be counted against reserved quota. Once the said candidate is to be adjusted as per his/her preference against the reserve category post ignoring his/her candidature

against non-reserve posts, then same would create corresponding vacancy in non-reserve posts resulting in offering post to general category post.

15. Apex Court in the case of ***Union of India Vs. Ramesh Ram, 2010 (7) SCC 234***, has clarified the legal position that when MRC candidates get adjusted against reserve post, the same creates corresponding vacancies in the general merit. MRC candidate having indicated their status as SC/ST/OBC at the time of application, begin their participation in the examination process as reserve candidate. Having qualified as per the general qualifying standard, they have the additional option for opting out of the reserved category and occupying a general post. Where, however, they are able to secure a better post in the reserved list their placement in the general list should not deprive of the same. The reserved status is protected so that his/her better performance does not deny him/her of the chance to be allotted to a more preferred service.

16. Reference, that has been made, is that the said incumbent is bound to prove that he/she would be at a disadvantageous situation cannot be accepted by us, inasmuch as, once merit has live link with the preference in question i.e. for providing institution of his/her choice, then what is not provided for in the rule cannot be provided for by the judicial dicta and candidate's preference cannot be ignored merely because he/she was higher in merit. In the present reference, what we find that general category is being treated as if it is not at all meant for reserved category candidate whereas general category is open category and indicative of the fact that the list has been prepared based on merit. Words shall be allotted institution of his preference has to be construed accordingly, failing which such provision would stand diluted. Once incumbent of reserved category has proceeded to make place for himself/herself on merit, then the choice that has been given by that candidate has to be accepted as his/her better performance does not deny him/her of being allotted preferred institution. The expression "preference" amongst others means prior right, advantage, precedence etc. Preference is always subjective, if you chose one institution in preference to another institution, you chose it because you have a feeling that your interest would be much more subserved by getting placement in the said institution. Once right to exercise choice of institution has been conferred by statutory rules, the same cannot be permitted to be taken up lightly unless and until there is a situation when it is impossible to act upon to the said choice, in view of this, the reference is answered in following terms;

"The OBC candidate, who is selected as Lecturer in general/open category, can claim as a matter of right, the allocation of an institution, for which, he/she gave preference as a reserved category candidate and he/she is not required to prove that non-allocation of the institution of his/her choice as a reserved category candidate, has put him/her on a disadvantageous position."

17. The reference is answered, accordingly. The matter be placed before appropriate Bench for hearing and deciding the writ petition in question on merits.

(2016) 9 ILRA 1924
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 41169 Of 2003

Shamsher Bahadur **...Petitioner**

Versus

Board Of Directors, Farrukhabad Gramin Bank Through Chairman **...Respondent**

Counsel for Petitioner:
K.M. Mishra, H.R. Mishra

Counsel for Respondent:
Amit Saxena, S.C.

Service Law -- Farrukhabad Gramin Bank (Staff) Service Regulations, 1981 -- Regulation 30(2) & (3) -- Power of Disciplinary Authority to Order De-novo Enquiry -- Petitioner, an officer of the Bank, was chargesheeted for irregularities; first Enquiry Officer's report was set aside by Disciplinary Authority who directed de-novo enquiry on the basis of fresh evidence not earlier placed, relying on **K.R. Deb v. Collector of Central Excise, Shillong, AIR 1971 SC 1447** to contend that Regulations do not permit more than one enquiry -- **Held:** Regulation 30 of Regulations, 1981, unlike Rule 15 of CCS (CCA) Rules, 1957 considered in K.R. Deb, contains no restriction on the Disciplinary Authority's power to direct further or de-novo enquiry -- Enquiry report is not binding on Disciplinary Authority, who may record his own findings or direct further/de-novo enquiry, provided due opportunity of defence consistent with natural justice is afforded -- K.R. Deb and Kanailal Bera v. Union of India, (2007) 11 SCC 517 distinguished as they turned on specific statutory restrictions absent in the present Regulations. (Paras 9-19)

Service Law -- Requirement of Fresh Chargesheet on Order of De-novo Enquiry -- Held: Chargesheet is an incident preceding commencement of oral enquiry and not an integral part of the oral enquiry itself; issuance of a fresh chargesheet is not a statutory requirement before conducting de-novo enquiry pursuant to the original chargesheet -- Absence of a fresh chargesheet does not vitiate the de-novo enquiry. (Paras 20-23)

Service Law -- Quantum of Punishment -- Loss of Confidence -- Scope of Judicial Review -- Punishment of withholding of increments and removal imposed for proved charges of non-compliance of Bank norms and causing loss to Bank -- **Held:** In cases of financial misconduct/lack of integrity by a Bank official holding a position of trust, it is loss of confidence, and not the quantum of money involved, that is the primary consideration for punishment; sympathy or generosity is impermissible -- Scope of judicial review of quantum of punishment is very limited and interference is warranted only where punishment shocks the conscience of the Court -- Punishment held neither excessive nor unjust. (Paras 24-31)

Writ Petition Dismissed -- Order of punishment dated 20.01.2003 and appellate order rejecting petitioner's appeal, upheld; no costs. (Para 33)

Case Law Discussed:
1. K.R. Deb v. Collector of Central Excise, Shillong, AIR 1971 SC 1447
2. Union of India v. P. Thayagarajan, 1999 (1) SCC 733
3. Kanailal Bera v. Union of India, 2007 (11) SCC 517
4. Divisional Controller, N.E.K.R.T.C. v. H. Amaresh, 2006 SCC 187
5. Divisional Controller, KSRTC (NWKRTC) v. A.T. Mane, (2005) 3 SCC 254
6. Niranjan Hemchandra Sashittal v. State of Maharashtra, (2013) 4 SCC 642
7. Rajasthan State TPT Corporation v. Bajrang Lal, (2014) 4 SCC 693

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri K.M. Mishra, learned counsel for petitioner and perused the record.

2. Petitioner Shamsher Bahadur, working as an officer in Farrukhabad Gramin Bank (hereinafter referred to as "Bank') was placed under suspension vide order dated 04.05.1992 passed by Chairman of Bank in its capacity as Disciplinary Authority. A chargesheet dated 28.10.1993 was served upon him containing allegations of certain irregularities alleged to be committed by him during period he worked as Manager, Kanpur Branch of Bank from 23.07.1987 to 27.01.1992. Two charges were levelled upon petitioner regarding misconduct under Regulation 19 and 30(1) of Farrukhabad Gramin Bank (Staff) Service Regulations, 1981 (hereinafter referred to as "Regulations 1981").

3. Enquiry Officer submitted report dated 27.10.1996 and according to petitioner his information is that he was exonerated in both charges. Chairman/Disciplinary Authority however passed an order dated 30.12.2000 questioning enquiry proceedings conducted pursuant to the chargesheet dated 28.10.1993 and directing to hold de-novo enquiry on the basis of fresh documentary/oral evidence which according to him were not placed before Enquiry Officer earlier. Fresh enquiry was conducted by one Gore Lal, appointed by Disciplinary Authority vide letter dated 19.01.2001 and he submitted report dated 28.06.2002. Enquiry Officer had held first charge as partly proved and in second charge there were five allegations out of which three were held proved and two unproved. Copy of enquiry report was furnished to petitioner requiring him to submit his representation, if any, which he submitted on 05.08.2002.

4. Disciplinary Authority ultimately passed order of punishment dated 20.01.2003 imposing punishment of withholding of three increments under Regulation 30(1)(e) and Removal under Regulation 30(1)(e). Petitioner preferred appeal but the same has also been rejected by Board of Director. Hence this writ petition.

5. Learned counsel for petitioner has assailed aforesaid order of punishment and appellate authority contending that;

(I) Regulations 1981, do not permit de-novo enquiry hence de-novo enquiry culminating in impugned order of punishment is wholly illegal and void-ab-initio. Reliance is placed on **K.R. Deb Vs Collector of Central Excise, Shillong AIR 1971 SC 1447**.

(ii) When Disciplinary Authority order for de-novo enquiry then it was incumbent to furnish fresh chargesheet. Oral hearing could not have been conducted de-novo on the basis of old chargesheet and this vitiates entire proceedings.

(iii) Looking to the charges proved against petitioner and nature of seriousness as thereof, it cannot be said that petitioner has committed any serious misconduct and therefore punishment imposed upon him is grossly disproportionate, arbitrary, excessive and illegal.

6. Regulation 30 of 1981 Regulations deals with penalties which may be imposed upon staff of Bank. If he is found guilty of displaying negligence, inefficiency or indolence or commits breach of the Regulations or knowingly does anything detrimental to the interests of the Bank or in conflict with its instructions or commits breach of discipline or is guilty of misconduct. It also prescribes the procedure to be followed before imposing punishment and reads as under, Regulation 30 (1) (2) (3) relevant for our purpose are quoted hereunder:-

"30 (1)- Without prejudice to the provisions of other regulations, an officer or employee who commits a breach of these regulations or who displays negligence, inefficiency or indolence, or who knowingly does anything detrimental to the interests of the Bank or in conflict with its instructions or who commits a breach of discipline or is guilty of any other act of misconduct, shall be liable to the following penalties-

(a) reprimand;

(b) delay or stoppage of increments or promotion;

(c) degradation to a lower post or grade of to a lower stage in his incremental scale;

(d) recovery from pay of the whole or part of any pecuniary loss caused to the Bank by the officer or employee;

(e) removal from service which shall not be a disqualification for future employment.

(f) dismissal.

"(2) No officer or employee shall be subjected to the penalties referred to in clause (b), (c), (d), (e) or (f) of sub-regulation (1) except by an order in writing signed by the Chairman and no such order shall be passed without the charge being formulated in writing and given to the

said officer or employee so that he shall have reasonable opportunity to answer them in writing or in person, as he prefers and in the latter case his defence shall be taken down in writing and read to him.

Provided that the requirements of this sub-regulation may be waived, if the facts on the basis of which action is to be taken have been established in a court of law or court martial, or where the officer or employee has absconded or where it is for any other reason impracticable to communicate with him or where there is difficulty in observing them and the requirements can be waived without injustice to him. In every case where all or any of the requirements of this sub-regulation are waived the reasons for so doing shall be recorded in writing.

(3) The enquiry under this regulation and the procedure with the exception of the final order, may be delegated in case the person against whom proceedings are taken is an officer to any officer who is in grade higher than such officer and in the case of an employee to any officer. For purposes of the enquiry, the officer or employee may not engage a legal practitioner."

7. Regulations as such do not contemplate anywhere as to the procedure followed by Disciplinary Authority after he receive enquiry report. It only contemplates that no order of punishment shall be passed by Disciplinary Authority without charges being formulated in writing or given to officer concerned and giving him a reasonable opportunity to answer them in writing or in person as he prefers and in case he answer in person his defence shall be taken down and read to him.

8. Regulation 30(3) permits Disciplinary Authority to delegate enquiry to any person who is in a higher grade than the delinquent officer.

9. Regulations nowhere contemplate a procedure to be followed by disciplinary authority when enquiry is delegated to any other authority and he submits report. In fact, the Regulations are silent on this aspect. In absence of any specific procedure prescribed in Regulation, general principles in our view would be applicable which says that enquiry report shall not be binding upon disciplinary authority and it is always open to disciplinary authority either to record its own findings on the basis of material already collected by Enquiry Officer and thereafter giving opportunity to the delinquent employee, pass a reasoned order. Disciplinary authority in alternative can also require Enquiry Officer to conduct further enquiry or de-novo enquiry as the case may be.

10. Learned counsel for petitioner further submitted that since Regulations did not permit disciplinary authority to reject enquiry report and direct for de-novo enquiry, hence disciplinary authority erred in law and acted without jurisdiction in directing de-novo enquiry and on the basis of de-novo enquiry order of punishment is also illegal and without jurisdiction and in this regard placed reliance on judgment of Supreme Court in **K.R. Deb (supra)**.

11. We find that Regulation 30 (2) and (3) of Regulations 1981 which are applicable in the case in hand nowhere contemplates such restriction or limitation with regard to power to be

exercised by disciplinary authority. If disciplinary authority finds a justified reason for holding a further enquiry or de-novo enquiry as the case may be, in absence of limitation under Regulations, we find it difficult to accept that an order for de-novo enquiry cannot be passed by disciplinary authority. It would not be appropriate to read the provisions dealing with disciplinary matters so as to curtail down powers of disciplinary authority when none has been prescribed under Regulations. The only occupying factor in our view, should be that delinquent employee before passing and order of punishment has been given due and effective opportunity of defence consistent with principles of natural justice.

12. In **K.R. Deb (supra)**, we find that therein a specific Rule was considered by Court and interpreted in the manner as was evident from a bare reading of Rule. Therein order of punishment of dismissal of a Sub-Inspector of Central Excise, employed by Union of India, was under consideration in the light of provisions of Central Civil Services (Classification, Control and Appeal) Rules, 1957 (hereinafter referred to as "CCS (CCA) Rules 1957"). The argument was raised in the light of Rule 15 of CCS (CCA) Rules 1957 that it did not contemplate more than one enquiry. Rule 15(1) reads as under:-

"Without prejudice to the provisions of the Public Servants (Inquiry) Act, 1850, no order imposing on a Government servant any of the penalties specified in Clauses (iv) to (vii) of Rule 13 shall be passed ***except after an inquiry****, held as far as may be, in the manner hereinafter provided."*

13. Construing Rule 15, Court said that on the face, Rule 15 contemplates only one enquiry. If in a particular case, Disciplinary Authority finds that some defect has crept into enquiry or some important witnesses were not available and not examined in the enquiry or for some other reasons, it may ask Enquiry Officer to record further evidence but there is no provision in Rule 15 for completely setting aside previous enquiry on the ground that report of Enquiry Officer does not appeal to Disciplinary Authority. Court said that under Rule 9, Disciplinary Authority has enough power to reconsider evidence itself and come to its own conclusion.

14. In the present case, in Regulations 1981, we do not find any such provision, parimateria to Rule 15 or Rule 9 of CCS Rules 1957, which were considered and interpreted in **K.R. Deb (supra).** Therefore, in our view, aforesaid judgment shall not help petitioner in advancing argument that de-novo oral enquiry could not have been ordered by Disciplinary Authority.

15. We find that this point was also raised in a subsequent decision in **Union of India and others Vs P. Thayagarajan, 1999 (1) SCC 733**, wherein a de-novo enquiry was ordered in purported exercise of power under Rule 27 (c) of Central Reserve Police Force Rules, 1955 (hereinafter referred to as "CRPF Rules 1955"). Court distinguished the decision in K.R. Deb (supra) and said in para 8 of judgment as under:-

"A careful reading of this passage will make it clear that this court notices that if in a particular case where there has been no proper enquiry because of some serious defect having

crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined, the Disciplinary Authority may ask the Inquiry Officer to record further evidence ***but that provision would not enable the Disciplinary Authority to set aside the previous enquiries on the ground that the report of the Enquiry Officer does not appeal to the Disciplinary Authority****. In the present case the basis upon which the Disciplinary Authority set aside the enquiry is that the procedure adopted by the Enquiry Officer was contrary to the relevant rules and affects the rights of the parties and not that the report does not appeal to him.* ***When important evidence, either to be relied upon by the department or by the delinquent official, is shut out, this would not result in any advancement of any justice but on the other hand result in a miscarriage thereof****. Therefore we are of the view that Rule 27(c) enables the Disciplinary Authority to record his findings on the report and to pass an appropriate order including ordering a de novo enquiry in a case of present nature."*

16. A similar issue was raised again in **Kanailal Bera Vs Union of India and others, 2007 (11) SCC 517**. It was also a case arising from CRPF Rules 1955. Appellant Kanailal Bera was dismissed from the post of Constable in CRPF. He was unauthorisedly absent for a period of 167 days. On this charge he was sentenced to seven days confinement to Civil Lines. Thereagainst he made a representation. Authorities however ordered another enquiry in which charges were held partly proved and he was dismissed from service. Court held that a second enquiry after finding charges partly proved in an earlier enquiry was not permissible under Rule 27 of CRPF Rules 1955 and placed reliance **K.R. Deb Vs Collector of Central Excise, Shillong (supra).** In para 5 of the judgment Court said:-

"The question as to whether a punishment of confinement to Civil Lines could have been directed or not should not detain us as we agree with the contention raised by learned counsel for the appellant that the ***purported order dated 5.4.1995 of the disciplinary authority was unsustainable in law. Rule 27 of the Central Reserve Police Force Rules 1955, inter alia, lays down the procedure for conducting a departmental inquiry. Once a disciplinary proceeding has been initiated, the same must be brought to its logical end meaning thereby a finding is required to be arrived at as to whether the delinquent officer is guilty of charges levelled against him or not****. In a given situation further evidences may be directed to be adduced but the same would not mean that* ***despite holding a delinquent officer to be partially guilty of the charges levelled against him another inquiry would be directed to be initiated on the self same charges which could not be proved in the first inquiry.****"*

17. The facts in **Kanailal Bera (supra)** shows its difference inasmuch as therein on the earlier enquiry charge was particularly found proved and punishment of seven days confinement to Civil Lines was imposed. Thereagainst delinquent employee filed appeal/representation and thereupon another enquiry in respect to charge which was not found proved was directed and then another order of punishment of dismissal was passed. Once an enquiry had already completed and punishment was also imposed after finding delinquent employee guilty of some charge, while exonerating in another, then again in respect to charge which was found not proved another enquiry is not permitted on the appeal preferred by employee. It is also barred by the principle of double

jeopardy. Regulation 27 also does not permit any such second enquiry after imposing punishment. Therefore, neither decision in K.R. Deb (supra) nor Kanailal Bera (supra) will help the petitioner in order to contend that no enquiry de-novo could have been directed by disciplinary authority.

18. In the present case, firstly, Regulations 1981 do not restrict power of disciplinary authority in directing for further or de-novo enquiry as the case may be, based upon facts and requirement in a particular case. Secondly, herein disciplinary authority found that there were some evidence, relevant in the matter, which could not be placed before Enquiry Officer though directly connected with charges leveled against delinquent employee.

19. It is in these facts and circumstances and in order to give full opportunity of defence to delinquent employee, disciplinary authority directed for a de-novo enquiry. In absence of any provision provided otherwise or curtailing power of disciplinary authority, we find no reason to restrict power of disciplinary authority in directing de-novo enquiry. Question no. 1 therefore, is answered against petitioner.

20. Then comes question no. 2, "whether it was necessary for disciplinary authority to issue a fresh chargesheet."

21. Disciplinary authority while directing de-novo enquiry required oral enquiry to be conducted again. A chargesheet is a part of departmental enquiry but oral enquiry commences after issue of a charge sheet. It is well established that disciplinary proceedings commences with service of chargesheet but it does not constitute integral part of oral enquiry inasmuch as oral enquiry would commence after service of chargesheet and reply given by delinquent employee, or in a given case, when Enquiry Officer is appointed, the chargesheet may be issued by Enquiry Officer himself and thereafter oral hearing may proceed. The fact remains that chargesheet is an integral part of enquiry but an incident to precede oral enquiry, conducted by Enquiry Officer, fixing date of oral enquiry. Oral enquiry includes date fixed for admission or denial of charges, by delinquent employee before Enquiry Officer, if it has not already submitted reply to the chargesheet taking a particular stand, opportunity given to Presenting Officer to place its evidence in support of charge, opportunity afforded to delinquent employee to place its evidence in defence before Enquiry Officer and lastly enquiry report.

22. In the present case, it is true that disciplinary authority ordered for de-novo enquiry by Enquiry Officer but there was no necessity of directing for issue of fresh chargesheet, for the reason that chargesheet precedes commencement of oral enquiry for it is an integral part of departmental enquiry and an enquiry commences with issue of chargesheet. The mere fact that after ordering for de-novo enquiry no fresh chargesheet was issued to delinquent employee would not vitiate oral enquiry conducted pursuant to direction of disciplinary authority for de-novo enquiry.

23. We do not find any statutory provision or requirement that a fresh chargesheet ought to have been given and non issue of fresh chargesheet would vitiate enquiry proceedings. In absence

of any statutory provision or law of precedence, we find no reason to accept the submission of learned counsel for petitioner and answer question no. 2 also against petitioner.

24. Then comes the third question, regarding quantum of punishment. Here charges levelled against petitioner relates to non compliance of Bank's norms, non computation of proper interest payable by a person who has taken loan and causing loss to Bank. Petitioner was Manager in the Bank. He held office of trust and was custodian of public funds which normally form capital of Bank. He was expected to show a conduct which best serve Bank's interest and not to cause loss to Bank or endanger Bank's revenue. In such matters, once charges are found proved, disciplinary authority in its wisdom can impose a particular suitable and appropriate punishment. In absence of anything to show that punishment is patently illegal and excessive so as to shock the conscience, no interference is called for. In the matter of quantum of punishment, interference in judicial review is very limited.

25. In **Divisional Controller, N.E.K.R.T.C. Vs. H. Amaresh, 2006 SCC 187**, dealing with the question of quantum of punishment, Court held,

*"**mis-appropriation of the funds by the delinquent employee was only Rs. 360.95 but it is not question of quantum of money misappropriated by delinquent employee but it is a question of loss of confidence and the basic aptitude of lack of integrity on the part of such person**. Court said "This Court in a catena of judgments held that the loss of confidence as the primary factor and not the amount of money mis-appropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of mis-appropriating a Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. **In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."***

(emphasis added)

26. In **Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2005) 3 SCC 254**, the amount found to be in possession of unaccounted money was only Rs. 93/-, but dealing with the question of quantum of punishment, Court said;

*"..... question of quantum of punishment, one should bear in mind the fact that it **is not the amount of money misappropriated that becomes a primary factor for awarding punishment, on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration**. In our opinion, when a person is found guilty of misappropriating corporation's fund, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal." (emphasis added)*

27. In **Niranjan Hemchandra Sashittal and another Vs State of Maharashtra, (2013) 4 SCC 642,** Court in para 25 of judgment said;

"In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small and in certain cases, it is extremely high. The gravity of the offence in such a case, is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenet of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law....." (emphasis added)

28. In **Rajasthan State TPT Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693**, Court said;

*" in cases involving corruption-there cannot be any other punishment than dismissal. **Any sympathy shown in such cases is totally uncalled for and opposed to public interest**. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant." (emphasis added)*

29. We do not propose to multiply the authorities on this aspect and suffice it to mention that dishonesty, lack of integrity on the part of an official of Bank, going to the extent of helping a scrupulous person to the extent that it may cause loss to Bank, of which the official is custodian and holding position in trust, is a very serious matter. It is the aptitude of a person which leans towards dishonesty and corruption or bad conduct, that needs punished. The circumstances or quantum of loss or amount of misappropriation or other things cannot be considered as a justification for such misconduct on the part of official concerned, so as to justify a lenient view on the issue of punishment.

30. A Bank official holds a position where public money is kept in trust and he is custodian thereof. If he causes any loss to public money on account of any lack of good conduct on his part, such person must be dealt with iron hands. There is no question of leniency or sympathy. In fact any indulgence in such matter will make even Court a party to such dishonest action, which has to be avoided, prevented and is totally uncalled for, since Court cannot be a party to a misdeed of a person. On the contrary, once a person had indulged in misconduct, lack of integrity or honesty etc., adequate preventive punishment, which may be a lesson to others also, is need of the day.

31. In the present case, looking to seriousness of charges which have been found proved against petitioner, we have no hesitation in holding that the punishment, neither can be said to be excessive, nor unjust, nor otherwise arbitrary justifying any interference. Hence third question is also answered against petitioner.

32. No other point has been argued.

33. Writ petition lacks merit and is accordingly dismissed. No costs.

(2016) 9 ILRA 1933
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ C No.- 42195 Of 2016
&
Writ C No.- 42660 Of 2016

Harbansh Singh (Advocate Roll A/H0014/2012) & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioners:
Narendra Singh, Rajiv Sharma, V.C. Mishra, Vikrant Pandey

Counsel for Respondents:
C.S.C., Anoop Trivedi, Manish Goyal

Societies Registration Act, 1860 (as amended in U.P.) -- Section 25(1) -- High Court Bar Association -- Bye-laws, Rule 55 -- Election dispute -- Maintainability of writ petition -- Availability of alternative statutory remedy -- Petitioners, being ordinary/life members and a member-advocate of the High Court Bar Association, challenged the result of election of the Governing Council held on 10.08.2016, alleging that dues of defaulting members were cleared after the cut-off date yet they were permitted to vote, that about 8160 votes were cast though not more than six thousand voters actually voted, that the result was declared not by a meeting convened by the Elders Committee as mandated by Rule 55 of the Bye-laws but through a message issued by the Chief Returning Officer, that about 2000 extra ballot papers were supplied to a candidate a day before polling, discrepancies in recount figures for a post of Vice President, and breach of the 'One Bar One Vote' principle on account of about 2000 dual members being included in the voters' list -- Preliminary objection raised by the Bar Association that petitioners have a statutory alternative remedy under Section 25(1) of the Act -- **Held:** Section 25(1), as amended in the State, empowers the Prescribed Authority to hear and decide, in a summary manner, any doubt or dispute regarding the election or continuance in office of an office-bearer of a registered society, including on grounds of corrupt practice or non-compliance with the Rules of the Society, and adequately covers all the grounds raised by the petitioners -- The challenge is not to the validity of any Rule but to the preparation of the electoral list on the basis of the Rules and to disputed questions of fact (such as whether ineligible persons actually cast votes, and the alleged supply of extra ballot papers), which would require evidence and are inappropriate for adjudication in writ jurisdiction under Article 226 of the Constitution -- Preliminary objection upheld; writ petitions dismissed, leaving petitioners to pursue the statutory remedy under Section 25(1). (Paras 19-25)

Constitution of India -- Article 226 -- Writ jurisdiction -- Court-annexed Bar Association -- Election disputes -- Exceptional circumstances -- Held: Though the writ court can, in exceptional and extraordinary circumstances, examine the affairs of a Court-annexed Bar Association, where the grounds raised are purely factual in nature and a statutory alternative remedy fully covers the challenge, the writ court

ought to decline to entertain the petition -- Followed **Shiv Sharan Upadhyay v. Bar Council of U.P., 2016 (1) AWC 900 (LB)**. (Para 21)

Precedent -- Distinguishing Bar Council of Delhi and Others v. Surjit Singh and Others, AIR 1980 SC 1612 -- Held: The dictum that a whole election challenge is maintainable by writ petition despite an alternative remedy is not universally correct -- Where the alternative remedy fully covers the challenge to the election, that remedy alone must be resorted to; the writ remedy survives only where the alternative forum, such as an Election Tribunal, is incompetent to grant the relief sought, as where the vires of a Rule is under challenge -- Since none of the grounds raised by the petitioners involved a challenge to the vires of the Bye-laws, the ratio of Surjit Singh did not assist the petitioners. (Paras 12-19)

Writ Petitions Dismissed -- Preliminary objection as to maintainability upheld; both connected writ petitions dismissed on the ground of availability of an efficacious statutory alternative remedy under Section 25(1) of the Societies Registration Act, 1860, coupled with the factual nature of the disputes raised. (Para 25)

Case Law Discussed:-

1. Shiv Sharan Upadhyay Advocate and Anr. v. Bar Council of U.P. & Ors., 2016 (1) AWC 900 (LB)
2. Sunita Sharma v. Dy. Registrar Chits Funds Society & 5 Others (P.I.L. No. 26676 of 2014, decided 14.05.2014)
3. Ajay Pratap Singh Advocate v. Oudh Bar Association, Lucknow and Others, 2014 (3) ADJ 394
4. Ram Nath Tyagi v. State of U.P. and Others (Civil Misc. Writ Petition No. 4508 of 2015, decided 05.02.2015)
5. Bar Council of Delhi and Ors. v. Surjit Singh and Others, AIR 1980 SC 1612
6. Bar Association and Ors. v. B.D. Kaushik, (2011) 13 SCC 774
7. In Re: v. Zila Adhivakta Sangh Allahabad (P.I.L. No. 15895 of 2015, decided 08.05.2015)

(Delivered by Hon'ble Dilip Gupta, J.
&
Hon'ble Manoj Kumar Gupta, J.)

1. **Writ Petition No. 42195 of 2016 1** has been filed by 22 ordinary/life members of the High Court Bar Association2 with the following prayers:-

" (i) Issue a writ, order or direction in the nature of mandamus directing the the Elders Committee to cancel the result declared in the meeting convened by the Chief Election Officer, Shri V.M. Zaidi in utter violation of the mandate of Rule 55 of the Bye-laws.

(ii) Issue a writ, order or direction in the nature of mandamus directing the Elders Committee to re-prepare the electoral role of the Association consisting of the Ordinary Members as well as the Life Members in accordance with the various decisions of this Court, Apex Court and provisions of the Bye-laws including the principles of "One Vote One Bar".

(iii) Issue a writ, order or direction in the nature of mandamus directing the Elders Committee to appoint new Chief Returning Officer excluding those who were connected with the election for the members of the Governing Council of the Association 2016-17.

(iv) Issue a writ, order or direction in the nature of mandamus directing the Elders Committee to hold the fresh re-pole for electing the office bearers of the Governing Council of the

Association adhering the direction issued by the High Court as well as the Apex Court from time to time.

(v) Issue a writ, order or direction in the nature of mandamus referring the matter to the Bar Council of U.P. under Section 35 of the Advocates Act for taking action against the Advocates involved in the misconduct of the election process of the Association as well as violation of Rules and direction of this Hon'ble Court and the Apex Court issued from time to time.

(vi) Issue a writ, order or direction in the nature of mandamus drecognizing the constitution of the Governing Council of the Association issued by Shri V.M. Zaidi and handing over charge to them in an illegally convened meeting of the General Body on 1.9.2016 in violation of Rule 55 whereby the Chairman Elders Committee alone was entitled to convene the same and declare the result.

(vii) Issue a writ, order or direction in the nature of mandamus directing the Respondent No.2 to ensure compliance of the various directions issued by this Hon'ble Court as well as Apex Court with regard to the membership of the various Annex Bar Association, all over the State of U.P.

2. **Writ Petition No. 42660 of 2016 3** has been filed with the following prayers :-

" (i) Issue a writ, order or direction in the nature certiorari setting aside the election of the Executive Body of High Court Bar Association held on 10th of August 2016 as the same is illegal and in serious contravention of the HCBA Bye-laws that have been upheld by order dated 8.5.2015 passed by the Hon'ble Full Bench [Seven Judges decision Annexure No.9].

(ii) Issue, a writ order or direction in the nature of 'MANDAMUS';

(a) constituting "Implementation Committee" to hold the HCBA Election 2016, afresh under monitoring of the Hon'ble High Court as was done by Hon'ble Division Bench in the case of District Court Bar Association matter Inre: Pankaj Kumar Singh (Annexure No.16 to the Writ Petition), following the order dated 8.5.2015 passed by the Hon'ble Full Bench [Seven Judges decision Annexure No.9]

(b) Directing the Election Committee 2016 of the High Court Bar Association to prepare comprehensive Voter List with photographs, addresses, e-mail, and phone numbers of the members / voters, after obtaining their affidavits to the effect that they have not voted in any other Court Annexed Bar Association in Allahabad or any other district in the State of Uttar Pradesh or any other States in India.

(c) Directing preparation of comprehensive tentative voter list for elections High Court Bar Association Allahabad 2016 as stated above so that it should be ready for scrutiny by the members on the date declaring the final date for holding elections.

(d) That the objections be invited and the final voter list be published and conspicuously displayed and conveyed to the members of the bar and also be sent on e-mail of the ordinary members, at least 20 days in advance of the scheduled date for elections.

(e) To hold the elections by means of deploying Electronic Voting Machine in the Library Hall, in order to save the exorbitant expenditure in constructing tamboos (tents/tin sheets structures for elections of the Association.

(f) To form a committee including Hon'ble Judge(s) for full Digitalization of the High Court Bar Association making all information available online / e-mail viz; Voter List, Member Details, Executive Committees, Annual Budget, Minutes of All Meetings of the Executive Committee/Governing Council, Income and Expenditure Details, Legal Seminars, Cultural Functions Invitations, Visit of Dignitaries and Luminaries and other important information of the like, for ready reference / information of the members of the High Court Bar Association.

(iii) Issue, a writ order or direction in the nature of 'ad interim mandamus' calling for the records of the HCBA viz. the list of members whose membership subscription dues have been cleared after 11.07.2016.

(iv) Issue, a writ order or direction in the nature of 'ad interim mandamus' restraining the newly elected office bearers of Governing Council Body High Court Bar Association Election 2016 from functioning as such, and to give the charge of the HCBA Executive Council to Elders Committee until fresh elections are conducted as per the Mandamus prayed for in Prayer No. 2(a), 2(b), 2(c), 2(d), 2(e) & 2(f) during the pendency of the present Writ Petition before this Hon'ble High Court, so as to secure the ends of justice."

3. Rule 2 (i) of the Rules of the Association provides that the Association is a society registered under the provisions of the Societies Registration Act, 18604 and shall consist of all Office-bearers and the Members of the Governing Council and the General Body of the Association and also those who become Members of the Association by or under these Rules and continue to be Members. Rule 4(d) provides for constitution of a General Body comprising of all the Members of the Association.

4. Rule 5 provides that the Association shall have Honorary Members, Life Members, Non-resident Members and Ordinary Members.

5. Rule 15 deals with the Office-bearers and is as follows:-

"The Association shall have the following office-bearers who shall be elected every year as per decision in the Annual General Meeting.

(i) President.

(ii) Senior Vice President.

(iii) Five Vice Presidents.

(iv) Honorary Secretary

(v) Treasurer

(vi) Three Joint Secretaries one of whom shall be in charge of administration, second in charge of the Library and a third in charge of the publication.

(vii) A Joint Secretary Women from amongst women Members of the Association to be elected by all the voters, to look after the women Rooms.

Fifteen Members of the Governing Council."

6. Rule 16 dealing with the Governing Council is as follows:-

"The affairs of the Association shall be managed and its entire business including the investment of its funds shall be conducted by an under the control of the Governing Council consisting of :-

(i) Office bearers elected under rule 15.

(ii) The Advocate General, Uttar Pradesh will be an Ex-Officio member having right to vote.

(iii) The Former Presidents & Hony. Secretaries of the Association shall be Ex-Officio, member of the Governing Council having right to vote."

7. Rule 18 deals with the term of office and is as follows:-

"The Officer-bearers of the Association and members of the Governing Council shall hold the office till the completion of one year from the date of their election. However, in extra ordinary circumstances they may continue for a further period of one month more with the prior approval of Elder's Committee for the reasons to be recorded, within which they will get the election completed failing which the administration of the Association will vest in the Elders Committee who will hold the election as per bye-laws within another one month.

Explanation :- Date of election is date when the new Governing Council takes over the charge."

8. Rules 55 deals with the procedure of election and is reproduced :-

"The meeting of the Annual General Body of the Associate will be convened at least a month before the expiry of the term of the Officer Bearers and shall fix a date for Election.

The Elders Committee will act as Panel of the Returning Officers to hold Election and be entitled to include any other Member of the Association; provided one is not contesting the Election and the result of the Election shall be declared in the Meeting of the General Body so convened by the Elders Committee.

In order to meet the heavy burden of expenditure of the Bar Association, the Elders Committee will also fix security money for various posts, which shall not be refundable after the nomination is filed and found valid Only Ordinary Members, who have put in 3 years of continuous Membership will be entitled to vote and participate in election provided their subscription is paid till before the month in which annual General Body Meeting is fixed.

The person, who has held Officer twice, will not be entitled to contest the Elections in sequence; however, he can re-contest after a gap of one year."

9. The first petition has been filed alleging that the last election of the Governing Council was held on 9 July 2015 and it took charge on 15 July 2015. The tenure of one year, therefore, expired on 15 July 2016. The meeting of the General Body for the purpose of holding fresh election for the year 2016-17 was called on 11 July 2016 and 10 August 2016 was fixed for holding the election in the said meeting. The Elders Committee nominated a Senior Advocate as the Chief Returning Officer and a team of five Assistant Returning Officers for conducting the said election. The Chief Election Officer declared the election programme which is as follows :

Sr. No	Date	Programme
1	27.7.2016	Publication of voter list
2	27.7.2016 to 30.7.2016.	Issuance of nomination form from 10:00 A.M. to 4:00 P.M
3	28.7.2016	Filing and disposal of objections to the voter list
4	29.7.2016	Publication of final voter list.
5	29.7.2016 to 30.7.2016	Security money deposit and filing of nomination form from 10:00 to 5:00 P.M.
6	31.7.2016	Scrutiny of nomination papers
7	31.7.2016	Withdrawal of nomination till 4:00 P.M.
8	1.8.2016	Publication of final list of candidates.
9	2.8.2016	Objection to list of candidates

10	3.8.2016	Disposal of objections to the list of candidates.
11	10.8.2016	Election will be held from 10:00 A.M. to 5:00 P.M.

10. The election took place on 10 August 2016 in which it is alleged that about 8160 votes were cast.

11. The main averments contained in the first petition regarding the illegality in the holding of the election are as follows :-

(i) The Annual General meeting should have been convened a month before the expiry of the tenure of 15 July 2016 and only those resident members / life members who had cleared the dues before a month of the holding of the Annual General Body meeting and completed three years regular membership were only entitled to vote but the members were permitted to clear the dues even after 15 July 2016 by the Chief Returning Officer. This deposit of membership fees could at best have continued the membership of the defaulting members but would not entitle them to participate in the election;

(ii) The petitioners and large number of members for the Bar Association had complained of the biased attitude of the Chief Election Officer towards a particular candidate and though not more than six thousands voters were actually cast but the number of votes cast was stated to be 8160;

(iii) Rule 55 provides that the result of the election shall be declared in the meeting of the General Body to be convened by the Elders Committee but the Chief Returning Officer on his own issued a message to the members inviting them "in the charge ceremony of newly elected office-bearers" on 1 September 2016 in the Library Hall of the High Court Bar Association. It is stated that the Chairman of the Elders Committee had informed the petitioners that he had not convened any meeting for the purpose of declaring the election result;

(iv) A day before the polling, about 2000 ballot papers were delivered to the elected President of the Bar Association in connivance with the printer which fact was known to the Chief Election Officer;

(v) A candidate for the post of Vice President was declared to have secured zero vote in the first round but on recount he is said to have secured 220 votes, while another candidate is said to have secured 1487 votes in the first round but on recount is said to have secured only 565 votes; and

(vi) The principle of "One Bar One Vote" was not adhered to as the electoral list consists of names of about two thousand members who are also members of other Bar Associations and have also participated in the election.

12. Some additional facts have been stated in the second petition which are as follows :

(i) the voters list had been prepared in utter disregard to the Bye-laws and an objection was filed before the Chief Election officer;

(ii) Only one day was provided to file objections to the voters list and as such reasonable opportunity was not provided to file objections;

(iii) The Chief Election Officer and the Elders Committee did not follow the bye-laws or the directions contained in the order dated 8 May 2016 passed by by seven Judges in **Public Interest Litigation (PIL) No. 15895 of 2015 5** as also judgment dated 14 May 2014 delivered by the Division Bench in **Public Interest Litigation (PIL) No. 26676 of 2014 6** and the decision of the **Supreme Court in Bar Association and Ors. v. B.D. Kaushik7**;

(iv) The dues of many members were deposited after 11 July 2016 but this fact can be ascertained only after the account of the High Court Bar Association is made known; and

(v) The principle of "One Bar One Vote" has not been followed.

13. What has, therefore, been mainly urged in both the writ petitions is the participation in the election process by certain persons who were actually not entitled to participate as either their membership amount was deposited after the last date contemplated under the Rules or that they were the members of more than one association. It has also been urged that two thousand extra votes were cast and number of glaring illegalities were committed during the elections process. It is for this reason that it was sought to be urged by learned counsel for the petitioner that the entire election should be set aside and a fresh election should be ordered to be held in accordance with the Rules.

14. A preliminary objection was raised by Sri Anoop Trivedi learned counsel appearing for the Bar Association that the Court should decline to entertain this petition as the petitioners have a statutory alternative remedy available to them under Section 25 of the Act. In support of this contention, learned counsel has placed reliance on the decision of the Lucknow Bench of this Court in **Shiv Sharan Upadhyay Advocate and Anr. Vs. Bar Council of U.P. & Ors.8**

15. Sri V.C. Mishra, learned Senior Counsel for the petitioners appearing in the first petition and Sri Sant Saran Upadhyay, Sri Vijay Chand Srivastava and Ms. Sadhna Upadhyay learned counsel appearing for the petitioner in the second writ petition, however, contended that though the Bar Association is a society registered under the provisions of the Act but nonetheless it is a Court annexed Bar Association and, therefore, the petition is not only maintainable but should also be entertained by the Court so as to safeguard the interest of the High Court as well as of the Advocates regularly practicing in the Court. Learned counsel have placed reliance on the decision of this Court in **Sunita Sharma (supra)** and of the Lucknow Bench in **Ajay Pratap Singh Advocate v. Oudh Bar Association, Lucknow and Others9**. Learned counsel have also placed

reliance on the decisions of the Supreme Court in **Bar Council of Delhi v. Surjit Singh and Others10 and B.D. Kaushik (supra)**.

16. We have considered the submissions advanced by learned counsel for the parties on the preliminary objection.

17. It is not in dispute that the Bar Association is a society registered under the provisions of the Act and that the Bar Association is a High Court annexed Association. The petitioners have sought the cancellation of the election result on a number of grounds.

18. Learned counsel for the petitioners have placed reliance on the Public Interest Litigation filed by **Sunita Sharma**. This petition was filed before the election was held to challenge the decision taken by the Elders Committee regarding the entitlement of certain persons to vote and for setting aside the tentative voters list published on 5 May 2016. The Division Bench observed that the having regard to the provisions of the Rules, the basic object and purpose of the High Court Bar Association can be sub-served only if the voters list is prepared so as to recognize those ordinary members who are advocates on the Rolls of the High Court regularly practicing in the High Court and who have been admitted by the Governing Council under Rule 7 to be ordinary members. It was pointed out during the course of hearing that about 1600 members of the Bar Association have been included in the tentative voters list though they are not borne on the Advocates Roll of the High Court as maintained under Rule 3-A of Chapter XXIV of the High Court Rules. The Division Bench, therefore, observed that allowing such persons who are not regularly practicing before the Court to be included in the voters list would dislocate the very existence of the High Court Bar Association and this would not be in the interest of maintaining the sanctity, independence and functioning of this High Court. The Court also observed that it was constrained to intervene even though the election process had commenced in order to protect an Association of the Institution which has a direct bearing on the administration of justice from being spirited away by nearly 1600 outsiders who were not regular practitioners.

19. The decision of the Supreme Court in **Bar Council of Delhi and Ors. (supra)** has also been relied upon by the learned counsel for the petitioners. Writ Petitions had been filed in the Delhi High Court to challenge the election of Bar Council of Delhi held in the year 1978. The Delhi High Court allowed the three writ petitions and set aside the election for the reason that the impugned proviso to Rule 3 (j) of the Delhi Bar Council Rules was found to be ultra vires and invalid and the electoral list so prepared by the Delhi Bar Council on the basis of said rule resulting in the exclusion of the names was, therefore, not valid in law. The Supreme Court held that since the election would not be a valid election on that account it could be challenged in a Writ Petition. In paragraphs 22, the Supreme Court also observed that if the alternative remedy fully covers the challenge to the election, then that remedy must be resorted to but as the Election Tribunal could not adjudicate upon the vires of the Rules, a writ petition could be entertained. The observations are as follows :-

"We may add that the view expressed by some of the High Courts in the cases referred to above that merely because the whole election has been challenged by a writ petition, the petition would be maintainable in spite of there being an alternative remedy being available, so widely put, may not be quite correct and especially after the recent amendment of Article 226 of the Constitution. **If the alternative remedy fully covers the challenge to the election then that remedy and that remedy alone must be resorted to even though it involves the challenge of the election of all the successful candidates**. But if the nature and the ground of the challenge of the whole election are such that the alternative remedy is no remedy in the eye of law to cover the challenge or, in any event, is not adequate and efficacious remedy then the remedy of writ petition to challenge the whole election is still available**. In the present case we have pointed out above that the Election Tribunal would have found itself incompetent to declare the proviso to Rule 3(j) of the Delhi Bar Council Election Rules ultra vires and that being so the alternative remedy provided in Rule 34(8) was no remedy at all."**

(emphasis supplied)

20. In **B.D. Kaushik (supra),** the appeal before the Supreme Court was directed against an interim order dated 5 July 2003 passed under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908. The Supreme Court considered it appropriate, on the request made by the learned Senior Counsel, to give certain directions / guidelines for effecting implementation of the principle of "One Bar One Vote".

21. In **Ajay Pratap Singh, Advocate (supra)**, a preliminary objection has been raised on behalf of the respondents as well as interveners that writ petition filed in the High Court against the society was not maintainable. The Division Bench held that the Oudh Bar Association was a Court annexed Bar Association recognized by the High Court and so the petition was maintainable. The dispute that had been raised was regarding making a fresh list of members who were practicing in the Court and were not in arrears of subscription before notifying the general election. The Division Bench disposed of the petition with certain directions regarding the preparation of the list.

22. It needs to be stated that the decision of the Lucknow Bench in **Ajay Pratap Singh, Advocate (supra)** was subsequently explained and distinguished by a Division Bench in **Civil Misc. Writ Petition No. 4508 of 2015 11**. This Writ Petition had been filed to challenge the order dated 3 December 2014 whereby the petitioner had been debarred from the membership of the Association for a period of one year. The petition was dismissed on the ground that the petitioner had a statutory alternative remedy under section 25(1) of the Act.

23. Thus, all the cases referred by the learned counsel for the petitioners relate to preparation of the voters list except **Bar Council of Delhi** where the High Court set aside the election result and the Supreme Court upheld the decision of the High Court. What is important to notice is that even in this decision the Supreme Court observed that the views expressed by some of the High Courts that merely because the election was challenged in a writ petition, it would be maintainable in spite of their being an alternative remedy available would not be quite correct for if

an alternative remedy fully covers the challenge to an election, then that remedy alone must be resorted to. The Supreme Court had upheld the decision of the Delhi High Court to cancel the election result for the reason that the rule on the basis of which the electoral list had been prepared was found to be ultra vires. The Supreme Court observed that the Election Tribunal would have found itself incompetent to decide that proviso to Rule 3(g) of the Delhi Bar Council Election Rules was ultra vires and so the alternative remedy before the Election Tribunal was held not to be a remedy at all.

24. In these petitions, the election has been held and result has been declared, though there is a factual dispute as to whether it was declared in accordance with Rule 55 of the Rules or not. According to the petitioners, the Elders Committee had not convened the meeting of the General Body in which the election result was declared.

25. Section 25(1) of the Act, as amended in the State, on which reliance has been placed by the learned counsel for the respondents to contend that the petitioners have a statutory alternative remedy, is as follows:-

"**Section 25 (1)** :- The prescribed authority may, on a reference made to it by the Registrar or by at least one-fourth of the members of a society registered in Uttar Pradesh, hear and decide in a summary manner any doubt or dispute in respect of the election or continuance in office of an office-bearers of such society, and may pass such orders in respect thereof as it deems fit:

Provided that the election of an office-bearer shall be set aside where the prescribed authority is satisfied:-

(a) that any corrupt practice has been committed by such office-bearer; or

(b) that the nomination of any candidate has been improperly rejected; or

(c) that the result of the election in so far as it concerns such office-bearer has been materially affected by the improper acceptance of any nomination or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with the provisions of any rules of the Society.

Explanation :- A person shall be deemed to have committed a corrupt practice who, directly or indirectly, by himself or by any other person -

(i) induces, or attempts to induce, by fraud, international misrepresentation, coercion or threat of injury, any elector to give or to refrain from giving a vote in favour of any candidate, or any person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate at the election;

(ii) with a view to inducing any elector to give or refrain from giving a vote in favour of any candidate, or to inducing any person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at the election, offers or gives any money, or valuable consideration, or any place or employment, or holds out any promise of individual advantage or profit to any person;

(iii) abets (within the meaning of the Indian Penal Code) the doing of any of the acts specified in clauses (i) and (ii);

(iv) induces or attempts to induce a candidate or elector to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure;

(v) canvasses on grounds of caste, community, sect or religion;

(vi) commits such other practice as the State Government may prescribe to be a corrupt practice.

Explanation II :- A promise of individual advantage or profit to a person includes a promise for the benefit of the person himself or of any one in whom he is interested.

Explanation III :- The State Government may prescribe the procedure for hearing and decision of doubts or disputes in respect of such elections and make provision in respect of any other matter relating to such elections for which insufficient provision exists in this Act or in the rules of the society."

26. Thus, under section 25(1) of the Act, the Prescribed Authority can decide any doubt or dispute in respect of an election or continuance in office of office-bearers of the Society and can pass such orders in respect thereof as it deems fit. The conditions under which the Prescribed Authority can set aside the election of office-bearers have also been provided. They, amongst others, include the setting aside of an election where any corrupt practice has been committed or where there has been non-compliance of any Rules of the Society. Section 25(1) of the Act, therefore, adequately covers the grounds raised by the petitioners to challenge the election result and there is no good reason as to why the petitioners should not avail this statutory remedy. The challenge by the petitioners is not to the validity of any Rule but to the preparation of the electoral list on the basis of the Rules. According to the petitioners, names of some members have been included which should not have been included. It has to be verified as to whether even such persons, whom the petitioners allege should not have been included in the voters list, had actually cast their votes. Allegations of corrupt practice have also been made inasmuch as it is asserted that 2000 ballot papers were supplied by the printer to a candidate. These are all factual disputes and it will not be appropriate for a Court exercising writ jurisdiction under Article 226 of the Constitution to actually examine such dispute particularly when there would entail leading of evidence. It is for this reason that, in the facts and circumstances of the present case, the Court is not inclined to

entertain this petition when an alternative statutory remedy before the Prescribed Authority is available to the petitioners.

27. In this connection, learned counsel for the respondents have placed reliance on the decision of the Lucknow Bench in **Shiv Sharan Upadhyay (supra).** The High Court observed that a writ petition under Article 226 of the Constitution would not be an appropriate remedy to challenge the election, though in exceptional and extra ordinary circumstances the High Court can entertain such a writ petition. The Court found from the pleadings that the ground raised in the writ petition were purely factual, for which, evidence was required to be led by the parties. The Court observed that a statutory alternative remedy was available under section 25(1) of the Act which could be availed by the petitioners for raising all the grievances. The Court also observed that the petitioners could also file a civil suit in regard to the grievances raised in the petition.

28. Thus, for all the reasons stated above, we are not inclined to entertain these petitions as factual disputes have been raised and the petitioners have a statutory alternative remedy available under Section 25 (1) of the Act. The preliminary objection raised by the respondents is upheld and the petitions are, accordingly, dismissed.

(2016) 9 ILRA 1946
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 43340 Of 2016

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

Counsel for Petitioner:
Niraj Tiwari

Counsel for Respondents:
C.S.C., Sujit Kumar Rai

U.P. Co-operative Societies Act, 1965 -- Sections 120 & 121 -- Liability for Payment of Salary -- Maintainability of Mandamus against Registrar -- Petitioner, an employee of a Sadhan Sahakari Samiti whose appointment was approved by District Assistant Registrar under Section 120, sought mandamus against Registrar, Co-operative Societies for payment of arrears of salary, contending that approval of appointment by respondent no.5 made respondent nos. 2 and 5 liable for his salary -- **Held:** Section 120 merely prescribes qualifications for appointment to be possessed by a person appointed by a co-operative society and empowers the Registrar to order removal of a person appointed in contravention thereof -- Appointment as well as liability for payment of salary/remuneration remains that of the co-operative society itself; mere approval of appointment under Section 120 does not render the State or Registrar liable for payment of salary -- No provision shown making State respondents liable for the petitioner's salary. (Paras 9-12)
Writ Petition Dismissed with Costs -- Petition held devoid of substance; dismissed with cost of Rs. 5,000/- to be deposited by petitioner with the Legal Cell Authority, High Court, Allahabad, within two weeks. (Paras 13-14)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Niraj Tiwari, learned counsel for the petitioner, learned standing counsel for respondent nos.1, 2, 5 and 6 and Sri Sujeet Kumar Rai, learned counsel for respondent nos. 3 and 4.

2. This writ petition has been filed praying for a direction to the respondent no.2, i.e. Registrar, Co-operative Society, U.P. Lucknow to ensure the payment of arrears of salary of the petitioner w.e.f. 1.10.1995 to 31.1.2016 with interest @ 12% per annum. Further relief has been sought that the respondent no.2 should be directed to provide the fund to ensure that huge dues are paid.

3. Briefly stated the facts of the present case are that as per own allegation of the petitioner he was an employee of Sadhan Sahakari Samiti, Lakhua Pakar, Block-Belghat, District Gorakhpur. His appointment was approved by the District Assistant Registrar, respondent no.5 as per provision of Section 120/121 of the U.P. Co-operative Societies Act, 1965 (hereinafter referred to as "the Act").

4. The grievance of the petitioner is that his salary has not been paid by the society, namely, Sadhan Sahakari Samiti, Lakhua Pakar, Block-Belghat, District Gorakhpur. Consequently, the petitioner has filed this writ petition praying for a writ, order or direction in the nature of mandamus to the respondent no.2 for payment of his salary.

5. Learned counsel for the petitioner submits that since approval of his appointment as an employee of the respondent no.7 was granted by the respondent no.5 vide order dated 1.6.1982 with reference to the provisions of Section 120 and 121 of the Act and as such respondent nos.2 and 5 are liable for payment of salary and arrears of salary of the petitioner and consequently a writ of mandamus may be issued to the respondent no.2 to ensure payment of arrears of the salary of the petitioner.

6. Sri Sujeet Kumar and the learned standing counsel jointly submit that the writ petition itself is not maintainable and the entire submissions made by learned counsel for the petitioner are wholly misconceived inasmush as the respondent no.7, Cooperative Society is not 'State' within the meaning of Article 12 of the Constitution of India. They further submit that the petitioner was an employee of the respondent no.7 and mere approval of his appointment granted by the respondent No.5 under the Regulatory Provisions of Section 120 or 121 of the Act shall not make him an employee of the State Government.

7. They further submit that the petitioner was neither appointed by the State respondents nor the State respondents are liable for payment of the salary of the petitioner.

8. I have carefully considered the submissions of learned counsel for the parties.

9. As per own allegations of the petitioner in paragraph no. 3 of the writ petition he was appointed as Salesman/Account Clerk in Sadhan Sahakari Samiti, Lakhua Pakar, Block-Belghat, District Gorakhpur on 13.12.1979 by the respondent no.7 and approval of his appointment under Section 120 of the Act was granted by the respondent no. 5 vide order dated 1.6.1982.

10. Section 120 of the Act reads as under:

120 Qualifications for appointment as Secretary, manager etc. of cooperative societies.- *(1) No* ***person shall be appointed by a cooperative society as secretary****, manager, accountant or as any other officer to* ***be paid or remunerated by the society*** *unless he possesses such qualifications and furnishes such security, if any, as may be specified by the Registrar from time to time in respect of any co-operative society or class of societies.*

(2) Any person appointed in contravention of the provisions contained in sub-section (1) shall be liable to removal from his office by the Registrar.

11. Apparently, the Provisions of Section 120 of the Act provides for appointment of a person by a Co-operative Society as a Secretary, Manager, Accountant or as any other officer to be paid or remunerated by the society provided he possess such qualification and furnishes such security, if any, as may be specified by the Registrar from time to time in respect of any co-operative society or class of societies and in case any person is appointed in contravention of the provisions of Section 120(1) of the Act then he shall be liable to be removed from the office by the Registrar. Thus provisions of Section 120 clearly provides that a Co-operative Society may appoint any person as Secretary, Manager, Accountant or as any other officer unless he possess such qualification and furnishes such security, if any, as may be specified by the Registrar. Provisions itself makes it clear that the appointment shall be made by the co-operative society and payment of salary or remuneration of the appointed person shall also be paid by the Society. The appointment of the petitioner has not been made by the respondent no.2, 3 or 5.

12. Under the circumstances, I find that the entire relief sought by the petitioner is wholly misconceived. No provision could be shown by the learned counsel for the petitioner despite being asked that under which provision the State respondents are liable for payment of salary of the petitioner who claims himself to be an employee of Sadhan Sahakari Samiti, Lakhua Pakar, Block-Belghat, District Gorakhpur.

13. In view of the above discussion, I do not find any substance in the present writ petition. Writ petition is wholly devoid of substance and, therefore, deserves to be dismissed with costs.

14. In view of the aforesaid, writ petition is dismissed with cost of Rs.5000/- which shall be deposited by the petitioner with the Legal Cell Authority, High Court, Allahabad, within two weeks.

(2016) 9 ILRA 1949
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 43569 Of 2016

Satish Kumar & Ors. **...Petitioners**
Versus
Union Of India & Ors. **...Respondents**

Counsel for Petitioners:
Shri Krishna Mishra; Ashok Khare (Sr. Advocate) assisted by S.K. Mishra

Counsel for Respondents:
A.S.G.I., Santosh Kumar Mishra

Contract Labour (Regulation and Abolition) Act, 1970 -- Section 31 -- Notification of Exemption -- Challenge to Legislative Notification by Writ of Certiorari -- Petitioners, contract labourers of Food Corporation of India, claimed regularisation pursuant to abolition notification dated 23.04.2010 under Section 10(1) of the Act, their claim earlier rejected and a writ petition (Writ-A No. 34027 of 2013) seeking regularisation still pending -- Petitioners challenged subsequent Notification dated 06.07.2016 issued under Section 31 exempting FCI godowns/depots/railheads from applicability of the abolition notification, following directions of Nagpur Bench of Bombay High Court in **Court on its own motion v. Union of India, P.I.L. No. 84 of 2014** and pending Special Leave Petition before the Supreme Court -- **Held:** A writ of certiorari is a wholly inappropriate relief for challenging the validity of a legislative/statutory notification; relying on **Prabodh Verma v. State of U.P., 1984 (4) SCC 255**, the proper relief would be a declaration of invalidity -- No infringement of legislative competence or of fundamental rights under Part III demonstrated; there is a presumption in favour of constitutional validity of subordinate legislation -- Validity of the very notification was shown to be under challenge before the Supreme Court in the pending Special Leave Petition, in which no interim order had been passed -- Petitioners' claim for regularisation itself remains pending consideration in Writ-A No. 34027 of 2013. (Paras 16-21)
Writ Petition Dismissed -- Challenge to Notification dated 06.07.2016 rejected; no infirmity found. (Para 22)

Case Law Discussed:
1. Prabodh Verma v. State of U.P., 1984 (4) SCC 255
2. Dwarka Nath, Hindu Undivided Family v. I.T.O., (1965) 3 SCR 536
3. Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar, 1963 Supp 1 SCR 676

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ashok Khare, learned senior counsel assisted by Sri S.K. Mishra, learned counsel for the petitioners, Sri Ahok Mehta, learned Additional Solicitor General of India, assisted by

Sri Rajesh Tripathi, learned counsel for the respondent nos. 1 to 3 and Sri Santosh Kumar Mishra, learned counsel for respondent nos. 4 to 6.

2. Sri Khare submits that after the notification dated 23.4.2010 issued by the Central Government in exercise of powers conferred under Section 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970, the petitioners claimed for regularisation. They filed Writ - A No.34027 of 2013, Satish Kumar and 49 others Vs. Food Corporation of India and 3 others in which an interim order dated 19.6.2013 was passed as under:

"Sri P.K.Singh learned counsel has received notice on behalf of Food Corporation of India. He prays for and is granted six weeks time to file counter affidavit. Rejoinder, if any, within ten days thereafter.

List accordingly.

From the record it appears that that respondents have constituted a Committee. A copy of the report of the Committee has been brought on the record as Annexure-9 to the writ petition. From the perusal of the report it appears that there are documents which indicate that 222 labours had worked. However, in the impugned order it is mentioned that no record is available. This reasoning given in the impugned order is contrary to the report of the Committee dated 19.11.2012. In view of the said fact the reason given in the impugned order does not appear to be prima facie correct.

The petitioners are at liberty to file a representation within a week before the competent authority and if the work is available the petitioners shall be engaged on the same status on which they were working on the date when the impugned order was passed.

Learned counsel for the petitioner has relied on the order of the Division Bench of this Court in PIL No. 57992 of 2013. The competent authority shall keep regard of the said order also."

3. In Public Interest Litigation (PIL) No.7992 of 2012, FCI Mazdoor Union & another Vs. Union of India & others Thru. Lab Sec & others an interim order was passed as under:

"Mr. Aditya Pandey, learned Advocate, has appeared on behalf of respondent nos.1 and 2.

The instructions placed before us be kept with the record.

Strictly as an interim measure and without prejudice to the rights and contentions of the parties and subject to scrutiny, the Labourers, who are contractually appointed, will not be treated to be removed till further order/s to be passed by this Court. Passing of this order will in no way affect the authorities concerned to pass an order in compliance of the Division Bench order

dated 08.12.2009 passed in Civil Misc. Writ Petition No.64808 of 2009 (F.C.I. Mazdoor Union, U.P. Lucknow and another Vs, Union of India and others). The benefits, if any, to be given to the petitioners, will be considered by the appropriate Bench on the next date of hearing.

Let counter affidavit be filed within six weeks. Rejoinder, if any, will be filed within two weeks thereafter. The matter will appear eight weeks hence."

4. It is stated by learned counsel for the petitioners that the aforesaid Writ Petition as well as P.I.L. both are pending.

5. Sri Khare states that in Special Leave to Appeal (Civil) No.136 of 2016 filed by the FCI workers Union challenging the judgment of Nagpur Bench of Bombay High Court the date is fixed for 16.9.2016 before the Hon'ble Supreme Court. He states that now the Government of India has issued the impugned Notification No.S.O. 2327(E) dated 6.7.2016 (Ministry of Labour and Employee) which would adversely effect the petitioners. A prayer has been made to quash the aforesaid Notification.

6. Sri Ashok Mehta, learned Additional Solicitor General has placed before this Court the aforesaid judgment in P.I.L. No. 84 of 2014 dated 20.11.2015, the concluding part of which has already been quoted above. He also produced the order dated 8.1.2016 passed by Hon'ble Supreme Court in the Special Leave to Appeal (c) 136 of 2016 filed by the F.C.I. workers Union of India which is reproduced below:

"Mr. Ranjit Kumar, learned SG is requested to take instructions from the Government of India, in the meantime, as to the steps they have taken in terms of the impugned order passed by the High Court."

7. Sri Ashok Mehta submits that neither the relief for quashing the Notification can be granted in a writ petition nor the writ petition is maintainable inasmuch as their claim for regularisation was rejected and against which according to the petitioners they have filed a Writ - A No.34027 of 2013 which is pending.

8. He further submits that neither the legislative competence to issue the impugned Notification has been questioned nor the impugned Notification violates any of the fundamental rights of the petitioners nor it is in conflict with the provision of the Rules and as such the writ petition deserves to be dismissed.

9. I have considered the submission of the learned counsel for the parties.

10. It appears that the impugned Notification dated 6.7.2016 has been issued after an order dated 20.11.2015 was passed by the Nagpur Bench of Bombay High Court in P.I.L. No.84 of 2014, (Court On Its Own Motion Vs. Union of India and others).

11. It appears that a Division Bench of Nagpur Bench of Bombay High Court suo motu took up a P.I.L. No.84 of 2014 based on News Paper item in the daily "The Times of India" and issued certain directions as under :

30. In that view of the matter, we dispose of the present Public Interest Litigation by passing the following order.

(i) The Government of India is directed to decide the representation made by the Food Corporation of India for grant of exemption under the provisions of Section 31 of the said Act within a period of one month from today, in the light of observations made by us hereinabove within a period of one month from today.

(ii) The Government of India shall decide the issue regarding de-notification of the depots of the Food Corporation of India, in respect of which notification is issued u/s.10 of the said Act, within a period of six months from today, in the light of observations made by us hereinabove and the report of M/s.Deloitt Consultancy and the report of High Level Committee appointed by the Government of India itself.

(iii) We clarify that the respondent/Food Corporation of India would be entitled to transfer the services of departmental labourers from one depot to another subject to protecting their salary and all other service conditions.

(iv) We also clarify that the respondent/Corporation would be at liberty to implement its policy of change in the Scheme of incentives.

(v) The Government of India shall also take a decision regarding abolition of system of departmental labourers in a phased manner or absorbing their services in other establishments as recommended by the High Level Committee.

12. It further appears that the aforesaid judgment of Nagpur Bench of Bombay High Court was challenged in S.L.P. No(s) (C)136 of 2016, (C.C.) No.913 of 2016 and 11465 of 2016 in which Hon'ble Supreme Court on 8.1.2016 directed the Solicitor General to take instructions from the Government of India regarding the steps taken in terms of the judgment passed by the Nagpur Bench.

13. From the order dated 17.8.2016 passed by a learned Single Judge of Madras High Court in Writ Petition No.26628 to 26630 of 2016 and other connected writ petitions it appears that after the aforesaid order of Hon'ble Supreme Court dated 8.1.2016, the impugned Notification dated 6.7.2016 under Section 31 of the Act was issued by the Government of India exempting the godowns, depots and railheads of Food Corporation of India from the applicability of certain notifications including the Notification dated 23.4.2010 under Section 10 of the Act.

14. In the aforesaid order dated 17.8.2016 the Madras High Court, observed that the petitioners before it were originally employed as Contract Labourers by the F.C.I. They raised dispute

before the Industrial Tribunal, Madras which directed the F.C.I. to reguarise their services vide award dated 29.7.1998 and 19.2.1997 which was challenged by the F.C.I. Chennai before the Madras High Court in writ petitions which were dismissed by the learned Single Judge by order dated 14.8.2003. Against the dismissal of the writ petitions by learned Single Judge, Writ Appeals were preferred before the Division Bench which were also dismissed on 13.12.2006 against which Special Leave Petitions were preferred by the F.C.I. before the Hon'ble Supreme Court which are pending and no stay order has been obtained by the F.C.I. The Madras High Court further noted the orders passed by the Division Bench of Nagpur Bench of Bombay High Court in P.I.L. No.84 of 2014. After noticing these facts the Madras High Court observed in paragraph 8 that the issue of regularisation of the petitioners are pending before the Hon'ble Supreme Court. It recorded the assurance given by learned Additional Solicitor General.

15. Undisputedly, Special Leave to Appeal (C) No.136 of 2016, Food Corporation of India Workers Union Vs. Union of India & Ors. was preferred before the Hon'ble Supreme Court in which by order dated 8.1.2016, the Hon'ble Supreme Court permitted the learned Solicitor General to take instructions from the Government of India as to the steps taken in terms of the impugned order passed by the Nagapur Bench of Bombay High Court. Sri Khare states that in the aforesaid Special Leave to Appeal, validity of the impugned notification dated 6.7.2016 has also been challenged. The matter is still pending before the Hon'ble Supreme Court in which admittedly no interim order has been passed by the Hon'ble Supreme Court.

16. The petitioners have filed the present writ petition for the following relief:

"A. Issue writ, order or direction in the nature of certiorari quashing the notification dated 6.7.2016.

B. Issue writ, order or direction in the nature of mandamus directing the respondents not to take any whereby the service conditions of petitioners may be effected."

17. The impugned Notification dated 6.7.2016 has been issued by the Central Government in exercise of powers conferred under Section 31 of Contract Labour (Regulation and Abolition) Act, 1970.

18. In the case of **Prabodh Verma Vs. State of U.P., 1984 (4) SCC 255** (para 31 to 34 and 36 to 38) Hon'ble Supreme Court held as under:

"31. A writ of certiorari can never be issued to call for the record or papers and proceedings of an Act or Ordinance and for quashing such Act or ordinance. The writ of certiorari and the writs of habeas corpus, mandamus, prohibition and quo warranto were known in English common law as "prerogative writs". "Prerogative writs,' are to be distinguished from "writs of right" also known as "writs of course". Writs issued as part of the public administration of justice are called "writs of right" or "writs of course" because the Crown is bound by Magna Carta of 1215 to issue them., as for instance, a writ to commence an action at common law. Prerogative writs are (or rather,

were) so called because they are issued by virtue of the Crown's prerogative, not as a matter of right but only on some probable cause being shown to the satisfaction of the court why the extraordinary power of the Crown should be invoked to render assistance to the party. The common law regards the Sovereign as the source or fountain of justice, and certain ancient remedial processes of an extraordinary nature, known as prerogative writs, have from the earliest times issued from the Court of King's Bench in which the Sovereign was always present in contemplation of law. (See Jowitt's "Dictionary of Law" vol.2, p. 1885, and Halsbury's "Laws of England", fourth Edition,., vol. 11, para. 1451, f.n.3).

32. We are concerned here with the writ of certiorari. "Certiorari' is a Late Latin word being the passive form of the word "certiorare" meaning `inform' and occurred in the original Latin words of the writ which translated read "we being desirous for certain reasons, that the said record should by you be certified to us". Certiorari was essentially a royal demand for information; the king, wishing to be certified of some matter, orders that the necessary information be provided for him. We find in De Smith's Judicial Review of Administrative Action, fourth Edition, page 587, some interesting instances where writs of certiorori were so issued. Thus, these writs were addressed to the escheator or the sheriff to make inquisitions; the earliest being for the year 1260. Similarly, when Parliament granted Edward II one foot-soldier for every township, the writ addressed to the sheriffs to send in returns of their townships to the Exchequer was a writ of certiorari. Very soon after its first appearance this writ was used to remove to the King's Court at Westminster the proceedings of inferior courts of record; for instance, in 1271 the proceeding in an assize of darrein presentment were transferred to Westminster because of their dilatoriness. This power was also assumed by the Court of Chancery and in the Tudor an early Stuart periods a writ of certiorari was frequently issued to bring the proceedings of inferior courts of common law before the Chancellor. Later, however, the Chancery confied its supervisory functions to inferior courts of equity. In A New Abridgement of the Law, seventh edition, volume II at pages 9 and 10, Matthew Bacon has described a writ of certiorari in these words:

A certiorari is an original writ issuing out of Chancery, or the King's Bench, directed in the King's name, to the judges or officers of inferior courts, commanding them to return the records of a cause pending before them, to the end the party may have the more sure and speedy justice before him, or such other justice as he shall assign to determine the cause.

33. By the time of King Charles II, however, applications for certiorari as also for habeas corpus and prohibition came to be made usually in the Court of King's Bench.

34. The different functions of the prerogative writs of prohibition, certiorari and mandamus have been thus described in Halsbury's Laws of England, fourth edition, volume I, in para 80:

Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review

or to remove indictments for trial in that court, mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs...During the seventeenth century certiorari evolved as a general remedy to quash the proceedings of inferior tribunals and was used largely to supervise justices of the peace in the performance of their criminal and administrative functions under various statutes. In 1700 [in R. v. Glamorganshire (Inhabitants) (1700) 1 Ld Raym 580 and Groennevt v. Burwell, (1700) 1 Ld Raym 580] it was held that the Court of King's Bench would examine the proceedings of all jurisdictions erected by Act of Parliament, and that, if under pretence of such an Act they proceeded to arrogate jurisdiction to themselves greater than the Act warranted, the court would send a certiorari to them to have their proceedings returned to the court, so that the Court might restrain them from exceeding that jurisdiction. If bodies exercising such jurisdiction did not perform their duty, the King's Bench would grant a mandamus. Prohibition would issue if anything remained to prohibit. The ambit of certiorari and prohibition was not limited to the supervision of functions that would ordinarily be regarded as strictly judicial, and in the nineteenth century the writs came to be used to control the exercise of certain administrative functions by local and central government authorities which did not necessarily act under judicial forms."

36. In India, prior to the Constitution, the power to issue prerogative writs was vested only in three High Courts, that is, the High Courts established by Letters Patent issued by Queen Victoria under authority given by the Indian High Courts Act, 1861 (24 & 25 Vict c. 104) for the establishment of the High Courts of Judicature at Fort William in Bengal and at Madras and at Bombay for these three Presidencies, namely, the High Courts of Calcutta, Madras and Bombay. Hence this Act is generally called the Charter Act and the High Courts established thereunder the Chartered High Courts. These High Courts were the successors so far as their original jurisdictions were concerned of the Supreme Courts which were established in these three Presidency- towns and inherited from those courts the powers of the Court of King's Bench which included the power to issue prerogative writs, Apart from these three High Courts none of the other High Courts in India possessed this power. The position was changed when the Constitution of India came into force. Article 225 continues the jurisdiction of existing High Courts. Article 226, however, confers upon every High Court the power to issue to any person or authority, including in proper cases, any Government, within the territories in relation to which it exercises jurisdiction, "directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of the rights conferred by Part III or for any other purpose". It may be mentioned that under Article 32 of the Constitution, the same power as has been conferred upon the High Courts is conferred upon this Court without any restriction as to territorial jurisdiction but, unlike the High Court, restricted only to the enforcement of any of the rights conferred by Part III of the Constitution, namely, the Fundamental Rights. Referring to Article 226, this Court in Dwarka nath, Hindu Undivided Family v. I.T.O.(1965)3 SCR 536, said:

This article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as

understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the high Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art. 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country like India functioning under a federal structure, such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this article. Some limitations are implicit in the article and others may be evolved to direct the article through the defined channels.

(Emphasis supplied)

37. The fact that the High Courts and a fortiori this Court have power to mould the reliefs to meet the requirements of each case does not mean that the draftsman of a writ petition should not apply his mind to the proper relief which should be asked for and throw the entire burden of it upon the Court. An Advocate owes a duty to his client as well as to the Court - a duty to his client to give of his best to the case which he has undertaken to conduct for his client and a duty to assist the Court to the utmost of his skill and ability in the proper and satisfactory administration of justice. In our system of administration of justice the courts have a right to receive assistance from the Bar and it is the duty of the advocate who drafts a writ petition or any other pleading to ask for appropriate reliefs. The true nature of a writ of certiorari has been pointed out this by Court In several decisions. We need refer to only one of them, namely, Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar,1963 Supp 1 SCR 676. In that case Subba Rao. J., as he then was, speaking for the court, said:

Certiorari lies to remove for the purpose of quashing the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functions. It is not necessary for the purpose of this appeal to notice the distinction between a writ of certiorari and a writ in the nature of certiorari: in either case the High Court directs an inferior tribunal or authority to transmit to itself the record of proceedings pending there for scrutiny and, if necessary, for quashing the same.

38. A writ in the nature of certiorari is thus a wholly inappropriate relief to ask for when the constitutional validity of a legislative measure is challenged and it is surprising to find that in spite of repeated pronouncements of this Court as to the true nature of this writ it should have been asked for in the Sangh's petition. As pointed out in Dwarkanath case (1965) 3 SCR 536, under Article 226 the High Courts have the power to issue directions, orders and writs, including prerogative writs. This power includes the giving of declarations as also consequential reliefs including relief by way of injunction. The proper relief for the petitioners in the Sangh's petition to have asked was a declaration that U.P. Ordinance 22 of 1978 was unconstitutional and void and, if a consequential

relief was thought necessary, a writ of mandamus or writ in the nature of mandamus or a direction, order or injunction restraining the State and its officers from enforcing or giving effect to the provisions of that ordinance. The High Court granted the proper relief by declaring that Ordinance to be void but it should have, before proceeding to hear the writ petition, insisted that the petitioners should set their house in order by amending the petition and praying for proper reliefs. The High Court was too indulgent in this matter. After all, it was not a petition from a Prisoner languishing in jail or from a bonded labourer or a party in person or by a public-spirited citizen seeking to bring a gross injustice to the notice of the court. Here, the High Court had before it as the main petitioner a union which had taken collective action to enforce its demands and had defied the Government by flouting its orders and an Ordinance promulgated by the Governor, namely, U.P. Ordinance 25 of 1977, and had by reason of its collective might ultimately made the Government come to terms with it. The petitioners were represented by well-known counsel, one of them practising in this Court. It is true that neither this Court nor any High Court should dismiss a writ petition on a mere technicality or just because a proper relief is not asked for; but from this it does not follow that it should condone every kind of laxity. We would not have dwelt upon this aspect of the case but for the fact that we find that laxity in drafting all types of pleadings is becoming the rule and a well-drafted pleading, an exception. An ill-drafted pleading is an offspring of the union of carelessness with imprecise thinking and its brothers are slipshod preparation of the case and rambling and irrelevant arguments leading to waste of time which the courts can ill afford by reason of their overcrowded dockets."

19. There is no dispute as to the legislative competence of the Central Government to enact the impugned Notification. According to the petitioners their matters for regularisation is still pending before this Court in Writ - A No.34027 of 2013. The petitioners have completely failed to point out infringement of their fundamental rights guaranteed under part III of the Constitution of India, by the impugned Notification. It is settled principles of law that there is always presumption in favour of constitutional validity of a legislation.

20. As per their own case the petitioners claimed regularisation after the employment of contract labour was prohibited by the Government of India by issuing Notification No.S.O. 947(E) dated 23.4.2010. Their claim for regularisation as per averments made in paragraph 10 of the writ petition was rejected by the respondent no.6 by order dated 9.4.2013 on the ground that no records were available. This order was challenged by the petitioners and others by filing Writ A No.34027 of 2013 which is pending.

21. Considering the facts and circumstances as noted above as well as the judgment of Nagapur Bench of Bombay High Court in P.I.L. No.84 of 2014 and the order of Hon'ble Supreme Court as noted above, I do not find any infirmity in the impugned Notification. Writ petition No.34027 of 2013 filed by the petitioners for regularisation is also admittedly pending.

22. Writ petition lacks merit and is consequently dismissed. There shall be no order as to costs.

(2016) 9 ILRA 1958
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 43720 Of 2016

Rahul Kumar Soni **...Petitioner**
Versus
Union Of India & Ors. **...Respondents**

Counsel for Petitioner:
Jeevan Prakash Sharma, Abhishek Kumar Srivastava

Counsel for Respondents:
A.S.G.I., Shakti Dhar Dube

Service Law -- Suspension pending Departmental Enquiry -- Simultaneous Criminal Proceedings -- Standing Orders, Clauses 26.01, 26.22 & 26.23 -- Petitioner suspended on charge of misconduct of stealing computers, CPU, monitor, keyboard, printers, routers and fans from office of General Manager, evidenced by CCTV footage -- FIR lodged and stolen articles recovered by Police from petitioner's residence and car -- Petitioner sought revocation of suspension on the ground that a criminal case having been registered on identical facts, continuance of suspension/departmental proceeding was uncalled for, relying on **M. Paul Anthony Capt. v. Bharat Gold Mines Ltd., AIR 1999 SC 1416** -- **Held:** Initiation of criminal proceedings and departmental proceedings operate in distinct and different jurisdictional areas; standard of proof in departmental proceeding is preponderance of probabilities whereas in criminal case it is proof beyond reasonable doubt -- There is no legal bar to both proceedings continuing simultaneously; stay of disciplinary proceedings is not a matter of course and is warranted only where the criminal charge is grave and involves complicated questions of fact and law -- Interest of administration demands that disciplinary proceedings are not unduly delayed and undesirable elements are dealt with promptly -- Impugned suspension order records charges of misconduct evidenced by CCTV footage and requires petitioner's explanation, with subsistence allowance payable -- No error of law found in suspending the petitioner. (Paras 6-11)
Writ Petition Dismissed -- Petitioner's suspension order dated 06.04.2016 upheld; no merit found in challenge to suspension pending departmental enquiry. (Para 12)

Case Law Discussed:
1. M Paul Anthony Capt. v. Bharat Gold Mines Ltd., AIR 1999 SC 1416
2. State of Rajsthan v. B.K. Meena, (1996) 6 SCC 417 = AIR 1997 SC 13
3. Depot Manager, A.P. State Road Transport Corporation v. Mohd. Yousuf Miyan, (1997) 2 SCC 699 = AIR 1997 SC 2232

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Jeevan Prakash Sharma, learned counsel for the petitioner and Sri Shakti Dhar Dube, learned counsel for the respondents No.2 & 3. No one appears on behalf of respondent No.1 despite service of notice.

2. This writ petition has been filed by the petitioner praying for the following relief:

"(i) Issue a writ order or direction in the nature of certiorari quashing the impugned order dated 06.04.2016 passed by respondent No.3.

(ii) Issue a writ order or direction in the nature of mandamus directing the respondent authority to revoke the suspension of the petitioner forthwith, during the pendency of the enquiry.

(iii) Issue any such other and further order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iv) Award the cost of the writ petition against the contesting respondents"

3. By the impugned order, the petitioner has been suspended on the charges of misconduct of stealing computers, CPU, monitor, key-board and printers, routers and two fans in the night of 05.04.2016 between 12 to 2.15 A.M. The evidence which came in the hands of the department, was CCTV footage in which the petitioner was seen stealing the aforesaid articles from the office of the General Manager. An FIR was lodged on the next day with the concerned Police Station. The Police took quick action, raided the residential house of the petitioner and recovered the aforesaid articles from his possession in his residential house as well as from his Swift D-Zire Car bearing registration No.UP64Y-1963.

4. Learned counsel for the petitioner submits that since a criminal case has been registered against the petitioner and as such his suspension is wholly uncalled for in view of the decision of Hon'ble Supreme Court in the case of **M Paul Anthony Capt. Vs. Bharat Gold Mines Ltd., AIR 1999 SC 1416**.

5. Learned counsel for respondents submits that departmental proceeding has been lawfully initiated against the petitioner on charges of misconduct and as such, the initiation of departmental proceeding is wholly valid.

6. I have carefully considered the submissions of the learned counsel for the parties.

7. Perusal of the impugned order dated 06.04.2016 suspending the petitioner shows that the petitioner has been suspended on charges of misconduct attracting major penalty under clauses 26.01, 26.22 & 26.23 of the Standing Orders. By the impugned order, petitioner has been required to submit his explanation. The impugned order also provides for payment of subsistence allowance

to the petitioner during the period of suspension. The impugned order records that the charges of misconduct are evidenced by CCTV footage.

8. It is settled law that initiation of a criminal proceeding and a departmental proceeding operate in distinct and different jurisdictional areas. The standard of proof required in departmental proceeding is different from that required in a criminal case. In departmental proceeding, the standard of proof is one of preponderance of the probabilities while in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt.

9. In the case of **State of Rajsthan Vs. B.K. Meena, (1996) 6 SCC 417 = AIR 1997 SC 13,** (para-14 of AIR), Hon'ble Supreme Court held as under:

"It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situation, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charge. The staying of disciplinary proceedings, it is emphasised, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast rules can be enunciated in that behalf. The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is that 'the defence of the employee in the criminal case may not be prejudiced.' This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be "determined in each case taking into consideration all the facts and circumstances of the case. The ground indicated in D.C.M., AIR 1960 SC 806 and Tata Oil Mills, AIR 1965 SC 155 is also not an invariable rule. It is only a factor which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending considerations is that the disciplinary enquiry cannot be - and should not be - delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion. That is the reality in spite of repeated advice and admonitions from this Court and the High Courts. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanour is inquired into promptly. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of the delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long

periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest. While it is not possible to enumerate the various factors, for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view of the various principles laid down in the decisions referred to above."

10. In the case of **M Paul Anthony Capt. (supra)** relied by learned counsel for the petitioner, Hon'ble Supreme Court has referred to the judgment in the case of **B.K. Meena** (supra) and observed in paras-20, 21 & 22 as under:

"[20] This decision has gone two steps further to the earlier decisions by providing :

1. The 'advisability', 'desirability' or 'propriety' of staying the departmental proceedings "go into the scales while judging the advisability or desirability of staying the disciplinary proceedings" merely as one of the factors which cannot be considered in isolation of other circumstances of the case. But the charges in the criminal case must, in any case, be of a grave and serious nature involving complicated questions of fact and law.

(2) One of the contending considerations would be that the disciplinary enquiry cannot -- and should not be -- delayed unduly. If the criminal case is unduly delayed, that may itself be a good ground for going ahead with the disciplinary enquiry even though the disciplinary proceedings were held over at an earlier stage. It would not be in the interests of administration that persons accused of serious misdemeanour should be continued in office indefinitely awaiting the result of criminal proceedings.

[21] In another case, namely, Depot Manager, Andhra Pradesh State Road Transport Corporation vs. Mohd. Yousuf Miyan (1997) 2 SCC 699 : AIR 1997 SC 2232, again it was held that there is no bar to proceed simultaneously with the departmental inquiry and trial of a criminal case unless the charge in the criminal case is of a grave nature involving complicated questions of fact and law.

[22] The conclusions which are deducible from various decisions of this Court referred to above are :

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a

grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the Departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

11. The facts of the present case as afore-noted and the law laid down by Hon'ble Supreme Court in the case of **B.K. Meena (supra)**, **the Depot Manager, Andhra Pradesh State Road Transport Corporation (supra),** in the case of **M Paul Anthony, Capt. (supra)** clearly indicate that the respondents have not committed any error of law to suspend the petitioner by the impugned order dated 06.04.2016. Under the circumstances, I do not find any merit in this writ petition.

12. Consequently, writ petition fails and is hereby dismissed.
